MILITARY JUSTICE

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,

OF THE

COMMITTEE ON THE JUDICIARY,

AND A

SPECIAL SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, and S. 2907

BILLS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE ARMED SERVICES

JANUARY 18, 19, 25, AND 26; MARCH 1, 2, AND 3, 1966

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[1] Published separately as Part 3.

MILITARY JUSTICE

TUESDAY, JANUARY 18, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND SPECIAL
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the Subcommittee on Constitutional Rights), presiding.

Present: Senators Ervin, Thurmond, Fong, and Javits.

Senator ERVIN. The meeting will come to order.

This hearing is being conducted by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, and a Special Subcommittee of the Senate Armed Services Committee under an understanding that the power to vote upon the bills S. 745 through S. 760 being considered in hearing shall remain vested in the Senate Armed Services Committee.

I should like to express to the Department of Defense and the representatives of the three services the subcommittees' appreciation for the cooperation and assistance which they have given us in the preparation of these hearings.

We are grateful for the detailed evaluations of the bills which the services provided, and the additional information which they furnished from time to time over the course of the subcommittees' long investigation of military justice. I would feel remiss were I not to express our appreciation to the Senate liaison office of the three services for their cooperation in connection with these hearings and for their continued expert assistance in handling the hundreds of individual military cases investigated by the Subcommittee on Constitutional Rights every year.

Beginning this morning, the subcommittees will hold 6 days of hearings on a series of 18 bills (S. 745–S. 762) designed to improve the quality of military jusitce. The bills would amend the Uniform Code of Military Justice and other statutes relating to military courts and administrative discharge board to insure that military personnel appearing before such courts and boards receive all the rights, privileges and safeguards guaranteed to every American citizen under the Constitution.

Also to be discussed in the hearings are two substitute bills, drafted by the Department of Defense, and introduced as H.R. 273 and H.R. 277 by Representative Charles E. Bennett, of Florida.

(The bills, S. 745 through S. 762, and H.R. 273 and H.R. 277,[1] are set forth beginning at page 464.)

The special problems involved in protecting the rights of the several classes of persons subject to military jurisdiction—servicemen and civilian dependents and employees—have been of particular concern to the Subcommittee on Constitutional Rights almost since its formation in 1955. In 1957, the Supreme Court held, in the much-publicized *Girard* case [2] that it was permissible for military authorities to waive jurisdiction to try a serviceman for a homicide committed in Japan and permit his trial in a Japanese court. After that case, the subcommittee undertook an investigation of the extent to which the rights of servicemen may be abridged when they are stationed abroad and so become subject in some degree to the jurisdiction of foreign governments. Also, after the Supreme Court decisions invalidating the provisions of the Uniform Code of Military Justice authorizing trial by court-martial of military dependents and employees stationed overseas in peacetime, the subcommitte studied the problem of providing a suitable forum for the trial of such persons where all their constitutional rights would be preserved.

The subcommittee has followed with great interest the recent perceptible trend in the Federal courts toward greater judicial protection for military personnel. As recently as 1950 the Supreme Court was still adhering to the doctrine established during the last century that review of court-martial proceedings by Federal civil courts was strictly limited to a determination of whether the military court had jurisdiction over the defendant and the offense and whether the punishment adjudged was within lawful limits. Finally, however, in *Burns* v. *Wilson*,[3] decided in 1953, the Court acknowledged that court-martial proceedings are subject to due process requirements and that Federal civil courts could review a court-martial conviction to insure that the accused was accorded his full constitutional rights. In addition, the Court's ruling in *Harmon* v. *Brucker*,[4] decided in 1958, that administrative discharge action by the armed services can be judicially reviewed by Federal civil courts, has led to a variety of cases testing the legality of administrative discharges.

However, despite this vast improvement in the judicial attitude toward the rights of service personnel, the subcommittee members and individual Senators continued to receive numerous complaints concerning military justice and the issuance of administrative discharge by the armed services. More than a decade had passed since the enactment of the Uniform Code of Military Justice and the subcommittee was greatly disturbed by claims that abuses persisted which the code was designed to eliminate. Accordingly, in 1961 we decided to conduct hearings on the broad subject of the constitutional rights of military personnel to determine the extent to which those rights were being preserved or abridged in the administration of military justice and the issuance of discharges from the Armed Forces.

The hearings occupied 7 days in February and March 1962. Testimony was received from spokesmen for the Defense Department and

[1] On Feb. 9, 1966, these latter two bills were introduced in identical form in the Senate by Senator Ervin as S. 2906 and S. 2907, respectively.
[2] *Wilson* v. *Girard*, 354 U.S. 524 (1957).
[3] 346 U.S. 137 (1953).
[4] 355 U.S. 579 (1958).

the armed services, from the judges of the Court of Military Appeals, from representatives of bar associations and veterans' organizations and from various individuals with special experience with the administration of military justice. Subsequently, the subcommittee issued a summary report summarizing the most significant opinions expressed during the hearings and setting forth the subcommittee's conclusions based upon its hearings, studies, and field investigations. In that summary report the subcommittee made 22 recommendations for improving military justice, some of which could be put into force by departmental regulations, others by legislation. The 18 bills we shall consider at these hearings embody most of those legislative recommendations.

For convenience of discussion the bills may be classified in four major areas, with some overlap. The major areas are (1) military justice as administered by courts-martial under the uniform code, (2) administrative discharge procedures, (3) review of discharges, and (4) jurisdiction. Rather than discuss each of the bills in detail, I shall briefly discuss the changes they would make in these four major areas.

The largest group of bills consists of those related to military justice. Eleven of the bills contain provisions which would modify some phase of the administration of criminal justice by courts-martial under the uniform code. In some cases these provisions would change the form and procedures of the courts, and in other cases would increase the qualifications or alter the organizational status of military lawyers and members of courts-martial.

For example, S. 745 would seek to enhance the independence, impartiality and competence of law officers who preside over courts-martial by creating in each service an independent "field judiciary" made up of experienced, full-time legal officers assigned and responsible directly to the Judge Advocate General of the service. Such officers would be mature, competent lawyers, better able to assure that accused servicemen receive due process. The insulation from line commands provided by S. 745 would render them especially immune from command influence and thus better able to assure fairness and impartiality of the trial. S. 746 would create a separate Judge Advocate General's Corps for the Navy. S. 749 would broaden the existing prohibition in article 37 against exercise of command influence on courts-martial. It is felt that these three bills will have the overall effect of increasing the general competence of military lawyers, rendering military justice more uniform among the services and more adequately assuring the fair and impartial trial guaranteed by the sixth amendment.

Several of the bills would strengthen the safeguards available to an accused before a special court-martial. Although such courts are empowered to impose severe punishment, which may include a bad conduct discharge, there is presently no requirement that the accused be represented before such courts by qualified counsel, or even that a lawyer be present at the proceedings. To remedy this situation, S. 750 would amend the uniform code to provide that a special court-martial may not impose a bad conduct discharge unless the accused is offered the assistance of legally qualified counsel; and S. 752 would authorize the appointment of a law officer for a special court and would require such appointment as a prerequisite to the issuance of a bad conduct

discharge. S. 752 would also give the accused the right to waive trial by the members of a general court-martial or a special court-martial to which a law officer has been appointed and be tried instead by the law officer sitting alone much as a judge without jury in civilian courts. Other bills would authorize a pretrial conference for general courts-martial, increase the subpena power of military courts and boards, and extend from 1 to 2 years the period for petitioning for a new trial by any court-martial. Finally, S. 759 would abolish the one-officer summary court-martial and require that cases now tried by such courts be sent to a special court-martial or be handled under the expanded nonjudicial punishment provisions of article 15 of the uniform code.

I am strongly convinced that the reforms embodied in these bills would vastly improve the quality of military justice and would go far toward assuring that the accused before a military court was afforded the same procedural safeguards he would have in civilian court.

The second major group of bills consists of those relating to administrative discharges. Each armed service makes provision in its directives for administrative discharges, which may be honorable, general, or undesirable. The undesirable discharge is under other than honorable conditions, is characterized by much the same stigma as the dishonorable discharge and, for purposes of veterans' benefits and certain other rights, is treated in the same way as a bad conduct discharge imposed by a special court-martial. In fact, an undesirable discharge may be issued by an administrative board for misconduct that would be cognizable by a court-martial, and herein lies one of the most serious problems to be considered at these hearings.

If a serviceman is tried by court-martial for alleged misconduct, various procedural rights and safeguards are guaranteed to him by the uniform code. For example, he must be advised of the nature of the charges against him, must be allowed to confront and cross-examine opposing witnesses and subpena witnesses in his own behalf, and must be accorded the assistance of qualified counsel. In addition, he has the protection of the rules of evidence and several levels of judicial review. On the other hand, the serviceman who is brought before an administrative board considering the issuance of an undesirable discharge need not be represented by legally qualified counsel, may not have the opportunity to confront adverse witnesses or to subpena witnesses in his own favor, and may receive an undesirable discharge on the basis of evidence which would be inadmissible before a court-martial.

The Subcommittee on Constitutional Rights has received numerous complaints that the safeguards of the uniform code have been circumvented by the use of administrative discharge proceedings which are not subject to these safeguards. In this regard, I might mention that the annual report of the Court of Military Appeals for 1960 contained a reference to a statement by a former Judge Advocate General of the Air Force 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."

Protests to the armed services that the constitutional rights of individual service personnel have been violated by resort to administrative

board proceedings in lieu of courts-martial have been answered by the assertion that such proceedings are "administrative" rather than "punitive." Furthermore, the acts and omissions considered by administrative boards are asserted not to be the same kind of "misconduct" cognizable by a court-martial, but rather evidence of unfitness or unsuitability for further service.

The subcommittees have not always found such distinctions to be valid. From the standpoint of a serviceman who has been reduced in rank, and thereby in pay and emoluments, it makes little difference whether the reduction was labeled "punitive" and accomplished by a court-martial or termed "administrative" and accomplished by a board. Similarly, from a veteran's standpoint it is a somewhat academic distinction that, because of alleged misconduct, he had been discharged under other than honorable conditions, stigmatized, and deprived of veterans' benefits by an administrative discharge, rather than by a discharge imposed in the sentence of a court-martial.

The subcommittees believe that, to the extent that the armed services use administrative action to circumvent protections provided by the Uniform Code, the intent of Congress is thwarted and the constitutional rights of service personnel are jeopardized. These bills are designed to remedy that situation.

Perhaps the most important bill in this group is S. 758 which would provide that no serviceman may be given an administrative discharge under less than honorable conditions on the grounds of alleged misconduct if he files a written demand for trial by a general or special court-martial. This would preclude the use of administrative proceedings to bypass the safeguards provided by the Uniform Code, at least when the serviceman involved objects to administrative proceedings. S. 756 would preclude resort to administrative proceedings after abortive attempts to secure a separation by court-martial. That bill would prohibit the giving of administrative discharges under less than honorable conditions for misconduct which has previously been the subject of an acquittal or equivalent disposition by a court-martial. It would also prohibit a finding or sentence by a second administrative board less favorable to the serviceman involved than the finding or sentence of an earlier board based on the same charges and the same evidence.

Other bills in this group would render administrative board proceedings more judicial in nature by affording the serviceman involved many of the safeguards now available in courts-martial. S. 750 would provide that an administrative board may not issue a discharge under less than honorable conditions unless the accused is afforded the assistance of legally qualified counsel. S. 754 would require the appointment of a qualified law officer to any administrative board empowered to make findings or recommendations which might be the basis for a discharge under less than honorable conditions. S. 749 would extend the prohibitions against command influence to administrative board proceedings. S. 760 would extend the subpena power to administrative boards. And, finally, S. 753 would provide for review by the Court of Military Appeals of certain questions of law arising in administrative board proceedings.

The subcommittees note with great interest that the Department of Defense has recently promulgated a new directive governing the issu-

ance of administrative discharges by the services. This directive is a vast improvement in many respects over the directive which had governed administrative discharge procedures since January 1959. In particular, it appreciably increases the safeguards afforded the respondent before a board considering issuing a discharge under other than honorable conditions. In many instances it embodies changes suggested in the subcommittee's summary report of the 1962 hearings. In many respects, however, the directive falls short of the improvements contemplated by the bills we are considering at these hearings. Furthermore, it would seem advisable to accomplish revision of administrative discharge procedures by statute rather than by departmental directives subject to revision or dilution by service regulations. We do not, therefore, deem consideration of the bills relating to administrative discharges to be rendered any less compelling by the promulgation of the new Defense Department directive.[1]

The third major area covered by the bills is the matter of review of discharges. Each service presently has its own boards for the correction of military records, empowered to recommend to the Secretary of the Department that he "correct any military record * * * to correct an error or to remove an injustice." Although these boards can recommend corrective action with respect to findings and sentence of a court-martial, the effect of such a recommendation is unclear in light of the provision in article 76 of the Uniform Code that courts-martial proceedings are final and conclusive after undergoing the prescribed appellate review. Furthermore, the present boards usually do not have full-time members and are often characterized by a lack of uniformity among the services in the application of governing statutes and directives. S. 747 would seek to correct these inadequacies by creating one correction board for all the services, located for administrative purposes in the office of the Secretary of Defense. This unified correction board would be composed of full-time civilian members, and would be empowered to modify, set aside or expunge the findings or sentence of a court-martial in appropriate cases. Such a board should be better able to provide competent, uniform and effective review of the records of trial by court-martial.

The Uniform Code makes provision in article 66 for boards of review, located in the offices of the Service Judge Advocate General, which review the records of all trials by court-martial resulting in serious sentences and certain other court-martial cases referred by the appropriate Judge Advocate General. S. 748 would seek to improve the efficiency and stature of these boards by changing their names to "Courts of Military Review," designating the members as "judges," and requiring, among other things, civilian members and minimum tours of duty for military members. In order to insure that the chairman of one of these courts of review not unduly influence the junior members, S. 755 would prohibit any member of a court of review from preparing the efficiency reports of junior military members or otherwise participating in decisions affecting their military careers.

Finally, as I noted earlier, S. 753 would authorize the Court of Military Appeals to review certain questions of law arising in administra-

[1] The two directives appear at pp. 769 (1959) and 784 (1965).

tive board proceedings. The court now reviews only court-martial cases.

The final area into which I have grouped the bills is that of jurisdiction. Two of the bills would grant jurisdiction to Federal district courts to try certain military dependents and employees and former servicemen.

Article 2 of the Uniform Code purports to subject to military jurisdiction civilian dependents and employees accompanying the Armed Forces overseas; but the Supreme Court has held that provision unconstitutional.[1] To fill the jurisdictional gap created by the Supreme Court decisions, S. 762 would authorize the trial in Federal district courts of persons who commit serious offenses while accompanying the Armed Forces outside of the United States. I realize that there may be differences of viewpoint as to whether the jurisdiction of American courts should be limited only to persons in a special relation to the military or should instead be extended to include other categories; as to what should be the statute of limitations and the authorized punishments; and as to which categories of offenses should be punishable. I believe, however, that the proposal dealing with the trial of certain persons accompanying the Armed Forces outside of the United States will provide the starting point for a penetrating study, and hopefully, to a solution of the problem. I invite criticisms and suggestions along this line from the witnesses.

Article 3(a) of the Uniform Code of Military Justice purports to authorize trial by court-martial of former members of the Armed Forces who, while in a military status, committed serious crimes for which they cannot be tried by any State or Federal court.

In *Toth* v. *Quarles*,[2] the Supreme Court held that this provision was unconstitutional and that court-martial jurisdiction cannot be extended to former members of the Armed Forces. S. 761 would comply with the constitutional requirements set out by the Supreme Court and at the same time would fill a jurisdictional gap by authorizing trial in Federal district courts of violations of the Uniform Code which otherwise would not be subject to trial in any American tribunal. Again, I recognize that serious questions are presented and I invite suggestions from witnesses.

Each of the 18 bills we shall consider is the outgrowth of extensive study and detailed research. Each of them benefits from the testimony received during the initial hearings conducted in 1962 by the Subcommittee on Constitutional Rights, from an intensive 17-day field investigation, from the comments and suggestions of hundreds of former judge advocates and others knowledgeable about military justice and from continuing review of courts-martial and administrative discharge by the subcommittee. Each of the bills is designed to better protect the constitutional rights of members and former members of the Armed Forces and of persons accompanying the Armed Forces overseas. No objective should be more important than to protect the constitutional rights of the service men and women who are ever ready to protect the Constitution of the United States and the Government established under it.

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[1] *Kinsella* v. *Singleton*, 361 U.S. 234 (1960).
[2] 350 U.S. 11 (1955).

The subcommittees are extremely gratified by the list of distinguished witnesses who have consented to testify on the bills. I know that we shall receive expert and constructive testimony from each of them and I am looking forward to hearing them.

I would like to add that while I give tentative support to these bills in their present form, I will change my mind if anyone can give me convincing reasons to do so with respect to any of them.

On behalf of the subcommittees I would like to thank all of those who have agreed to participate in these hearings as witnesses from the Court of Military Appeals, from the armed services, from members of the bar and from other categories of life.

We trust that each witness will express his opinion with respect to these bills, that if he thinks the bills or any of them are sound he will give his reasons for so feeling. If he thinks the bills are unsound in any respect and so bad in totality that they ought to be rejected that he will likewise give his reasons for his views; and if he thinks the bills can be improved by amendment we would deeply appreciate his giving us the benefit of any suggested amendment that would accomplish that purpose.

I might state this, I am delighted to have Senator Thurmond and Senator Fong and Senator Javits sitting with us. Senator Fong and Senator Javits who are members of the Subcommittee on Constitutional Rights and Senator Thurmond who is a member of the Senate Armed Services Committee and a member of the Special Armed Services Subcommittee.

Senator Thurmond, do you have any statement?

Senator THURMOND. Thank you, Mr. Chairman, I am honored to serve with you on this subcommittee. I think this is a very interesting and vital field in which the subcommittee is now projecting itself.

There are facets which I feel can be improved from the standpoint of the administration of military justice, and also of preserving the constitutional rights of the serviceman.

As a longtime member of the Reserves, I realize the importance of the command functions of the Defense Establishment, and I believe these can be reconciled in such a way that the commander will not be jeopardized and yet we can preserve the constitutional rights of the servicemen. I shall be pleased to hear all of the witnesses and I am very anxious to get their views on these matters. I am sure their testimony will be most helpful to us in arriving at a final conclusion on some of these points which I think involve a very keen and fine sense of judgment.

Thank you, Mr. Chairman.

Senator ERVIN. Thank you, Senator.

Senator Fong, do you have a statement?

Senator FONG. Mr. Chairman, I have no statement to make. I am very happy to be here and I will listen to the witnesses.

Senator ERVIN. Senator Javits.

Senator JAVITS. Mr. Chairman, once again I thank the Chair for, first, showing initiative in holding these hearings and in this critical sphere of our national life and, second, serving with Senator Thurmond, I recognize the critical importance of both the discipline and morale in which we are engaged in here if we can do it well, and I

think it can be of inestimable benefit to the Nation and to the armed services.

Finally, Mr. Chairman, I notice with the greatest pleasure the names as witnesses of the chairman of the Military Law Committee of the New York State Bar Association, Sidney Wolff, and tomorrow of the chairman of the Military Law Committee of the Association of the Bar of the City of New York. I would hope, Mr. Chairman, that we could either directly or through staff, get the best possible thinking in the field of jurisprudence from the bar associations and from the field of law professors and law school deans and that we can be inestimably helped by a civilian appraisal in terms of civil liberties and the Constitution and the extent to which these practices might conceivably benefit from what we learn in the administration of criminal justice civily, so that we may have not only the expertise of the armed services and those charged with law enforcement in the armed services but also the civilian components, thank you.

Senator ERVIN. Thank you.

Counsel will call the first witness.

Mr. CREECH. Thank you, Mr. Chairman.

Mr. Chairman, the first witness this morning is the Honorable Charles E. Bennett, a Member of Congress and a Representative of the State of Florida.

Mr. Bennett.

Senator ERVIN. If I may be permitted to address you by your correct title, the Chair is delighted to welcome Representative Bennett to give us the benefit of his thoughts on this subject.

The Congressman has introduced similar bills in the House and has manifested a longtime interest in this field.

STATEMENT OF HON. CHARLES E. BENNETT, A REPRESENTATIVE IN CONGRESS FROM THE SECOND CONGRESSIONAL DISTRICT OF THE STATE OF FLORIDA

Mr. BENNETT. Thank you, Mr. Chairman, I am the subcommittee chairman of a committee in the House Armed Services Committee which is looking into discharges and some of the related matters and I followed your great leadership with great interest in this general field. I have a short statement to present to you, if I may.

Mr. Chairman, it is a distinct pleasure for me to appear before this joint meeting of these two subcommittees and I want to take this opportunity to personally congratulate the distinguished senior Senator from North Carolina for his leadership in the field of military justice. It can safely be said that no one person has contributed more than you have to the protection of the American serviceman's individual rights.

As you may know, I have been a member of the House Armed Services Committee for over a decade and a half now, having been assigned to that committee from another about the time the Uniform Code of Military Justice was adopted. Various matters before the committee over the past 15 years have shown that the code needs further work.

In November of 1964 the Department of Defense advised it had two draft bills to overcome certain problems in modern military jus-

tice, concerning which I had contacted them. Those two proposals I introduced and they presently bear the numbers of H.R. 273 and H.R. 277 and in many respects resemble five of the Senate bills now before this committee for consideration. They in no way diminish the objects sought by the Senate bills, but if anything strengthen them.

Essentially, my bill, H.R. 273, provides for pretrial proceedings, authorizes the law officer to conduct court-martial proceedings alone under certain circumstances, guarantees legal counsel in special court-martial cases, and establishes postconviction proceedings. H.R. 277 will extend the period within which a new trial may be requested from the present 1 year to 2 years, and it authorizes the Judge Advocate General of each service to set aside those convictions where fraud, illegality, lack of jurisdiction, improper venue, or newly discovered evidence is found.

At this point I think I should make my position clear that I am not wedded to the language of my two proposals, because we have not had hearings on these bills in our committee yet. Perhaps your committee will report a bill better than these two I have proposed, in which case I would, of course, prefer to back your bill. A hearing was scheduled by the House Armed Services Committee on these two House bills for early in October of the last session, but when we learned you expected to conduct hearings ours was postponed until you had a chance to meet and report something. By way of urging action, I certainly hope this committee will report a bill to the Senate, and get it passed early in this session, because I would like the House to have a Senate bill to consider when hearings are held later this year.

Without exploring the technicalities of my bills, since I know the Department of Defense will go into this in great detail later in these hearings, I would like to say that what I am trying to do with these two bills is to streamline the military court-martial proceeding so as to insure every serviceman the same rights as a person accused of committing a crime in a Federal criminal proceeding.

I want to again thank the members of these two committees for your efforts to insure a standard of military justice that all Americans can be proud of, and I greatly hope you will report and pass a bill that the House can consider promptly in this session.

I would like to say that we are all in these days trying to find a field of consensus, and we all from our experience in our legislative careers have realized if you have too large a package, particularly in the second year of the session, the probabilities of passing anything somewhat diminish. The bills which I have introduced do have the approval of the American Bar Association and do have the approval of the Department of Defense, and various other bars which have considered these. Without in any way reflecting on any other bills that may exist, these bills do represent a pretty tight consensus upon which there is no dissent as far as I know.

If the committee should come to the conclusion that it would like to get out a bill that they felt they could pass in this session of the Congress, they might want to consider getting out a compact bill and then proceed another year, perhaps, to do a fuller job.

Senator ERVIN. Well, if it is satisfactory to you, in order to get those bills before this subcommittee, I would be glad to introduce them in the Senate so we can consider them along with other bills.[1]

Mr. BENNETT. That would be excellent. I certainly want to cooperate with you fully in any way I can. I appreciate fully your kindness in letting me testify. I realize more informed witnesses will go into the technicalities.

Senator ERVIN. We certainly appreciate your testimony. No questions from counsel? Do any of the Senators have any questions?

Senator THURMOND. We are glad to have you with us.

Mr. BENNETT. Thank you very much.

Senator ERVIN. Thank you.

Mr. CREECH. Mr. Chairman, the next witness is the Honorable Thomas D. Morris, Assistant Secretary of Defense for Manpower. Mr. Morris.

STATEMENT OF HON. THOMAS D. MORRIS, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER

Mr. MORRIS. Mr. Chairman, and members of the committee, I am Thomas D. Morris, Assistant Secretary of Defense for Manpower. I am here at the kind invitation of this committee to present the views of the Department of Defense on 18 bills introduced in the Senate on behalf of yourself and Senators Hruska, Bayh, Fong, Johnston, Long, and Williams. These bills are intended to provide additional protection for the Constitutional Rights of members of the Armed Forces.

I am accompanied today by Mr. Frank Bartimo, to my left, Assistant General Counsel, Manpower, Department of Defense; Maj. Gen. R. H. McCaw, Judge Advocate General of the Army; Rear Adm. Wilfred A. Hearn, Judge Advocate General of the Navy; Maj. Gen. R. W. Manss, Judge Advocate General of the Air Force; Brig. Gen. William W. Berg, the Deputy Assistant Secretary of Defense (Military Personnel Policy); and Brig. Gen. K. J. Hodson, the Assistant Judge Advocate General of the Army for Military Justice.

As you know, Mr. Chairman, the Department of Defense has furnished this committee individual reports on all but two of the bills, those being S. 761 and S. 762. These bills cover a number of specific aspects of the judicial procedures, administrative discharge procedures, and the review requirements relating to these procedures. Many of the bills are interrelated. Generally they can be classified into three broad areas—"military justice," "administrative discharges," and "review of discharges." Two of the bills, S. 761 and S. 762, fall outside this classification and will be discussed separately.

General Hodson, the Assistant Judge Advocate General of the Army for Military Justice will present, in detail, the Department of Defense analysis and position on the provisions of the bills which relate to military justice, and he will speak to the technical aspects of the proposed legislation. In the interest of expediting the Defense presentation, I have asked Admiral Hearn, the Judge Advocate General of the Navy, to speak briefly for the Judge Advocates General of the three military departments and to introduce General Hodson. Brig. Gen.

[1] H.R. 273 and H.R. 277 were introduced in the Senate by Senator Ervin on Feb. 9, 1966, as S. 2906 and S. 2907, respectively.

William W. Berg, the Deputy Assistant Secretary of Defense for Military Personnel Policy will follow and will present, in detail, the Department of Defense positions on the provisions of the bills which relate to administrative discharges and discharge reviews. I should point out that these officers are appearing as witnesses for the Department of Defense and not as spokesmen for their respective departments. Departmental officials, however, are present and prepared to respond to queries concerning operations of the individual departments in these areas.

The Subcommittee on Constitutional Rights deserves the highest praise for its efforts and studies in connection with the proposed legislation. Though we may differ as to the best manner of achieving certain of the objectives embodied in the legislation, I wish to make it unmistakably clear that the Department of Defense, no less than this committee, holds that military service in the Armed Forces of the Nation should not abridge or deprive any American citizen of the substance of constitutional rights to which he would otherwise be entitled as a private citizen, insofar as this is compatible with his status as a member of the Armed Forces. We further recognize that our system of military justice must be responsive to the special conditions of current military service as well as to constitutional essentials. Our administrative discharge and separation procedures likewise should be guided by the sense of justice and fairplay that every American has a right to expect from his Government.

The actions of the Congress and the Department of Defense speak clearly as to these objectives and are manifested by the enactment of the Uniform Code of Military Justice, the publishing of a directive on administrative discharges by the Department of Defense in 1959, the proposed legislation which resulted from your exhaustive hearings held in 1962 on the constitutional rights of military personnel, and a recent complete revision of the 1959 Department of Defense directive on administrative discharges.

I am sure that these hearings will result in further improvement in the constitutional protections accorded to our servicemen. But to this I must add a word of caution; namely, that any legislation enacted pursuant to these hearings should accomplish the desired objectives without adversely affecting the military effectiveness of our forces.

We have distinguished between those provisions of the bills which deal with the administration of military justice under the Uniform Code of Military Justice and those provisions which are concerned in varying degree with the administrative authority now vested in the Secretary of Defense and the Secretaries of the military departments. This distinction between military justice procedures and administrative procedures is considered essential to the orderly and efficient operation of the Department of Defense. Therefore, we urge that any legislation resulting from these hearings that affects administrative board proceedings of all types be completely separate and apart from the Uniform Code of Military Justice. Whatever legislation is enacted in this area should not be incorporated into the code but placed elsewhere as appropriate in title 10. Other Department of Defense witnesses will develop this view fully in their discussions of the pertinent bills.

Also I would like to stress that we consider it very important that our military commanders have at their disposal the mechanism to

separate from the Armed Services those individuals who are clearly unqualified for military duty. To retain such individuals within a military unit any longer than necessary could frustrate the commander's ability to satisfactorily accomplish his mission. It could also have an adverse morale impact on the great majority who accept their share of responsibilities. Additionally, we believe that it is our obligation to distinguish, with a suitably characterized discharge certificate, between those who, to the best of their ability, have served our Nation with honor and those few whose unfitness is clearly established by their voluntary behavior.

As I have indicated earlier the Department of Defense is in substantial agreement with the objectives of much of the proposed legislation. This will be evident during the presentations of General Hodson and General Berg who will discuss the bills individually together with certain substitutions and modifications which will be recommended for your consideration.

The Department of Defense is respectfully requesting that action on 3 of the 18 bills be deferred for the time being. They are S. 746, S. 761 and S. 762. S. 746 is the proposed legislation which would provide that law specialists in the Navy would be members of a Judge Advocate General Corps. The relationship of this bill to the matter of constitutional rights of servicemen appears to be based on the expectation that this change would enhance the professional standing of these officers, remove line influence from their promotion prospects and, by increasing career attractiveness, encourage highly capable young lawyers to seek careers in the Navy. However, the proposal directly affects officer personnel management rather than the administration of military justice. The Department of Defense has supported the concept of a Judge Advocate General Corps in the Navy. Appropriate provisions have been incorporated in an existing legislative proposal for comprehensive revision of officer personnel laws, submitted to Congress in March 1963, and March 1965. We recommend that no action be taken on S. 746 at this time, in order that the substance of the proposal can be considered in a context that is directly relevant.

The other bills are S. 761 and S. 762. S. 761 is intended to fill a jurisdictional void created by the Supreme Court when it ruled that courts-martial lacked jurisdiction to try former servicemen for predischarge violations of the uniform code. S. 762 is being proposed to fill a similar jurisdictional void by granting to U.S. district courts jurisdiction to try any citizen who commits certain offenses in violation of the Uniform Code of Military Justice while serving with, employed by, or accompanying the Armed Forces outside the United States.

In the several years that have elapsed since the Supreme Court decisions creating these gaps, there has been extended consideration of this problem. We currently do not have agreement in the executive branch on feasible remedies. The Department of Defense is now staffing substitute legislation on which we hope to obtain agreement and thereafter propose for your consideration in lieu of S. 761 and S. 762. Accordingly, it is respectfully requested that consideration of these two bills also be deferred.

Mr. Chairman and members of the committee, I have restricted my comments to a preface to the discussion of the specifics of the legisla-

tion, which are numerous and interrelated. The witnesses who follow are supported by departmental personnel and, with them, constitute a team who can go into these matters to the full extent that you desire. If, after this much more detailed review, you have questions to which you wish my personal response, I shall be available at your pleasure.

I would like now, with your permission, sir, to introduce Rear Adm. Wilfred Hearn, the Judge Advocate General of the Navy to speak briefly on behalf of the three Judge Advocate Generals.

Thank you, sir.

Senator ERVIN. Mr. Secretary, I want to assure you that it is not the purpose of the subcommittees or my purpose to do anything whatever which would impair in any way the capacity of the Armed Forces to maintain discipline. The members of the subcommittee and myself recognize that the protection of the Nation depends upon the capacity of the armed services to maintain and enforce discipline.

The overall purpose of our proceedings is to ascertain whether or not we can bring that necessary function and the administration of criminal justice into harmony with each other.

Mr. MORRIS. Right, sir.

Senator ERVIN. Adjustments may be necessary to achieve that purpose, it seems to me. I will say to the counsel and other members of the subcommittees, that it might be advisable for us to not examine the Secretary at this time but to postpone any questioning of him until we have heard from the members of the armed services who give their views. Then we would be in much better position to question the Secretary with respect to what their views disclose in the light of the policies of the Department.

Mr. MORRIS. I shall be available at your pleasure, sir.

Senator ERVIN. If any member of the subcommittee disagrees with me on that he can ask the Secretary questions at this time but it does seem to me that it would be better for the Secretary to agree to come back later following the questioning.

On behalf of both subcommittees, I wish to thank you, Mr. Secretary, for your appearance here this morning.

Mr. MORRIS. Thank you, sir.

Senator ERVIN. Call the next witness.

Mr. CREECH. Mr. Chairman, the next witness is Rear Adm. Wilfred A. Hearn, Judge Advocate General of the Department of the Navy.

Admiral Hearn.

Senator ERVIN. Admiral Hearn, I want to welcome you to the subcommittees and thank you for coming here and for giving us the benefit of your views on these very important matters.

STATEMENT OF REAR ADM. WILFRED A. HEARN, U.S. NAVY, JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral HEARN. Thank you, Mr. Chairman.

Mr. Chairman and members of the joint subcommittee. I am Rear Adm. Wilfred A. Hearn, Judge Advocate General of the Navy. I am indeed pleased to have this opportunity to present on behalf of the Judge Advocates General the views of the Department of Defense on

the military justice bills which are under consideration by this committee. I will, however, confine my remarks to general observations and leave to Brigadier General Hodson the technical aspects of the proposed legislation. As Secretary Morris stated, the Judge Advocate General of the Army, the Judge Advocate General of the Air Force, and I will be pleased to respond to any questions which this committee may have. Further, we strongly endorse the position taken by the Secretary.

In connection with the constitutional rights of service personnel who are suspected of or charged with commission of military offenses, following World War II the Congress exhaustively considered such rights in connection with the revision of our system of military justice. The Uniform Code of Military Justice, the product of this deliberate consideration by the Congress, surrounded service personnel with judicial protection never before known in military services of this or any other nation. Fifteen years have elapsed since the enactment of the code. It is appropriate now to examine its operation in the light of present day circumstances and current judicial thinking to see whether or not amendments relating to the fundamental rights of service personnel are required.

We must, however, and here I echo Secretary Morris, keep our military justice system not only responsive to constitutional essentials, but also responsive to those special conditions of current military service which are necessary to the creation, molding, and maintenance of the most effective fighting force in the world.

In arriving at its position on the various bills before this committee, the Department of Defense has looked to this balance, has favored the enactment of all proposed legislation which on balance will meet both objectives, and has opposed those provisions which in our opinion will impede the efficiency or effectiveness of our military organization. I respectfully commend you to this approach: The rights of individuals are of recognized great importance, but the readiness, the ability to respond, and the spirit of our Armed Forces are of no less importance, for these very factors some day may determine whether or not this nation will retain its freedom and independence.

I speak for all the Judge Advocates General in favoring the early enactment of those bills or substitutes which are favored by individual reports heretofore submitted to this committee by the Department of Defense.

I am now honored to introduce to the committee Brigadier General Hodson, Assistant Judge Advocate General for Military Justice, Department of the Army, who will discuss in specific terms the various bills before this committee.

Senator ERVIN. Admiral, I thank you very much.

Admiral HEARN. Thank you very much, Mr. Chairman.

Senator ERVIN. Admiral, I appreciate your presence here, and the subcommittees will be delighted to hear from General Hodson at this time.

General, we are delighted to have you with us, and we appreciate your willingness to express your views on this subject.

STATEMENT OF BRIG. GEN. KENNETH J. HODSON, ASSISTANT JUDGE ADVOCATE GENERAL FOR MILITARY JUSTICE, DEPARTMENT OF THE ARMY

General HODSON. Thank you, Mr. Chairman.

Mr. Chairman and members of the joint subcommittee, I am Brig. Gen. Kenneth J. Hodson, Assistant Judge Advocate General for Military Justice, Department of the Army. With the concurrence of the three Judge Advocates General, I have been designated by the Department of Defense to present testimony to this joint subcommittee in connection with the military justice aspects of the several bills under consideration. While I am speaking as a representative of the Department of Defense, it should be clearly understood that all three military departments have participated in the development of, and support, the views expressed in this statement.

While some parts of my testimony will oppose certain aspects of several of the bills under consideration here, I wish to emphasize at the outset the wholehearted concurrence of the Defense Department in the broad underlying objectives of all legislative proposals designed to protect the constitutional and other legal rights of the members of the Armed Forces. In many respects, members of the Armed Forces charged with criminal offenses are now accorded more legal safeguards than members of the civilian community in similar circumstances. The present requirements for legal representation of the military accused before and during trial in general court-martial cases and upon the automatic appellate review of those cases are examples. However, there is no question but that improvement can and should be made in the Uniform Code of Military Justice to provide additional safeguards and remedies for the accused as well as in the interest of streamlining procedures with a view to a more orderly disposition of criminal charges and a more efficient use of manpower.

Before taking up the several bills which I am here to discuss, I wish to emphasize our belief that any legislation resulting from these hearings should keep administrative board proceedings of all types completely divorced from the Uniform Code of Military Justice and affirm our desire to assist in assuring that any forthcoming legislation is in the best possible form from a technical standpoint to facilitate its successful implementation. Further, it is our hope that unneeded laws will not be enacted when the same objectives can better be attained by other means.

I would now like to discuss five of the bills which clearly involve areas in which there is substantial agreement in objectives and purpose between the Defense Department and the sponsors of those bills insofar as they relate to the administration of military justice. These bills are S. 747, S. 750, S. 751, S. 752, and S. 757.

The Department of Defense favors that portion of S. 750 requiring that an accused at a trial by special court-martial be represented by legally qualified counsel before the special court-martial can adjudge a bad conduct discharge. However, as we have previously stated, we oppose any legislation, including a portion of S. 750, which would

incorporate laws relating to administrative discharge proceedings into the Uniform Code of Military Justice.

S. 752 authorizes the appointment of a law officer to a special court-martial and prohibits a special court-martial from adjudging a bad conduct discharge unless a law officer has been detailed and has been present at the trial proceedings. The bill also authorizes an accused to waive trial by members of a general court-martial, or of a special court-martial to which a law officer has been detailed, and be tried by the law officer alone. The Department of Defense favors the permissive appointment of a law officer to special courts-martial. However, we are opposed to the provision that a special court-martial cannot adjudge a bad conduct discharge unless a law officer has been detailed and has been present at the trial.

The committee is properly concerned—as are we—with safeguarding the rights of the accused in all cases involving a bad conduct discharge adjudged by a special court-martial. We believe that his rights can be adequately safeguarded if he is represented at the trial by legally qualified counsel. And that it is not necessary that a law officer be present in every case. Legal representation at the trial will assure the proper presentation of defense evidence and timely objection to procedural matters or to the prosecution evidence. Legal representation during the automatic appellate review, which may include consideration of the case by the Court of Military Appeals, will assure the correction of any errors which may have occurred during the trial. A mandatory requirement that a law officer be appointed to a special court-martial before it can adjudge a bad conduct discharge cannot be justified when you consider that many of the offenses tried by special courts-martial do not involve complex legal issues. It is our view that detail of a law officer to a special court-martial should be reserved for those cases in which the legal or factual issues are sufficiently complex to require his services.

With regard to the provision permitting an accused to waive trial before the court members, S. 752 gives the accused an absolute right to trial by the law officer alone if, upon the advice of counsel, he makes a proper request before trial. This provision is contrary to rule 23(a) of the Federal Rules of Criminal Procedure, which provides that "cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government." This rule was upheld by the U.S. Supreme Court in the case of *Singer* v. *United States*, decided on March 1, 1965 (380 U.S. 24). There are many cases in which there may be sound reasons why the factual issue of guilt or innocence or the appropriateness of the sentence should be determined by the considered judgment of more than one individual. Accordingly, the Department of Defense believes that waiver of a trial before the court members should be conditioned on the consent of the Government, and the authority who convenes the court is the logical person to determine whether this consent should be granted.

Another provision of S. 752 would permit law officers acting as one-officer general courts-martial to impose the death penalty. The Department of Defense is opposed to this provision. While we realize that under certain conditions in the Federal civilian system and

some State jurisdictions the judge is empowered to adjudge the death penalty, we prefer, in the military for a decision of this vast importance always to be the result of the deliberations and the considered judgment of more than one person. We do not feel that it is in the best interests of the accused or the Government to confer upon the law officer the power and responsibility to adjudge death.

The Department of Defense is in full agreement with the objectives of S. 757, authorizing pretrial proceedings to be conducted by the law officer, but we believe that the bill should be modified to improve its effectiveness. For example, the bill authorizes only law officers of general courts-martial to conduct pretrial proceedings, although another bill, S. 752, would provide for the appointment of law officers to certain special courts-martial. We believe the authority to hold pretrial proceedings should be granted to law officers of both general and special courts-martial. The bill authorizes the law officer to rule during the pretrial proceedings on matters as to which he is authorized to make final disposition during trial. This terminology could be interpreted to mean that the law officer could not rule on the admissibility of confessions at the pretrial session. Further, by specifically authorizing the law officer to handle certain obviously appropriate matters such as motions to suppress evidence and receiving stipulations the provisions of S. 757 leave in doubt the power of law officers to deal with the other appropriate matters not specifically mentioned in the bill which he should be empowered to dispose of at a pretrial session.

The substitute bill proposed by the Department of Defense in its reports on S. 750, S. 752, and S. 757 is designed to overcome the limitations I have pointed out with regard to those three bills and to make other desirable changes.

The substitute bill would achieve fulfillment of the stated aim of the Court of Military Appeals to "assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system." Under the bill, the law officer would have authority to rule with finality on those matters which are customarily determined by the judge, whereas under present law the ruling of the law officer concerning important legal issues and questions may be overruled by members of the court, who comprise the military jury and who are generally untrained in the law. The law officer cannot rule finally on a motion for a finding of not guilty, and he cannot rule at all on challenges for cause. This lack of authority is clearly contrary to the practice in the Federal district courts. Rule 29 of the Federal Rules of Criminal Procedure and the provisions of title 28 of the United States Code, section 1870, permit the civilian trial judge to rule finally on these matters. In addition, the Court of Military Appeals has on several occasions in its annual reports to Congress and in reported cases voiced its view that the law should be changed to permit the law officer to rule on challenges for cause, rather than to permit the court members to make this decision.

The substitute bill also provides for recorded pretrial and other sessions by a law officer before the court members are assembled, or otherwise out of their presence, to consider and dispose of interlocutory questions and other procedural matters. For example,

motions of counsel raising objections concerning the admissibility of confessions and admissions, evidence obtained by search and seizure, and other such matters can be disposed of under the provisions of the substitute bill in a pretrial session. This type of pretrial procedure is now authorized in several of the States. Use of the pretrial session will insure that the trial of the issue of guilt or innocence will not be delayed unnecessarily after the court members are in attendance and that the continuity of presenting the facts in the case will not be disrupted by having the members of the court leave the courtroom from time to time, as is now necessary, while legal issues are being discussed by the law officer and counsel. These interruptions detract from the dignity and solemnity of the trial proceedings, often annoy and irritate the members of the court, and create a risk of injuring the interests of the accused.

Under the proposed substitute bill, law officers can also hold recorded post-trial sessions without the presence of court members to act upon matters such as remands issued by appellate agencies. From time to time an appellate agency may remand a case for further action at the trial level on questions relating to jurisdiction of the trial court, venue, speedy trial, or mental capacity. In civilian practice, a trial judge encounters no procedural difficulties in conducting necessary post-trial proceedings without a jury to comply with mandates of appellate courts. However, under the present military law the absence of authority to call the court into session without the presence of court members makes it cumbersome and difficult, if not impossible, to carry out the mandates of appellate agencies in cases remanded for further action on interlocutory matters at the trial level. The substitute bill will cure this weakness in the military system, for its effect will be that there will always be a court open to handle these matters just as there is in the civilian Federal system.

The substitute bill incorporates the provision of S. 752, permitting the accused to waive trial before court members and be tried by a law officer alone, but, for reasons previously stated, it requires that the convening authority must consent to the waiver, and it provides necessary safeguards, such as the right of the accused to know the identity of the law officer and to have the advice of counsel with regard to his decision in this matter. In addition, unlike S. 752, the substitute bill specifically provides that a general court-martial composed of a law officer alone cannot adjudge the penalty of death.

The substitute bill also requires that an accused at a special court-martial be represented or afforded the opportunity to be represented by counsel who is legally qualified before the special court-martial may adjudge a bad conduct discharge, and it gives the convening authority the power to appoint a law officer to special courts-martial.

Other features of the substitute bill improve the procedure for handling pleas of guilty, administering oaths and granting continuances, ruling on the taking of depositions, authenticating records of trial, and for preparing records of trial in acquittal cases.

Another Senate bill for which the Department of Defense has submitted a substitute bill is S. 751. S. 751 amends article 73 of the Uniform Code of Military Justice to permit a petition for a new trial to be made to the Judge Advocate General within 2 years after approval

of a court-martial sentence, rather than 1 year as now prescribed, and it extends the right to petition for a new trial to all court-martial cases. The Judge Advocates General and the Court of Military Appeals have since 1953 recommended a 2-year period for petitioning for a new trial. This would bring military practice in line with the rule in Federal courts. However, the Department of Defense believes that the other objectives of this bill, namely, to provide relief in cases not now covered by the new trial provisions, can better be achieved by combining the two objectives in one bill and giving the Judge Advocates General power to set aside or modify the findings or sentence or both in all cases not reviewed by a board of review. The administrative burden alone which could result in opening the new trial doors to thousands of inferior court-martial cases warrants authorizing the Judge Advocates General to take direct corrective action in these cases rather than limiting their authority to granting a new rial. Further, it would be costly and probably impracticable in most cases to reassemble evidence and witnesses to try these cases anew.

S. 747 would create a board for the correction of military records within the Department of Defense, and would authorize it to correct any military record, including authority to modify, set aside, or expunge the findings and sentence of a court-martial not reviewed by a board of review. General Berg will present the Department of Defense position with respect to whether a correction board should be established in the Department of Defense. I will limit my remarks to the question of whether a board of this type should be authorized to take corrective action in courts-martial cases as provided in S. 747. It is the position of the Department of Defense that such boards are not now and should not be appellate tribunals within the established system of military justice. Legal issues are and should be resolved before reaching them. The determination whether a conviction should be set aside or modified for legal reasons is essentially the exercise of a judicial function. Accordingly, it is believed that the authority to make this determination should be granted to the Judge Advocate General rather than to an administrative board operating apart from the established system of military justice.

The Defense Department's second substitute bill overcomes all of the objections mentioned with regard to S. 747 and S. 751, while combining and accomplishing the desirable objectives of those bills. The substitute bill provides expanded authority for granting relief in those cases which are not reviewed by a board of review but which are considered to have become final under article 76 of the Uniform Code of Military Justice. This relief would be granted by the Judge Advocate General of the service concerned, who would have specific statutory authority to vacate or modify convictions or sentences in these cases if newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of an accused is found to exist. This would leave intact, and would not interfere with, the powers of the existing correction boards to correct an error or remove an injustice under section 1552 of title 10, United States Code.

The substitute bill would also extend from 1 to 2 years the time within which a petition for a new trial may be filed in those cases

which are reviewed by a board of review. At this time with the committee's permission, I will offer a technical but important amendment to this proposed substitute bill.

In addition to extending the period for petitioning for a new trial from 1 to 2 years, it was intended that the substitute bill make the right to petition for a new trial available with respect to all cases referred to a board of review. We now find that, because of a slight difference in the language of articles 66(b) and 73 of the Uniform Code of Military Justice, the substitute bill fails to make the right to petition for a new trial applicable in those cases which affect general or flag officers and in cases referred to a board of review by the Judge Advocate General under article 69. The amendment to the substitute bill corrects this matter. It is requested that the proposed amendment as well as the two substitute bills to which I have been referring and their sectional analyses be included as annexes to this testimony.[1] I have copies of all these documents with me to furnish to the committee.

I turn now to the remainder of the Senate bills pertaining to military justice matters, for which the Department of Defense has submitted no proposed substitute legislation.

We are opposed to the features of S. 745 which would require the establishment of a field, or trial judiciary, and would specify by law details as to the assignment and duties of the law officer. Although the Army and Navy now have a trial judiciary program, the Air Force has not experienced a need for this type of system. The Air Force carefully selects judge advocates as law officers without placing them in a separate assignment category. There has been no indication that this diversity has resulted in any evil that should be corrected by requiring all of the services to conform to a standard program.

The Department of Defense believe that each armed force should be able to determine, on the basis of its own needs, the best method of meeting its responsibilities in the administration of military justice. Although the field judiciary program is working well in the Army and Navy at present, all three services agree that the program need not, and indeed should not, be prescribed by statute at this time. Further experience with the field judiciary program may indicate the need for changes not envisioned by the Senate bill, and war or emergency situations in particular might well reveal a need for revisions in the systems now in operation in the Army and Navy.

The Defense Department outlined several detailed objections to S. 748, which renames the boards of review and reorganizes them to provide for a civilian chief judge and for a civilian member of each board or panel which considers a case. According to the report accompanying the bill, the mandatory requirement for civilian membership is designated to provide continuity and facilitate "understanding and application by the board of the legal principles enunciated by the all-civilian Court of Military Appeals." This bill appears to misapprehend the status and qualifications of the military lawyer, and makes an unnecessary and drastic revision of the intermediate appellate portion of the military court-martial system.

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[1] The substitute bills appear at p. 25. The sectional analyses and the proposed technical amendment to H.R. 277 appear at pp. 690 and 710.

The Department of Defense is not persuaded that the administration of military justice in the Armed Forces would be improved if senior military officers who have devoted their entire adult lives to the practice of military law, and have done so in the bosom of the military community, were replaced by civilian employees. The use of these senior officers as appellate judges provides the best kind of continuity as it is the practice in all services to appoint to these boards senior officers who have had 20 to 25 years of experience in all phases of the administration of military justice, including service as law officers of general courts-martial or as the legal adviser to convening authorities of general courts-martial. There is no evidence to show that they are incapable of understanding and applying the legal principles enunciated by the Court of Military Appeals.

One of the most serious consequences of the enactment of this bill would be its erosive effect on the prestige of military lawyers. By its terms, it tells all judge advocates and legal officers of the Armed Forces that they are not qualified to preside over a military appellate court, a proposition which is simply not true. I know of no civilian jurisdiction which disqualifies its trial judges from serving as appellate judges; in fact, most civilian lawyers seems to agree that experience as a trial judge makes for a better appellate judge. All services are experiencing difficulty in obtaining and retaining highly qualified military lawyers. Enactment of this bill, with its implication of lack of confidence in the ability of military lawyers to fill important positions in the administration of military justice, will make it even more difficult to attract qualified lawyers for service in the Armed Forces.

The Department of Defense also opposes enactment of the related bill, S. 755, which would prohibit the preparation of efficiency or fitness reports by members of boards of review with respect to any other member of the same or another board of review. We believe that the objectives of this bill can better be attained by strengthening article 37 of the Uniform Code of Military Justice, as S. 749 would do, to eliminate improper command influence under these and other circumstances. In our report on S. 749, we expressed no opposition to that portion of the bill which broadens the prohibition against command influence on courts-martial, nor did we oppose the general principle of prohibiting improper command influence on administrative bodies. We did oppose extending article 37 of the Uniform Code of Military Justice to cover administrative board proceedings because of our general opposition to broadening the code to cover administrative functions not related to the punishment and deterrence of criminal activity. We also recommended some technical improvements in the language of this bill which we urge you to consider.

To depart from my prepared statement I would like to add we opposed that portion of S. 749 which would prevent the performance of an officer as defense counsel from being taken into consideration in preparing efficiency or fitness reports. If this proposal became law, there would be no way to evaluate the performance of persons who are assigned as full-time counsel. This would be unfair to the counsel.

S. 753 would authorize the Court of Military Appeals to review proceedings of the Discharge Review Boards and the Boards for

Correction of Military Records which now exist in each of the services. Although the bill relates only to the review of administrative actions, it is drafted as an amendment to the Uniform Code of Military Justice. As the code is essentially restricted to providing that statutory basis for the exercise of criminal jurisdiction, I again urge that it would be undesirable to inject into it provisions governing purely administrative matters. For this reason and others I will now outline, the Department of Defense opposes enactment of this bill. The memorandum accompanying S. 753 states that the review by the Court of Military Appeals "would be solely on matters of law and would not embrace review of factual issues." A board of correction of military records considers very few cases involving strictly legal issues. Questions of law for the most part have been resolved prior to or in connection with the consideration of the application by the correction board. The vast majority of applications submitted to the board involve factual issues to be determined under service regulations, policies, and procedures. Thus, the board's decisions in most instances are predicated on general principles of fairness and justice.

S. 753 attempts to merge the administrative functions of a service Secretary with the military justice functions of the Judge Advocate General. The net effect would be to require the Judge Advocate General of each armed force to review every case before the Discharge Review Board and Board of Correction of Military Records in the military department concerned, including those in which the Secretary has taken final action, to determine whether any issues existed which would warrant forwarding the case to the Court of Military Appeals. This could entail the review each year of approximately 6,000 cases in the Army, 2,800 cases in the Navy, and 5,500 in the Air Force. In this regard, it should be noted that although the explanatory memorandum accompanying the bill indicates that the proposal is directed toward discharge cases, there is no such limitation in the bill. Accordingly, the Judge Advocate General concerned would be required to examine, and appeals could be taken from, all of the numerous cases that come before a correction board, regardless of the minor legal issues involved.

I would like to add at this point that it is our considered opinion that the present appellate remedies are sufficient to protect an individual's rights and assure him of a fair and just disposition of his case.

Further, it would be an anomaly to require the Judge Advocates General to review the findings of the Secretary of the military department.

Boards established under 10 United States Code 1552 consider many cases in which applicants have not been discharged under conditions other than honorable or in which relief from a discharge is not even an issue. If a substantial number of these cases were introduced into appellate channels, confusion and chaos would be generated. A serious backlog of cases in the appellate procedure would defeat the intended purpose and impede the administration of military justice under the court-martial system.

This bill would authorize the Court of Military Appeals to return a case to the appropriate board for "action in accordance with the decision of the court." A discharge review board has statutory au-

thority under 10 United States Code 1553 to take action "subject to review by the Secretary concerned." In the case of a board for correction of military records, the "Secretary of a military department . . . acting through boards" is authorized under 10 United States Code 1552 to make corrections. It is impossible to determine from the bill what effect a direction by the Court of Military Appeals is intended to have on the discretion of a Secretary under these statutes.

The amendment proposed by section 2 of S. 753 would require that legally qualified officers be assigned to serve as appellate counsel for respondents and the Government in administrative cases before the Court of Military Appeals. Although the volume of cases that would be produced by this bill is speculative at this point, it can be anticipated that the number would be substantial. The additional requirement for legal services that would be originated by this proposal could, either alone or in conjunction with proposals embodied in other bills in this area (S. 750, S. 751, S. 758, S. 752, S. 754), imposes an unacceptable demand on military manpower resources.

The Department of Defense now opposes S. 759, which would abolish the summary court-martial. We believe that our experience in the use of the commanding officer's broadened nonjudicial punishment powers justifies our conclusion that there is still a need for the summary court-martial. Not only do we need this court to provide a forum for those cases in which the accused has refused nonjudicial punishment and demanded trial by court-martial, but experience gained since February 1, 1963, the effective date of the present article 15, shows that the summary court-martial continues to be widely used for the trial of those cases in which nonjudicial punishment is not offered because not considered appropriate—for example, when the accused's conduct has not improved despite article 15 punishment in the past—but the offense is not deemed to be serious enough to justify referral to a special or general court-martial. In cases referred to a summary court-martial under these circumstances, the accused is actually benefited because he has an option to refuse trial by summary court-martial if he wants his case to be heard by one of the higher tribunals. On the other hand, if he decides to accept trial by a summary court-martial, it is a free choice which he may well decide to make, knowing that the punishment authorized to be adjudged by a special court-martial is considerably more severe than that which a summary court-martial is authorized to adjudge, and that the stigma attaching from conviction by a summary court-martial is less than that resulting from a special or general court-martial conviction. If this choice should be taken away, an accused who elects not to accept punishment under article 15 will be forced to cast himself before a tribunal which can impose upon him punishment in a vastly greater amount than a summary court-martial can impose.

The Department of Defense does not oppose in principle that portion of S. 760 which provides subpena power for compelling attendance of witnesses at formal pretrial investigations conducted under article 32 of the Uniform Code of Military Justice. We do oppose that part of the bill which would use the Uniform Code of Military Justice as a vehicle to confer subpena power upon administrative boards. With respect to extending subpena power to article 32 investigations, it

should be kept in mind that these investigations are in the nature of a preliminary inquiry and not adversary proceedings. They are somewhat analogous to a grand jury proceeding, where the affected individual has no subpena rights. Thus, extension of the power of subpena to these investigations would give the accused serviceman a right not enjoyed by his civilian counterparts in grand jury proceedings. If the committee should decide to enact legislation extending subpena power to article 32 investigations, we would like an opportunity to propose substitute language providing proper administrative controls and safeguards against abuse of the power.

This concludes my formal statement on the Department of Defense position on those of the bills which affect the administration of military justice.

I, and my colleagues from the other services, will be glad to receive any questions now which you may have with regard to the Defense Department's proposed substitute bills or the military justice aspects of the proposed Senate bills.

(There follows the two substitute bills, H.R. 273 and H.R. 277. The sectional analyses and the amendment, referred to in the foregoing statement, appear at pp. 690 and 710.)

[H.R. 273, 89th Cong., 1st sess.]

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, providing for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial proceedings by counsel having the qualifications of defense counsels detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of Title 10, United States Code, is amended as follows:

(1) Section 801(10) (article 1(10)) is amended by inserting the words "or special" after the word "general".

(2) Section 816 (article 16) is amended to read as follows:

"§ 816. Art. 16. Courts-martial classified

"The three kinds of courts-martial in each of the armed forces are—

"(1) general courts-martial, consisting of—

"(A) a law officer and not less than five members; or

"(B) only a law officer, if before the court is assembled 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 consents thereto;

"(2) special courts-martial, consisting of—

"(A) not less than three members; or

"(B) a law officer and not less than three members; or

"(C) only a law officer, under the same conditions as those prescribed in clause (1)(B); and

"(3) summary courts-martial, consisting of one commissioned officer."

(3) Section 818 (article 18) is amended by adding the following sentence at the end thereof: "However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) may not adjudge the penalty of death."

(4) Section 819 (article 19) is amended by striking out the last sentence and inserting the following sentence in place thereof: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made and, except in time of war, or of national emergency hereafter declared by Congress, the accused was represented or afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b))."

(5) Section 825(c)(1) (article 25(c)(1)) is amended—

(A) by striking out the words "before the convening of the court," in the first sentence and inserting the words "before the conclusion of a session called by the law officer under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused," in place thereof; and

(B) by striking out the word "convened" in the last sentence and inserting the word "assembled" in place thereof.

(6) Subchapter V is amended by striking out the following item in the analysis:

"826. 26. Law officer of a general court-martial."

and inserting the following item in place thereof:

"826. 26. Law officer of a general or special court-martial."

(7) The catchline and subsection (a) of section 826 (article 26) are amended to read as follows:

"§ 826. Art. 26. Law officer of a general or special court-martial

"(a) The authority convening a general court-martial shall, and, subject to the regulations of the Secretary concerned, the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for that duty by the Judge Advocate General of the armed force of which he is a member. A commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer, or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. However, no person may act as a law officer of a single-officer general court-martial unless he is specially certified to be qualified for that duty. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

(8) Section 826(b) (article 26(b)) is amended by striking out the figures "839" and "39" and inserting the figures "839(b)" and "39(b)", respectively, in place thereof.

(9) Section 829 is amended—

(A) by striking out the words "accused has been arraigned" in subsection (a) and inserting the words "court has been assembled for the trial of the accused" in place thereof;

(B) by inserting the words ", other than a single-officer general court-martial," after the word "court-martial" in the first sentence of subsection (b); and by amending the last sentence of subsection (b) to read as follows: "The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the law officer, the accused, and counsel.";

(C) by inserting the words ", other than a single-officer special court-martial," after the word "court-martial" in the first sentence of subsection (c); and by amending the last sentence of subsection (c) to read as follows: "The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused and counsel,"; and

(D) by adding the following new subsection at the end thereof:

"(d) If the law officer of a single-officer court-martial is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."

(10) Section 835 (article 35) is amended by striking out the second sentence and inserting the following in place thereof: "In time of peace no person may,

against his objection, be brought to trial, or be required to participate by himself or counsel in a session called by the law officer under section 839(a) of this title (article 39 (a)), in a general court-martial case within a period of five days after the service of charges upon him, or in a special court-martial case within a period of three days after the service of charges upon him."

(11) Section 838(b) (article 38(b)) is amended by striking out the words "president of the court" in the last sentence and inserting the words "law officer or by the president of a court-martial without a law officer" in place thereof.

(12) Section 839 (article 39) is amended to read as follows:

"§ 839. Art. 39. Sessions

"(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a law officer and members, the law officer may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

"(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

"(2) hearing and ruling upon any matter which may be ruled upon by the law officer under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

"(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

"(4) performing any other procedural function which may be performed by the law officer under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

"(b) When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a law officer has been detailed to the court, the law officer."

(13) Section 840 (article 40) is amended to read as follows:

"§ 840. Art. 40. Continuances

"The law officer or a court-martial without a law officer may, for reasonable cause, grant a continuaunce to any party for such time, and as often, as may appear to be just."

(14) Section 841(a) (article 41(a)) is amended—

(A) by amending the first sentence to read as follows: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and

(B) by striking out the word "court" in the second sentence and inserting the words "law officer or, if none, the court" in place thereof.

(15) Section 842(a) (article 42(a)) is amended to read as follows:

"(a) Before performing their respective duties, law officers, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a law officer, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty."

(16) Section 845 (article 45) is amended—

(A) by striking out the words "arraigned before a court-martial" in subsection (a) and inserting the words "after arraignment" in place thereof; and

(B) by amending subsection (b) to read as follows:

"(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the law officer or by a court-martial without a law officer, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty."

(17) Section 849(a) (article 49(a)) is amended by inserting after the word "unless" the words "the law officer or court-martial without a law officer hearing the case or, if the case is not being heard,".

(18) Section 851 (article 51) is amended—

(A) by amending the first sentence of subsection (a) to read as follows: "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot.";

(B) by amending the first two sentences of subsection (b) to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than motion for a finding of not guilty, is final and constitutes the ruling of the court.";

(C) by striking out the words "of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court" in the first sentence of subsection (c) and inserting the words "and the president of a court-martial without a law officer shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them" in place thereof; and

(D) by adding the following new subsection at the end thereof:

"(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence."

(19) Section 852 (article 52) is amended—

(A) by inserting the words "as provided in section 845(b) of this title (article 45(b)) or" after the word "except" in subsection (a)(2); and

(B) by adding to the first sentence of subsection (c) the words ", but a determination to reconsider a finding of guilty or, with a view toward decreasing it, a sentence may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence."

(20) Section 854(a) (article 54(a)) is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President."

SEC. 2. This Act becomes effective on the first day of the tenth month following the month in which it is enacted.

[H.R. 277, 89th Cong., 1st sess.]

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, to authorize the Judge Advocate General to grant relief in certain court-martial cases, to extend the time within which an accused may petition for a new trial, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

(1) Section 869 (article 69) is amended by adding the following new sentence at the end thereof: "Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a board of review, may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."

(2) Section 873 (article 73) is amended by striking out in the first sentence the words "one year" the first time they appear and inserting the words "two years" in place thereof.

SEC. 2. The amendment made by section 1(1) of this Act is effective upon the date of its enactment. The amendment made by section 1(2) of this Act is effective with respect to a court-martial sentence approved by the convening authority on and after, or not more than two years before, the date of its enactment.

Senator ERVIN. The counsel may question General Hodson.

Mr. CREECH. Thank you, Mr. Chairman.

General, the subcommittee has received reports concerning the operation of article 15 nonjudicial punishment. The indications have been that this has been a very successful program.

Now, under the current system, if a man is offered an article 15 punishment he may choose instead a summary court-martial. If he is offered summary court, then he can elect a special instead under article 20, I believe. Why does this difference exist, and what really—why give a man, each man, under any circumstances, the choice between an article 15 and a summary, or an article 15 and a special? Why should the decision of the commander as to article 15 determine his choice?

General HODSON. I am not sure that I understand your interpretation of the existing articles, Mr. Creech.

Mr. CREECH. Article 20, I believe, says if a man is offered a summary he may elect a special instead unless he has previously been offered an article 15 and has declined.

General HODSON. Well, let me give you my version of what those articles provide.

Article 15 provides that with certain minor exceptions, the accused may refuse to accept punishment under article 15. In that kind of a case, the article provides that he may be tried by a summary court-martial over his objection. If he has not been offered article 15 punishment, and you offer to try him by summary court-martial he can refuse to be tried by a summary court-marital, which means if you are going to try him you would have to try him by a special or general court. I think we are probably saying the same thing, but I am suggesting that the answer is that the man who is tried by summary court-martial now is there in effect by his election either because he fails to elect a trial, he fails to object to trial by summary court, or because he has chosen a summary court instead of an article 15.

The offenses which are punishable under article 15 are relatively minor, and it does not seem to us to be appropriate or desirable that

the man who, say, is being punished for being late for reveille, if you are going to punish him at all, if he refuses to accept punishment under article 15 that you then have to convene a three-man special court-martial, complete with counsel and prefer charges in order to adjudge some punishment for being late for reveille. This can be adequately handled by a summary court-martial.

Mr. CREECH. Now, General, the article 15 punishment is imposed by the commander who will usually constitute the summary court-martial, isn't that correct?

General HODSON. That is not correct.

Mr. CREECH. It is not correct. Well, will it be the commander or someone else in the immediate unit, who will make this decision with regard to article 15 and the summary court?

General HODSON. I maybe can handle this by illustration. If it is within a battalion, which is composed of companies, the company commander normally in the Army is the commander who would offer to impose article 15 punishment. If the accused refused to accept article 15 punishment the case would than go to the battalion commander. The battalion commander is authorized to appoint both a summary and a special court-martial, and if it were a minor offense, he would probably refer it to a summary court-martial if he referred it to trial at all.

Mr. CREECH. Is there any situation in which the commander would also be the same person who would either impose article 15 punishment or who would constitute the court, the summary court-martial?

General HODSON. Well, as a practical matter certainly within the Army this would not occur.

Mr. CREECH. How about within the Navy?

General HODSON. There is a provision where if the commander is the only officer serving with a unit he may also serve as a summary court-martial. It is never used in the Army. I don't know about the Navy.

Admiral HEARN. It is not the practice in the Navy. The commanding officer may refer the case to a summary initially or if the accused is based ashore and is entitled to an election, the commanding officer will refer the case to a summary court who may be an officer within his own command, but he never serves in both capacities.

Mr. CREECH. Excuse me, Admiral—you say he may refer it to a summary court.

If I understood you correctly, Admiral, if a man is land based, then the officer who is the commander may refer it to a summary court-martial. He will appoint the officer who will preside at the summary court, is that correct?

Admiral HEARN. That is correct.

Mr. CREECH. By the same token, it would be he who would administer the nonjudicial punishment if the man elected to take it, is that correct?

Admiral HEARN. The commanding officer would, that is correct.

Mr. CREECH. Sir, what, then, is the relative——

Senator ERVIN. Admiral, you might prefer to come up and sit beside General Hodson. It would be a little easier for the reporter to get the questions and the answers.

Mr. CREECH. Admiral, what protection would there be for the accused in the situation which we have just described in which the commanding officer would be the one to either impose the article 15 punishment or to constitute a summary court-martial, what protection is there for the serviceman in the summary court that doesn't exist in an article 15 action?

Admiral HEARN. As far as the protection of his rights are concerned, the case would be reviewed by the convening authority, who would be the commanding officer, and then reviewed by the next higher authority where it would become final.

Mr. CREECH. Sir, when you say be reviewed, is there going to be a written record?

Admiral HEARN. There is a summarized record.

Mr. CREECH. A summarized record?

Admiral HEARN. In the summary court.

Mr. CREECH. But it is not a verbatim record?

Admiral HEARN. It is not a verbatim record; that is correct.

Mr. CREECH. So on the review who would prepare the transcript for review?

Admiral HEARN. The summary court-martial officer.

Mr. CREECH. The officer himself would prepare it. Would this—does the accused have an opportunity to review this record? Does he have an opportunity to object to the record as being an unfair résumé of what transpired at the hearing or in court, the trial?

Admiral HEARN. I would have to guess the answer to that and say generally not. I have never heard of an instance where such a request has been made.

Mr. CREECH. So the reviewing officer——

Admiral HEARN. Let me just check with my associates.

Am I right in that?

Yes.

Mr. CREECH. So when it goes up for review then the only thing that is sent up for review is the summary which is prepared by the presiding officer at the summary court?

Admiral HEARN. That is correct.

Mr. CREECH. Of course, summary court is a one-officer court.

Admiral HEARN. That is correct.

Mr. CREECH. If the accused feels that the record on appeal or for review does not reflect the situation, there is no basis for him to make or take any action to bring this to the attention of the reviewing authority?

Admiral HEARN. Generally, I think that is correct.

Mr. CREECH. I see.

General HODSON. May I interrupt here, Mr. Creech, at this point? I have recalled some statistics that might be interesting with respect to the particular point you seem to be making.

In the Army during the last fiscal year we received reports of article 15 punishment and reports of trial by courts-martial. The acquittal rate in summary courts-martial generally was about 4 percent, as I recall it.

With respect to 2,500 cases where the accused refused punishment under article 15 and was thereafter tried by summary court-martial,

the acquittal rate was 14 percent, indicating at least to us from a statistical standpoint that the summary court was giving the case a very careful look and that there was some advantage to refusing punishments under article 15 and requesting trial by summary court.

Mr. CREECH. Now, General, do your records also indicate the extent to which the summary court-martial is being used now after the enactment of article 15, nonjudicial punishment?

General HODSON. We have those figures as to the number of trials——

Mr. CREECH. Does it indicate a substantial decline in the use of summary courts-martial?

General HODSON. There has been a substantial decline since 1962, since the rate before February 1963. There has been a substantial decline. The decline has not been as great as we were hoping for. As a matter of fact, last year's figure, as I said we had 2,500 cases by summary court-martial of men who had refused punishment under article 15, out of a total of about 17,000 summary court-martial cases. There has been some decline, but with 17,000 cases we feel that we can't very well recommend that the court be abolished.

Mr. CREECH. Has there been a degree of variation, appreciable degree of variation, between the various commands and services for that matter, with regard to the use of nonjudicial punishment under article 15 as opposed to the summary court-martial?

General HODSON. The only statistics with which I am familiar indicate that the Air Force is experiencing a far greater decline in the number of summary courts-martial trials than either the Army or the Navy.

Mr. CREECH. That is true across the board in all commands of that service?

General HODSON. I cannot answer that question. I only have the departmental figures.

Admiral HEARN. May I speak for a moment on this point?

Mr. CREECH. Yes.

Admiral HEARN. I might say while I don't have the figures immediately available, the number of instances in the Navy where an accused has refused nonjudicial punishment and chosen the summary court is very, very small. At the time that article 15 became law, we were having about 30,000 summary courts-martial per year. There was a rapid decline from that figure, and it has now leveled off to about 10,000 a year, which indicates to us that this is still a very useful tool for the disciplinary system of the service.

Senator ERVIN. Admiral, I am glad to say that the Navy Department and the then Judge Advocate General, Admiral Mott, and I discussed this matter and that I had the privilege of offering the amendment that gave military personnel the right to elect a court-martial in lieu of taking nonjudicial punishment. I think that was a very good change because it made the practice in the Navy and the Marine Corps correspond to that in the Army and the Air Force.

ADMIRAL HEARN. I think that is correct. It has certainly served a very useful purpose.

Senator ERVIN. Of course, in the old days before we had the code of military justice we used to have a practice in the Army of allowing a man to take company punishments, as we called it, in lieu of a court-martial. Company punishment, like nonjudicial punishment, I think,

is an excellent thing because it gives the service an opportunity to impose discipline, to teach a man discipline, without having it go into his records that he had been tried by a court-martial.

Admiral HEARN. That is correct, and it is human nature to want something you didn't have and if they didn't have the election they would all want it, but now that they have it they don't want it. They are not using it. That is the Navy's experience.

Mr. CREECH. Excuse me, Admiral, I was under the impression that you felt nonjudicial punishment under article 15 was being used to a very great extent and had cut your summary courts down from what—30,000, approximately?

Admiral HEARN. From 30,000 to 10,000, and you understand my statement correctly, sir.

Mr. CREECH. Now, Admiral, under article 20 if a man is offered a summary court but for some reason either—regardless of what the reason maybe, he desires to have a special court where he can be represented by legal counsel, or what have you, if he has not been previously offered nonjudicial punishment under article 15 then he is given a special court-martial, is that correct, sir?

Admiral HEARN. That is correct.

Mr. CREECH. But if he has been offered nonjudicial punishment, then he is not permitted this election, is that correct, sir?

Admiral HEARN. That is correct.

Mr. CREECH. Do you see some great advantage to the service in saying that in those instances in which a man is going to be offered a summary court-martial that he may appeal, I mean he may elect to take a special court-martial, only in those instances in which he has not been offered an article 15?

Admiral HEARN. Yes, sir. Of course when a person is being offered an article 15 he is involved in a minor infraction. Normally, when he is not given an article 15 punishment, or offered the article 15 punishment, the offense is a little bit more severe, in the opinion of the commanding officer, one which would warrant a summary trial, and it is at that point where he has his election. Whether he will accept the summary or whether he will elect to be tried by a special, and while I am unable to furnish you any figures on the exercise of that election, in that case, too, I think the elections have been very, very small.

Mr. CREECH. Sir, you indicate that where the commanding officer feels that the severity of the crime, of the alleged crime, is such that he should have a summary instead of an article 15, what is the difference in punishment which may be imposed under an article 15 and summary court-martial?

Admiral HEARN. I would have to, without refreshing my recollection, says perhaps the only substantial difference is that under the summary court-martial authority the accused can be given 30 days' confinement as opposed to 30 days' correctional custody under article 15.

Mr. CREECH. There is no appreciable difference between the punishment under the two, is there, sir?

Admiral HEARN. Only that difference, as I recall. There is this important effect, though, as the chairman mentioned a moment ago. When a person is convicted by a summary court-martial he then begins to acquire a record of convictions.

Mr. CREECH. Yes.

Admiral HEARN. And there are instances where an accused has had several article 15 punishments for the same type of offense that he is now charged with, and in situations like that it may be in the best interests of the service to begin to put on the record his infractions and for that reason he might be given a summary court-martial.

Mr. CREECH. Sir, what protection is there for the serviceman in a summary court-martial that does not exist under an article 15 action?

General HODSON. Are you talking about the time of the hearing?

Admiral HEARN. I can't think of any.

Mr. CREECH. Yes, sir.

General HODSON. Are you talking about at the time of the hearing?

Mr. CREECH. Yes.

General HODSON. One thing the commander who is planning to inflict article 15 punishment, having investigated the case, may be termed the nominal accuser. When it goes up to the next higher command and is referred for summary court, the summary court knows nothing about the case at all. He never head about it before. So carrying out the procedure at the hearing you have, I would say, a better chance of a completely impartial hearing than you have with respect to a hearing before the company commander. So you have got this advantage.

You have got the advantage, also, that if the accused does bring counsel in, counsel can be heard in a summary court. We do not furnish counsel, but if he provides counsel they can be heard. That is as far as the hearing is concerned. He can ask that witnesses be called and testify. He can through counsel cross-examine those witnesses. This is something that does not exist under article 15, that is just summary action. He is just notified, "I intend to impose punishment," and that is it. The summary court may call witnesses and cross-examine them.

Senator ERVIN. If I may interject, the company commander is not likely to offer a man nonjudicial punishment unless the has already decided that he is guilty.

General HODSON. He has already made this determination.

Senator ERVIN. Yes.

General HODSON. In his own mind.

Senator ERVIN. Yes.

General HODSON. Yes.

Senator ERVIN. Without an opportunity to be heard on the part of the serviceman or, rather, it could be without a opportunity to be heard, Although I should think——

General HODSON. Without a formal hearing——

Senator ERVIN. Perhaps he could give him an opportunity to speak for himself.

General HODSON. Usually these article 15's come up on report from a platoon sergeant to the first sergeant, from the first sergeant to the company commander that somebody was absent at reveille. The accused knew he was not there and that is the end of it.

Senator ERVIN. In other words, the company commander is not going to offer punishment of a nonjudicial nature under article 15 unless he has made up his mind to punish.

General HODSON. Yes. He has already investigated it.

Mr. CREECH. General, or Admiral, going back to what we were discussing before, either one of you might like to answer, if a man is offered nonjudicial punishment under article 15 and he refuses it and

then he is given a summary court martial, since he has been offered a nonjudicial punishment, if the man feels for some reason the commanding officer is prejudiced against him or that he wants to be tried once he refuses that nonjudicial punishment, though he can only be tried by the summary court, and at the summary court although he may bring in local counsel to represent him, the presiding officer is not a law officer, is that correct?

General HODSON. The summary court officer?

Mr. CREECH. Yes, sir, and may not have any legal or judicial experience, is that correct?

Admiral HEARN. That is correct.

Mr. CREECH. So if the legally trained counsel representing the accused raises or asks a ruling on certain points of law or a certain procedure, then these are going to be ruled upon by the presiding officer who may not have any legal or judicial experience, is that correct?

General HODSON. That is right.

Mr. CREECH. Then it is this same officer who has no legal or judicial experience who is being asked to rule on points of law and procedure, admissibility of evidence, and what-have-you, who will prepare the record for review, is that correct?

General HODSON. Yes. But I remind you this record is a summarized record.

Mr. CREECH. Yes, it is a summarized record. It is not even a verbatim record.

General HODSON. That is right, sir.

Mr. CREECH. So if the officer who prepares the record for review because of lack of experience with the law or with judicial procedure overlooks or omits for one reason or another the inclusion in the record of certain requests by defense counsel, certain objections and what-have-you to various rulings, then there is no way for them to be considered upon review, is there?

General HODSON. In the Army, there is none. I don't know what point you are driving at, Mr. Creech. We are not making any assertion here that a summary court martial is any different than the police, the magistrate's court, the recorder's court, which handles 95 percent of the criminal business in the United States today. Our courts are perhaps a cut above most of those. But they are substantially the same type of procedure you would have in the police, magistrate's or recorder's court. It is a summary court.

Mr. CREECH. General, the point I am trying to make here is that although a man may be offered an article 15 that in many instances it would seem to me if a man did not want to accept an article 15 punishment he might feel that the severity of his, of the accusation was such that he wanted to be represented by legally trained counsel. He might want to employ counsel. But that if he has to take counsel into the summary court there is really no opportunity for counsel, there may not be an opportunity for counsel to be terribly effective for him in the summary court, whereas if he has not been offered the nonjudicial punishment then he can elect to go into the special court where there is a law officer presiding, is that correct?

General HODSON. There is no law officer in Army special courts martial. There is no law officer provided by the Uniform Code of Military Justice at this time.

Mr. CREECH. But there are in the Air Force, are there not?

General HODSON. No; the Uniform Code of Military Justice does not provide for a law officer at this time.

Mr. CREECH. I realize it does not, but as a matter of practice are they not using law officers?

General HODSON. You can't use a law officer in the special courts. It would be a violation of the code at present. The presiding officer is permitted by law to make rulings. If he happened to be a lawyer, and if he happened to be a presiding officer he has the power to make legal rulings, but if you had a junior member who is a lawyer, the nonlawyer presiding officer is still the only one allowed to make rulings, so the lawyer would be sitting as a member and not as a lawyer in the special court.

Admiral HEARN. I might inject here that the nature of the alleged offenses which are considered by a commanding officer under an article 15 punishment or referred by him to a summary court martial, be it by way of the election of the accused or by the independent decision of the commanding officer, are of such minor nature that there are no legal questions that come up. There are no formal rules of evidence that are followed.

Senator ERVIN. This is an interesting discussion, and it reminds me of the story—and I will go off the record.

(Discussion off the record.)

Senator ERVIN. If I may inject myself at this point, I have enjoyed this discussion between the general and admiral and counsel. There is some objection made to summary courts on the ground that there is no complete record of the trial kept, and, therefore, the points raised may not be considered on review. I take it that your position is that summary courts are courts of very limited jurisdiction, that it would require the assignment of a tremendous amount of personnel if you had to have a court reporter or somebody like that to take down the evidence that it would require too much expense to make a complete record of all objections that might be raised and the evidence taken and that the present operation is justified since it is subject to review and you have got to depend upon the integrity of the summary court officer to make a correct summary of what transpired. General Hodson approximated it with police courts and magistrates courts.

In my State, we have magistrates who hold court and nobody takes down the evidence. He is not required to be a lawyer and usually is not. At the same time, we handle an objection by allowing an appeal of a trial de novo which, of course, makes two trials of one case. The question is whether there is any practical way that wouldn't be too expensive and whether or not you could insure having a better record for a summary court. In other words, it is a question of practicality, what is practical as compared with ultimate, perfect procedures, isn't it?

Admiral HEARN. Yes, sir.

Senator ERVIN. And the question is fundamentally raised by one of the bills that proposes to abolish the summary court, whether or not the summary courts, while they are inferior in procedural safeguards to the other courts-martial, are so useful and instrument that they should be retained or whether, by reason of the fact that they do have, in the very nature of things, a defective procedure as compared with those of other courts-martial, they should be abolished. That is what

it comes down to, is it not, and, in other words, whether the evils—I won't say the evils, but I would say the defects—in the procedure of the summary court are such that it should be abolished and special courts with enlarged personnel substituted for them.

Admiral HEARN. And risk the accused to a far more severe punishment. I might say that the practical considerations that the chairman mentioned are the reasons for not having a verbatim record and are certainly important. But more fundamental than that, we don't feel that the rights of the accused are in any way compromised by haveing a distinterested officer, who realizing his responsibility, hears the evidence, makes a decision and records the summarization of the evidence on the report. We feel that is in all fairness both to the accused and to the Government.

Senator ERVIN. And the summary court has no jurisdiction except to what are military offenses, isn't that true?

Admiral HEARN. Well, of course, he perhaps has jurisdiction, but if it is an offense other than a minor military offense, it would never be referred to the court in the first instance.

Senator ERVIN. I think it is a good time to unhitch and feed, as the farmers would say, at this time. Unless someone has some objection to the contrary, one of the two witnesses or counsel or Senator Thurmond, I would suggest we recess now until a quarter after two.

(Whereupon, at 12:25 p.m., the subcommittee recessed, to reconvene at 2:15 p.m. the same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittees will come to order.

Mr. CREECH. Mr. Chairman, Brigadier General Hodson and Admiral Hearn are now at the witness table—Admiral Hearn is not. Also, I wonder if General Manss would care to join them, inasmuch as some of the questions will pertain to the Air Force, of course.

Senator ERVIN. Will you proceed.

Mr. CREECH. General Manss, this morning we were proposing questions, some of which pertained to the Air Force, and I wonder, sir, if there is any information which you would care to give the subcommittees pertaining to the questions which have already been posed with regard to the Air Force.

STATEMENT OF MAJ. GEN. R. W. MANSS, JUDGE ADVOCATE GENERAL OF THE AIR FORCE

General MANSS. I do not have anything particularly to add to what has already been said as far as the jurisdiction and the operation of the summary court are concerned.

I might point out, however, that it has been our experience in the Air Force that the amendment to article 15 resulted in not only a dramatic decrease in the number of cases in 1963 after that amendment became effective, but we have continued to have a substantial decrease each year in the number of summary court cases.

For example, in 1961 we had 14,624, and in calendar year 1964 we had 3,073. We do not have complete figures for 1965, but the first 6 months were 916.

Now, possibly this is, I think, probably this is, due to a policy which we have and which we have told our people in the field, that we do not want anybody tried by summary court unless they have refused punishment under article 15, unless there are exceptional circumstances.

For example, in the last quarter of 1965, we only had 57 cases in which the accused had been offered article 15 punishment and refused it, and 39 of those were in one command. We have been able to pinpoint this one, and I think that command will have a better record in the next year.

So I do think, though, that we should retain the summary court because I think it is wrong, as both Admiral Hearn and General Hodson have said, to jump all the way from nonjudicial punishment up to a special court-martial.

Mr. CREECH. Now, General, this morning an analogy was drawn between the police court and the summary court-martial.

Now, of course, in the police court if one chooses to have counsel represent him, he can do so as a matter of right; and in the summary court, is he also entitled as a matter of right to bring in legally-trained counsel if he cares to do so?

General MANSS. Sir, the statute does not give him the authority to do it. I cannot speak for the other two services, but in the Air Force if he brings in counsel of his own choosing we designate a counsel to represent the Government and proceed with counsel on both sides.

Mr. CREECH. I wonder, gentlemen, if you feel this is——

Senator ERVIN. What did you say about the counsel designated by the Government?

General MANSS. The counsel is designated for the Government. When I say "we," I am using the term generically, the staff Judge Advocate of the particular base where the trial is going to take place will designate qualified counsel.

Senator ERVIN. As a matter of fact, the Air Force will permit a man in a summary court to be represented by counsel of his own choice?

General MANSS. Yes, sir.

Senator ERVIN. Notwithstanding that the statute is silent on whether he has the right to do so or not.

General MANSS. Mr. Chairman, that is right. But this does not happen very often. It very seldom happens.

Mr. CREECH. General Hodson, would this be the same situation in the Army?

STATEMENTS OF BRIG. GEN. K. J. HODSON, ASSISTANT JUDGE ADVOCATE GENERAL OF THE ARMY; AND REAR ADM. WILFRED A. HEARN, JUDGE ADVOCATE GENERAL OF THE NAVY—Resumed

General HODSON. In the Army, we have a rather detailed procedural guide which all summary court-martial officers follow. As a matter of fact, it is required that they be thoroughly familiar with this because it outlines all of the duties, and so forth.

Our procedural guide calls upon them to permit the accused to introduce counsel of his own choice at his own expense and it is contemplated

that this may happen. But I agree with General Manss it happens very rarely.

Mr. CREECH. Admiral Hearn, would this procedure also be applicable to the Navy?

Admiral HEARN. I think it would. Within my own experience as a commanding officer, I appointed summary courts—not many—but in this particular instance, the accused wanted to be represented by military counsel, and while there is no provision of law which says he is entitled to counsel, his desire was taken care of, and he was permitted counsel, who defended him in a summary court-martial. I have never heard of an instance where counsel was requested where the request was denied.

Mr. CREECH. Now, in the special court, the accused, as it exists today, the accused, is entitled to counsel, but he does not have to be legally trained counsel; is that correct?

Admiral HEARN. That is according to law; yes, sir.

General HODSON. Unless the prosecution is legally qualified.

Mr. CREECH. But there is nothing to prevent the accused from having legally trained counsel if he wishes to retain counsel in a special court.

General HODSON. That is correct, sir.

Mr. CREECH. Under S. 752, the individual, the accused would be entitled to legally trained counsel, and there would also be a law officer, of course, to preside in cases in which the defendant might receive a bad conduct discharge.

Now, would not 752 improve the administration of justice not only by providing for a trained law officer but by relieving the services of the responsibility of having to appoint a three-judge court in the case of a special? In other words, would not S. 752 make it easier for the services to administer military justice?

General HODSON. Well, as I indicated in my statement, we favor that part of S. 752 which requires the appointment of a legally qualified counsel if a BCD is to be adjudged.

We do not feel it necessary or desirable to make it mandatory that there be a law officer on a special court-martial which adjudges a BCD. However, if the committee favors our substitute proposal, it will provide for three kinds of special courts-martial: one, the three-member court; one, the single-officer, law-officer court; one, the court of three members plus a law officer.

We would also provide that upon the request of an accused and the consent of the convening authority, he may be tried by the single law officer court.

Now, in answering your question, I would say that if you enact other segments, such as our substitute bill that we have proposed, it is possible if the accused requests a trial by a single-officer court, that he would be tried by the single officer, law-officer court, and it would relieve the services of the responsibility of appointing a 3-member court.

Mr. CREECH. General Manss, I wonder if you would care to comment on that question and also, General, I do not believe we asked you to identify yourself for the record.

General MANSS. I am Maj. Gen. Robert W. Manss. I am the Judge Advocate General of the U.S. Air Force.

We have never actually objected on the merits to having a law officer in a special court-martial actually, although I do have one reservation that it would require a few more people, we would have to have more people to do it. Consequently, of course, all three services, I think, are in a little bit different position in regard to the way they operate their special courts-martial.

We, of course, use counsel in all cases on both sides, that is, qualified counsel.

Now, they may not necessarily be certified under 27(b)(2) but they are all Judge Advocates, and they are all members of the bar of the highest court of a State, or a Federal court, or the District of Columbia, so that we kind of feel this would not hurt us too much if we did this.

However, we realize that again here, depending upon the situation, we do not have anyway near the number of courts-martial that the other two services have, so we do not have that problem. That is one of the reasons why we are able to furnish counsel.

Again, I hate to keep quoting a lot of figures, but we had in the first 6 months of 1965 only 1,067 special courts-martial. Now, I do not know what the figures are in the other services, but I know they are much higher than that. So here again our situation is much different from the—actually, this is the reason we have never objected to this particular provision on the merits, but we have to go along with the position of the other two services because of their practical problems.

Mr. CREECH. General, earlier you gave the subcommittee figures, the most recent figures that you have on the number of nonjudicial punishments and the reduction of the number of summary courts-martial. I wonder, sir, if you feel the enactment of S. 752 would tend to further diminution of summary courts-martial and an increase in the special courts-martial.

General MANSS. No; I do not think it would have any effect on the decrease in the number of summaries, because actually you get into a situation where the convening authority is going to refer the case, and he should refer it to the lowest court which he thinks can handle the problem adequately. So I would not see that this would decrease that number at all.

Mr. CREECH. Admiral Hearn, I wonder, sir, if you would care to comment on these questions.

Admiral HEARN. It has been our practice in recent years to try to employ lawyer counsel on both sides of a special court-martial to the extent that we have been able to make them available.

While this is not required by the law, we have nevertheless pursued this policy on an informal basis, with some success.

Currently, approximately 50 percent of the special courts-martial which are tried in the Navy, and which come into the office of the Judge Advocate General for further review, have lawyer counsel for both the defense and the Government, and we have also had the informal practice of making available, to the extent that they are available, our law officers to sit as presidents of those special courts-martial which are of a complicated nature, and we have found that this practice has been successful. It has been in furtherance of the position which the Department of Defense is taking with respect to S. 752.

General HODSON. I might add one thing here, Mr. Creech. I believe if I understand what you are getting at, if we had the provision

for a single law officer special court there is a possibility that it might possibly decrease the number of summary courts. In my opinion, provided the accused would request a trial by that kind of a court, the convening authority might decide to refer those cases to the single law officer court rather than to a summary court. But this is something which I believe we need experience on before we abolish the summary court. It may be that this will work.

Mr. CREECH. You think, General, that the fact that under S. 752 the individual would be entitled to counsel, and the fact that he would be tried before a law officer, would cause the individual to prefer the special? Do you think this, once the serviceman became aware, they are going to be tried by a legally trained law officer and be represented by legal counsel, that this would encourage him to request a special court-martial?

General HODSON. I think it might. I have this feeling. But again I think we need a couple of more years of experience after we get the legislation authorizing the law officer special court. I have a feeling myself, and it is only my belief, that the accused might decide that if he thinks he has got a pretty good case that he, instead of being tried by summary court, would refuse to be tried by summary court, and ask to be tried by a single officer court, and I think that might happen in a number of cases.

Mr. CREECH. Do I infer, sir, from what you have said earlier in regard to your belief that the summary court should be retained at this time, although the number of cases has been greatly reduced, I think you indicated in the Army, about one-third of the former number because of the nonjudicial punishments, that if S. 752 is enacted that it may be later desirable to come back to review the situation to see whether summary courts-martial should still be retained?

General HODSON. That is my opinion; yes, sir.

Mr. CREECH. In other words, you feel that it might, whereas now you favor retention of the summary court, that under the terms of S. 752 that at some later date it may be desirable to review it.

General HODSON. Not 752, but the provision we have offered, the substitute, so that we will have a single law officer court at a special court-martial level. I would feel that in a matter of 3 or 4 years, or 2 or 3 years, our experience might indicate that it is more efficient and more effective to try those people by the single law officer court rather than to try them by the summary court. But we need the experience before we come to that conclusion.

Mr. CREECH. General, isn't it true that unless a special court-martial imposes a bad conduct discharge the petition for a new trial under 73 of the uniform code is not available to the accused?

General HODSON. In a special court-martial trial?

Mr. CREECH. Yes, sir.

General HODSON. Well, yes, the new trial petition there is limited to bad conduct and dishonorable discharge, so you not only have to have the imposition of the bad conduct discharge, it would have to be approved.

Mr. CREECH. Yes, sir.

What remedy then does the accused have if newly discovered evidence reveals that he should not have been convicted?

General HODSON. By a special court?
Mr. CREECH. Yes, sir.
General HODSON. At the present time?
Mr. CREECH. Yes, sir.
General HODSON. Well, he can go to the Army Board for the Correction of Military Records, and if they find an error or an injustice, which they might very well find in the situation that you have outlined, newly discovered evidence that might be favorable to the accused, they could correct his record and set aside his sentence.
Mr. CREECH. Admiral, would this be possible in the Navy?
Admiral HEARN. I would not like to say as a general proposition that the Board for the Correction of Naval Records is now available in all such cases. I will say, however, that the proposal which is part of the package which the Department of Defense is submitting to this subcommittee for consideration includes a provision which would authorize the Judge Advocate General of each of the armed services to have authority to review those cases which have become finalized by reason of the fact that they were reviewed in the field and did not contain a bad conduct discharge.
I would like to go back a moment to the question of doing away with the summary court. After seeing what our experience will be with the one-officer special court at sea, it may be rather difficult to convene such a court. So the experience, as good as it might be, with a one-officer special court, may not meet the requirements of the Navy.
Mr. CREECH. General Manss, since there seems to be some difference between the military departments with regard to their interpretations on the power of the correction boards under the circumstances that I was just discussing with General Hodson, I wonder, sir, if you would care to comment on the situation in the Air Force. Admiral Hearn seems to indicate that he is not so sure that the same procedure would be followed in the Navy.
General MANSS. Well, the only difference between the Army and the Air Force, as I understand it, is one of semantics. It depends on what order the Correction Board makes. Now, in the Air Force they actually say they set a conviction aside. There is a difference of opinion as to whether you should say this or whether you should say they merely corrected the record to show that the man was never convicted. The fact of his conviction would still remain, but it is not part of the record, so practically you achieve the same result.
Now, as Admiral Hearn pointed out, this is one of the purposes of having a provision in the DOD package to permit the Judge Advocate General to correct these mistakes and errors that are made in the subordinate type court-martial cases so that the people do not have to go to the Correction Board.
We do not necessarily say that the board should not have the authority. But, as a matter or practice in the Air Force, the board always sends the file over to us and asks us for our opinion as to whether or not they should actually, in effect, set the sentence aside, when you say—whether they correct the record or set it aside or not.
I have had a couple of cases, and again here we have a difference of opinion on the legal effect with the Army, but it accomplishes the result, I have had cases come to my attention two or three times in

which the court-martial in the field, either a summary or a special, appears to have been illegal, so I have appointed counsel to act for the accused without even asking him whether he wants to do this or not, and had him file an application with the board, and the board has taken action to correct the record to show that he was never tried, and so it restores him to his rights. We think if the Judge Advocate General is going to give his opinion in all of these cases, and in some instances has to do this the hard way, that we would be a lot better off, and we could save everybody's time and trouble and accomplish a much better job if we just had authority to do it.

Mr. CREECH. General Hodson, going to a new subject, sir, on page 18 of your statement you state that if the committee should decide to enact legislation extending subpena powers to article 32 investigations you would like an opportunity to propose substitute language providing for proper administrative controls and safeguards against the abuse of the power.

I wonder, sir, if you would care to expand your remarks there to give us some indication of what you have in mind.

General HODSON. This is not completely firmed up within the Department of Defense yet, but it is our thinking at this time that we would probably place a requirement in the statute itself which would say that the subpena could not be issued by the article 32 investigating officer without the approval of the commander who appointed him.

Now, this might seem to be too strict a rule and, as I say, we are not in complete final agreement on this. We might decide to send it up and require the approval of the general court-martial convening authority although I think that is a little too strict.

The purpose of this is to keep the article 32 investigating officer from being harassed to death with respect to a lot of unusual requests for witnesses. We feel that if he went up to the officer who appointed him for authority at that point they could probably get legal advice as to whether this witness should be called or not called because, you understand, that the article 32 officer is not now certainly in the Army very often a lawyer. This is substantially the same limitation that you now find with respect to depositions, that they may be taken unless the convening authority disagrees. So our present thinking is that that type of limitation should be put into the statute itself.

Mr. CREECH. Would either of the other two gentlemen care to comment on this?

General MANSS. I agree with General Hodson's statement. I think there has to be some kind of a brake on this because otherwise the accused or his counsel—and, generally, at least in the Air Force the accused has counsel in the article 32 investigation—can draw the proceedings out, they can try to muddy the waters as much as possible. Someone should be able to make a decision as to whether or not they can have all the witnesses that they request.

Now, this probably could take the form of something in the nature of making a proffer to determine what they want the witness to testify to, as you would in an actual trial. But I think somebody should make this determination.

Mr. CREECH. General Manss, when you say he has a counsel in the Air Force, did you mean, sir, legally trained counsel?

General MANSS. Yes, sir.

General HODSON. That is true of all the services by law.

General MANSS. That is true, in article 32 investigations he has qualified counsel.

General HODSON. If he requests it.

Mr. CREECH. And that would be the case in each service if he requests it, it is made available to him?

General HODSON. Yes. I think I can say without fear of contradiction that in all services he has legally trained counsel in the article 32 cases. He is advised he is entitled to a lawyer to represent him, and it is very rare that he is going to turn this down.

General MANSS. There you get into the proposition that you are going to have to appoint counsel if he is tried anyway, so you might as well get the counsel in at that time because generally, I would say 99 times out of a hundred, it is the same counsel who acted in the 32 investigation who is appointed counsel for the later trial, if any.

Mr. CREECH. Well, now, General Hodson, moving to page 12 of your statement, sir, with regard to S. 748, I would like to inquire, sir, isn't DOD replacing military lawyers to some extent with civilian attorneys under Secretary McNamara's mix-fixing policy which we have heard about?

General HODSON. I cannot answer that question with respect to how it is being applied to all three services. He has placed quotas, as I understand, on the three services, and the services have, in turn, passed those down to subordinate commands, and there is no question but that in determining whether an officer could be replaced by a civilian, that it would be reasonable to check into the replacement of military lawyers with civilian lawyers.

Mr. CREECH. And under this substitution policy of the Secretary's, to your knowledge, is there any reason to believe that military lawyers might not be replaced, for instance, even as board of review members or as law officers or any number of other capacities, if the Secretary deemed this desirable?

General HODSON. The only thing that I can say at this point is that the criteria that we have received so far would indicate that we would not be asked to replace the military members on the board of review with civilian members. I have outlined part of the reason for this in my statement, and I will expand on it if you wish.

We are having difficulty in recruitment now of career officers, and we have had for a number of years. If we told a new officer, coming into the Judge Advocate General's Corps, "You are entitled to a 30-year career all of which will be spent either in Vietnam or Korea," I do not think he would sign up with us.

The reason I say that is because if we do not have jobs of challenge back here in the United States to assign these people to when they arrive at senior rank, then it means that the 30-year career is going to be spent in the boondocks in Korea because there will be no jobs back here for them.

So, by having jobs back here for them, such a job as with the board of review, we can rotate them between field commands, and the Department, and thus give them a challenging career for their entire service, and this would be the basis upon which we would oppose re-

placing the military members of boards of review with the civilians at the present time under the Secretary of Defense's directive.

Mr. CREECH. Admiral Hearn, does the Navy still use civilians on boards of review?

Admiral HEARN. Yes, sir; we have a civilian on each of our boards of review, and along with one military officer we have a civilian who is an alternate.

I might go back to your statement of civilian substitution in accordance with the policy of the Secretary of Defense. It is not envisioned in the Navy that civilian substitution will be involved in the court-martial processes of the Navy.

Mr. CREECH. Yes, sir.

Sir, has the use of civilians on your Navy boards of review, has that been a morale problem or a personnel problem to the Navy JAG?

Admiral HEARN. Well, I will answer that no. I might say, though, that in addition to having boards of review with a civilian member, there have been times when we have had boards of review without a civilian member.

Mr. CREECH. I see.

Admiral HEARN. I would say that the quality and the quantity and professional caliber of the work of the board of review without a civilian member have been just as high as the board of review that had a civilian member.

However, I would say that the use of a civilian member on those boards of review has been satisfactory.

Mr. CREECH. Do you have any reason to feel that the presence of the civilian member or the use of civilian members on these boards has adversely affected your recruiting of lawyers for the naval service?

Admiral HEARN. I would not think so because there are other factors which are more important in the recruiting considerations than that.

There have only been at most six such civilian members, and they have associated entirely with the more senior lawyers, and I do not think it has had any impact on recruiting the younger officers.

Mr. CREECH. Sir, has a civilian ever been chairman of one of your boards of review?

Admiral HEARN. No, sir. There have been times—I will withdraw that. There have been times, I think, in the past when because of the availability of personnel there have been three civilian members of a board of review or, perhaps, two and it may well have been that during those temporary periods a civilian has been chairman.

Mr. CREECH. Gentleman, is there any service where the chairman of the board of review still rates the members of that board?

Senator ERVIN. Before you go to that, I would like to ask Admiral Hearn what was the reason why the Navy initiated the practice of having civilians on the boards of review? What was the origin?

Admiral HEARN. I think, perhaps, the reason was that the Judge Advocate General of the Navy at the time that the boards of review were orginally established in 1951, when the code was enacted, thought that it was a good thing to do. It was his decision.

Senator ERVIN. Do you know why he thought it was a good decision, that is what I am getting at?

Admiral HEARN. Sir?

Senator ERVIN. Do you know why the Secretary of the Navy thought it was a good decision?

Admiral HEARN. No, sir; I do not. Our boards as now constituted include one civilian, one naval officer, and one Marine Corps officer.

Senator ERVIN. On that point, the Marine Corps—I have a son-in-law who was in it and who was a lawyer, well trained in military law—the Marine Corps, as I understand it, has the practice of requiring every officer in the Marines to do all types of service. In other words, instead of assigning an officer exclusively to be a law officer, they require him to serve also as a line officer at times, at times as a law officer. Is that not the practice still?

Admiral HEARN. Colonel Neville from the Marine Corps is present, and I would pass that question to him, with your permission, Mr. Chairman.

STATEMENT OF COL. ROBERT B. NEVILLE, STAFF LEGAL OFFICER TO THE COMMANDANT, U.S. MARINE CORPS

Colonel NEVILLE. I am Colonel Neville from Headquarters, Marine Corps, Staff Legal Officer to the Commandant.

We used to follow that practice. In 1960 we adopted a practice of assigning lawyers who desired such assignment to legal duties only, and they have that as their primary military occupation. We now have some lawyers who are line officers and lawyers, but the great bulk of our lawyers are assigned to legal duties.

Senator ERVIN. Are they assigned before they perform line duties or are they required to perform a certain amount of line duty before they are assigned purely to legal work?

Colonel NEVILLE. Well, Mr. Chairman, it depends on what you mean by line duties.

Senator ERVIN. Well, you take an officer who goes into the Marine Corps and is a lawyer. Is he assigned to be a platoon commander before he is assigned to legal duty exclusively?

Colonel NEVILLE. No, sir, he is not compelled to be a platoon leader. However, he is sent to our basic school where he learns to be an all-around Marine officer before he is assigned as a lawyer. Does that answer your question, sir?

Senator ERVIN. I think it does. As I understood the old theory of the Marine Corps, a man was better rounded if he had all types of experience than a man could possibly acquire while serving as a marine.

Colonel NEVILLE. Yes, sir. That is still our philosophy, and we still encourage our lawyers to take other assignments. We do not compel them to, but if they volunteer for another assignment, for say, a period of 2 years in other types of duty, that request is always looked upon with favor if it can be done. If a lawyer accepts a regular commission, he is expected to serve one or two tours of duty as a line officer while he is still below field grade.

Senator ERVIN. I had always understood that the theory more particularly was that if an officer had had experience in command of a platoon, a company or any other detachment, he would be a better judge or a better prosecuting or defending counsel if he knew something about the behavior of men in the ranks.

Colonel NEVILLE. We still believe that, Mr. Chairman.

Senator ERVIN. As well as a man above the ranks.

Thank you.

Mr. CREECH. Returning to the question, if I may, gentlemen, is there any service where the chairman of the board of review still rates the members of the board?

General MANSS. Yes.

Admiral HEARN. Not in the Navy.

General MANSS. The Air Force does.

General HODSON. Not in the Army.

Mr. CREECH. The Air Force still rates?

General MANSS. Yes. If you don't mind, I would like to tell you why.

Mr. CREECH. Yes, sir.

General MANSS. We think actually that this is a good and desirable practice, because if we prohibited it we would be depriving the junior board member of a privilege which would be enjoyed by every other Air Force officer in having his performance evaluated by one who knows it best. The observable work products of a board of review are its decisions and its opinions, and actually I see all of those, and I know just exactly what all of the members of the board are doing, and if there is any problem in connection with this, I would know it.

Even when the individual signs decisions, they are a collective effort, and the collective product, of the board, and nobody outside the board or that group is in a position to evaluate accurately the contributions of the individual members. As long as the board functions satisfactorily as a unit, the outsiders would not have any way of distinguishing the truly brilliant judge from the hopelessly misplaced man, and if the system is changed, one of them could go along without hope of discovery and the other one without fear of being discovered. We think the plain truth is that even where the board members, who are now ostensibly and officially rated by someone outside the board, the rater of the record must necessarily rely on some advice from the chairman of the board in making the rating.

So obviously we do not think this is a bad practice, and we think that we should keep it, that it contributes to the vitality of the appellate system.

Now, the work of the individual member of the board of review is extremely important, and we think it is too important to be lost by just burying him down someplace where nobody really knows what he is doing, and, of course, at the same time we can tell if we have a member of a board who is not producing, so that we can remove him and get a better man into it.

Again, we have to go back to the chairman of the board to determine that.

The question of independence and integrity is invariably raised in this connection, and we think that a short answer to that should be that acknowledging that human beings are generally imperfect, and that most of us are pretty bad, that the evil envisioned is simply incredible. We do not believe it. We think it misjudges the caliber and devotion of our people to the point almost of being slanderous, I suppose you might say.

But no officer and lawyer sitting as a judge, who has devoted his entire adult lifetime to the service of the law is likely to put an accused in or out of jail just to please his boss, and we do not think that a chairman is any more likely to desire or to tolerate such a thing.

Senator ERVIN. Of course, General, there is a human element which I admit I succumb to. I am always inclined to think that the wisest Members of the Senate are those who share my sound views on questions. [Laughter.]

General MANSS. Maybe, Mr. Chairman, it is fortunate for them you are not rendering effectiveness reports. [Laughter.]

But actually——

Senator ERVIN. There is a human element which enters into this question, as well as into hundreds of other questions that confront us, I think, daily.

General MANSS. Actually, Mr. Chairman, I know of no occasion on which a board member has hesitated to express his opinion honestly, and I know of no occasion in which he has been—anything has happened to him as a result of doing that.

As a matter of fact, when the last promotion cycle occurred in the Air Force we had two of our lieutenant colonels on two boards of review promoted to colonel, and we had to make some shifts because they were kind of overranked in the job, and none of our people have ever been hurt, and we do not think that——

Senator ERVIN. It is conceivable, is it not, that he might get a higher rating at the hands of his senior by reason of the admiration the senior would have for his independence of thought?

General MANSS. Yes, sir; and, of course, another thing is every once in a while you run into a board chairman who takes all the guilty plea cases and he may feel a little indebted to his two junior members for doing his work for him. This is possible.

Mr. CREECH. General, without wishing to cast any aspersions and, indeed, I would like to make it very clear I am not doing so on any member of any service who might serve on any board or in any capacity, for that matter, but the subcommittee at the time that it queried former judge advocates throughout the services, this was not just the Air Force, this was the Air Force and the Army and the Navy, was told that this practice of permitting the rating by the senior board member provided an opportunity for command influence, and that there was too much opportunity for this and, therefore, it should be discontinued.

Apparently you would not concur with this based on your experience.

I wonder if you, General Hodson, if you would tell us, please, sir, for the record, why the Army does not use this system, if it employed it at one time, why it abandoned it?

General HODSON. It did employ it at one time, and the change came about at the time we created U.S. Army Judiciary. At the time we created a judiciary—this includes both the field and the appellate judiciary—we reviewed the entire organizational structure with the idea of making it as independent as possible.

At that time we came to the conclusion, as I recall it, that this was a case really of removing the appearance or the possible appearance of evil rather than removing evil itself, and it would make the judiciary

appear to be more independent if the chairman of the board no longer rated the board members. So, at the time we adopted the independent judiciary, we adopted the independent efficiency reporting system, but there was no evil that we knew of. It was just the appearance of the evil or the possible occurrence of evil.

Mr. CREECH. Yes. Admiral Hearn. Would you care to comment on the situation in the Navy, sir.

Admiral HEARN. We have practiced the general policy which is followed throughout the Navy or having the commanding officer of an organization sign, be the reporting senior for the members of his command.

As a consequence, we have never had the senior member of a board of review be the reporting senior for any board of review members and our practices with respect to the judiciary in the Navy is the same as that of the Army. I am the commanding officer of all of our judiciary officers and I make out their fitness reports, whether they be serving in Japan or whether they be serving in Washington, and the commanding officer of the members of the boards of review make out their fitness reports. The chairman of the board, as well as the other members of the board, their fitness reports. This follows the Navy's general practice.

General MANSS. Mr. Creech, may I add just one thing?

Mr. CREECH. Sure.

General MANSS. Under the Air Force system, and the way we do this, we have a rating officer and an endorsing officer.

Now, in the cases of the members of the board of review, the two junior members are rated by the chairman, and the effectiveness report is endorsed by the Director of Military Justice to whom the chairmen report directly. In other words, he makes their effectiveness reports, and then I endorse those.

Of course, the director of Military Justice and I are both very much familiar with what the boards are doing, so that we do not actually have one alone who does the rating. The endorsing officer always has the chance, he can raise it or he can lower it. Of course, he has to justify any changes that he makes in it or he can agree with it.

Mr. CREECH. Mr. Baker, do have any questions? General Hodson, Mr. Baker has a question for you, sir.

Mr. BAKER. In the case, General, where you have an independent member rating the members of the board, what do they predicate this rating on, what background information do they have available to do an adequate job?

General HODSON. I was going to mention there was a lot of merit in what General Manss has to say about having knowledge, and there is no question but what the senior member of the board knows better what the other two members are doing than anybody else.

Our ratings of the members of the board of review are made by the Assistant Judge Advocate General of the Army, and he has to base these ratings pretty much on reading decisions, attending hearings before boards of review to see how the board is functioning, in part upon reports rendered to him by the chief of our judiciary.

This has to do, of course, with whether they are at their desk and working, that type of thing, and that is about the basis of his rating.

Mr. Baker. So that the possibility under this system, it would appear, would be that the good man may be, if not too flashy, could be overlooked because you are looking more to the mechanical approach to his job rather than to the substantive?

General Hodson. That is correct. It is very difficult to make a rating of a board of review member under the circumstances. But it was a choice that we made.

I might mention at this point that one thing that makes it a little bit easier is that most of the people who are appointed to a board of review have from 22 to 25 years of service, and the rating officer is pretty familiar with the effectiveness reports or efficiency reports which that officer has received during the past 25 years, and he has some idea of the caliber of work that he has been doing in the past. I am sure that this has some influence on his rating, and maybe that is one way I might answer your question. If he is a real flashy officer he might look harder to find reason for rating him higher on a board of review. I am not certain, but it is very difficult, and there is a great deal of merit in what General Manss says, no question about it.

Mr. Baker. Thank you.

Mr. Creech. General, in our correspondence with the Department, and in our various discussions with members of the respective services, the representations have been made that where exceptions have been made in the proposed bills for time of war that there should also be specified times of emergency to cover such situations as the Vietnamese situation or the Korean situation, something of that sort.

I wonder, sir, if you would care to comment on this recommendation that where there are exceptions in time of war that it should be brought in to cover emergency situations.

General Hodson. In the substitute bill providing for legally qualified counsel on a special court-martial before a BCD may be adjudged, it is now written up except in time of war or national emergency declared by the Congress.

One of the DOD positions on one of the administrative board bills was to make an exception to providing legally qualified counsel before an undesirable discharge could be awarded in time of war or national emergency declared by the President or by the Congress, so there is some slight difference.

I will address myself, if I may, to the question of in time of war or emergency declared by the Congress, because that is in the military justice bill.

I might say at the outset that we do not feel too strongly about adding this "in time of war" exception. The national emergency declared by Congress, is a very, very rare bird. As you probably know, we are operating at the present time under the national emergency declared by President Truman in December 1950 in certain fields, and our bill says "national emergency hereafter declared," so that we are not taking advantage of one already in existence.

But "in time of emergency declared by Congress" the size of the Armed Forces could be increased almost without limitation, depending upon appropriations, and so forth. Not only could we recall ready reservists, we could recall standby and retired reservists, and there would be no limitation on the number that we could call.

So I can envision the possibility under an emergency declared by Congress of the Armed Forces literally jumping three or four times their present size in a very short period of time.

We felt that in view of that possibility, even though it might be remote, that it might be well to put in this exception and extend it not only to time of war but national emergency.

If you wish, I will address myself to the administrative exception, and include the national emergency declared by the President. That, of course, would only permit generally the President to call to active duty the ready reservists up to the extent of 1 million for a period of 2 years.

Now, in the field of military justice it was our thinking that we do not need an exception in that kind of a case, and we can continue to provide legally qualified counsel on a special court. But there is a limit to it, and possibly because of that rapid increase, we might wish to take advantage of that exception because we might not be able to provide legally qualified counsel for all administrative boards. But I want to make it clear at this time, and I think I am speaking for the Department of Defense, that we do not feel strongly about either one of these "national emergency" exceptions.

Mr. CREECH. You do not feel it is going to create any great problem for you.

General HODSON. No. In other words, "time of war," as far as we are concerned, would probably be adequate. We feel that we might well cover the other aspects because of the possibility of a drastic increase in the Armed Forces without there being a declaration of war.

General MANSS. Mr. Creech, there is one other reason, I think, and it may affect only—it might affect the Navy to some extent, too, of course. We have not been taking people, getting people from the draft, and I think this is one of the reasons, at least as far as the Air Force is concerned, why we have a smaller number of disciplinary problems because, frankly, we are getting a little more selectivity in the people that we take.

However, if we got into a situation where we started to use the draft, I think our rates would go up appreciably, and we might get into a situation like this.

But I think this is the kind of thing of which General Hodson speaks. Of course, if we do get into a wartime situation we could probably assume that along with the increase in the numbers of people in the Armed Forces generally, that we would have a corresponding increase in the number of people who had legal qualifications to perform the tasks they were assigned.

Mr. CREECH. Admiral Hearn, is there anything you would care to add to this?

Admiral HEARN. I do not care to add anything to what has been said except to say it looks to me as though in the years ahead we are going to be faced with more limited wars than we are with general wars, and the phrase "in time of war" has always had the connotation in the past of referring to an all-out general war. If we have to wait for general war before the exception would be operative, we may never meet the requirements of the services.

Mr. CREECH. Gentlemen, moving now to S. 745, General Hodson, the subcommittee has been told earlier that the field judiciary system has

been used very successfully in the Army and in the Navy, but even so that there is, we know of course there is, objection to this bill, which would provide for a statutory basis for the field judiciary.

I wonder, sir, what is the basis for objecting to this legislative mandate for the field judiciary?

General HODSON. Again the three services are in complete agreement here that we should not set this in concrete by putting it into a statute when you consider the limited experience that we have had with it.

It is true that the field judiciary is working fine in the Army. We are very happy with it and we are very proud of it.

But we recognize that there might be situations, and I am now thinking of wartime or emergency situations, where we would wish to make certain departures from the existing system.

Therefore, we would prefer to keep it as flexible as possible, and let us handle it administratively. If we set it in a statute, then we are pretty well dedicated to carrying it out exactly that way or coming in and asking for remedial legislation when we discover that because of certain things we did not foresee, we cannot make it work during wartime.

We think we can make it work during wartime, but we do not know that we are able to foresee every eventuality, and because of that we would prefer not to have it put into a statute.

Mr. CREECH. I wonder, General Manss, if you would care to tell the subcommittee why it is that the field judiciary, which apparently has worked so well in the Army and has been adopted administratively by the Navy also, why the Air Force is so opposed to this system.

General MANSS. Well, actually we do not think that the Air Force needs it. We just do not think that it is suited to our present requirements.

Now, we have watched the operation of the field judiciary in the other services, and from time to time have applied their experience to our requirements to determine whether or not we would be benefited by the adoption of a similar system. Each time we come to the same conclusion, and that is that it would not benefit us, and it would not benefit our people.

Our basic requirement is to afford the greatest possible protection to the fundamental rights of our people with the resources that we have available.

I would be willing to adopt it if at any time the facts showed that it would help us in doing this. But to do it now, I do not think that this is the time.

Now, it could be that if we come to a proposition where we are going to use law officers in special courts, we would then have to have a law officer and a qualified law officer in administrative discharge proceedings, this might have quite a bearing on it.

But the way it stands now we, with the number of general courts that we have, where a law officer would be required, just do not have that much business. Because of the way we are located geographically, we would have to spot people around in various parts of the world so that we would have to have about four times as many people as we would actually require if we could try all those cases in one place.

Again we have found that in about 80 to 85 percent of our cases the law officers are not members of the staff of the convening authority, so that this does away with any objection of command influence over law officers, because he is working for somebody else, and his commander or the staff judge advocate who was writing the effectiveness report on him, does not have anything to do with this particular performance of his duty.

As I said originally, we do not have doctrinaire approach to this thing. We do not say it is bad just because we do not like it. We think it is probably a good thing in the proper place, and we just do not think that we need it at this time.

Mr. CREECH. General, you seem to indicate that there would be some problem about getting your law officers around to the various bases. Perhaps you would not have sufficient law officers to readily send them to bases.

General MANSS. We could do it, I think, but it is just a question of doing a lot of travel, and what are they doing in between times.

Mr. CREECH. Yes, sir. I was going to ask you in that connection about the possibility of interservice use. I may be mistaken, but I believe, General Hodson, that the subcommittee was told that there has been interservice use between the Army and the Navy from time to time.

General HODSON. On a very limited basis so far. This is still being considered.

Mr. CREECH. Yes.

General MANSS. This has happened, I think, primarily in some of the joint commands where they are exercising what we call reciprocal court-martial jurisdiction. We have some offices where we have members of all three services in one legal office. But generally we have not done this, and I am not particularly in favor of doing it as a matter of practice in all cases.

Mr. CREECH. Gentlemen, I would like to direct this question to you, if I may.

The subcommittee has heard that the opposition to the field judiciary system in the Air Force existed at very high levels but that the lawyers and officers, in general, think that this would be a needed and valuable reform. I wonder, sir, if you have heard of such allegation or if you feel this is untrue or would you care to comment?

General MANSS. Well, I think, I won't say it is untrue because I cannot prove it is untrue. I think it is probably not true because I have not heard anything to this effect at all. I do not know—if somebody would specify what, whom they mean by high level. Do you mean me, or somebody higher than that, or somebody lower than that, or what?

Mr. CREECH. Well, I have a feeling, sir, when we are talking about you we would be talking in terms of very high level. [Laughter.]

General MANSS. No. I work for the Chief of Staff, and I can say, frankly, that I do not even think he knows there is a problem right at this point because I have never discussed it with him.

Mr. CREECH. But it is your feeling that the representations which you have made here with regard to the field judiciary represent a consensus within the Air Force?

General MANSS. I do.

Mr. CREECH. Yes, sir.

Gentlemen, moving to S. 749, which, of course, is designed to strengthen the prohibitions against command influence, I wonder, General Hodson, if you feel that it is possible to avoid command influence when the court is selected by the person recommending a court-martial?

General HODSON. You mean our present system?

Mr. CREECH. Yes, sir.

General HODSON. You are just talking generally, then, not about S. 749, is that right?

Mr. CREECH. Yes.

General HODSON. Oh, yes, I firmly believe this. Our experience certainly under the Uniform Code of Military Justice leads me to the conclusion that the courts-martial selected by the convening authority are not subjected to command influence in any particular.

Of course, there have been two or three command influence cases with which I am sure the committee is familiar; but, generally speaking, those are very rare exceptions. Generally speaking, I do not think there is any doubt about it. Certainly in the Army the convening authority can select the court and still have the court free, independent, and impartial to exercise its own judgment.

Mr. CREECH. Do you feel, sir, that the opportunity for command influence might be removed if the officers of a court were chosen by lot from a panel of available men rather than being designated?

General HODSON. I think that if you had the policy of selecting your court members substantially the same as you select a jury, certainly in certain jurisdictions I suppose that you might say that you might remove the possibility of command influence by the convening authority. I do not know whether you have in mind that these members of the court would not be under the command of the convening authority or whether they would be from another command.

If they are under the command of the convening authority, and they were selected by lot, I would assume you would have the same opportunity for command influence that you have now.

If they are not under the command of the convening authority and were selected by lot, I suppose you would remove almost any possibility of command influence.

But, as I say, I do not feel there is any command influence exercised today, and I base this conclusion on the practical problem of selecting court membership within the Army itself. It is very rare in a general court-martial that the convening authority knows the members of the court personally. He may know one man on the entire panel, so his opportunity to influence the judgment of that court is almost nil.

If it were selected by lot, of course we might have some difficulty with our military operations in the sense that if all of the battalion commanders of a particular group happened to have been selected for a court at the same time, that particular outfit is out of action. So I do not think that the lot system would work too well.

Mr. CREECH. Sir, you mentioned the possibility of using officers from different commands. The subcommittee has been told, I believe, that this was done during World War II in north Africa with great success. Are you familiar with that, sir?

General HODSON. I am not familiar with that experience in north Africa. I know various experiments were run there, and in Italy and also in France, but I am not familiar with that particular one.

Mr. CREECH. The experience to which you alluded, does that indicate to you that this is desirable? Do you recommend this type of procedure?

General HODSON. Of having the members of the court come from another command?

Mr. CREECH. Another command; yes, sir.

General HODSON. I do not favor it. I see no need for it. There is every appearance that court-martial members in all of the services are completely independent in their judgment. I have some evidence to that effect by the fact that the acquittal rate in courts-martial generally compares quite favorably to the acquittal rate in Federal courts.

If that is any indication of independent judgment, and I think it is about the only evidence that I can present to you, but if you would compare those you would find that our acquittal rates are about the same. Guilty plea rates are about the same, and one other thing that I think you might take into consideration is the fact that unless the accused requests enlisted members on the court, that the members of a court, generally speaking, are 75 or 80 percent of them, at least college graduates. They are rather senior officers with considerable experience. They have been selected to be commissioned officers because they have unusually exceptional backgrounds.

You usually do not get very far in the Armed Forces if you kowtow to everybody all the way up the line. You kind of peter out about halfway up the career ladder if you do that. You have got to have some kind of independent judgment not only in the field of administration of military justice but in the field of operations and planning.

So most officers in the Army are familiar with acting independently and with performing independently, and they carry out the duties as court members just as they carry out their other duties, without fear of reprisal, and completely independently and impartially, in my opinion.

Mr. CREECH. Admiral?

Admiral HEARN. I would like to address myself to this question, sir. I am not aware of any instance in the Navy where the court membership coming from the command or convening authority has had any effect whatsoever upon the outcome of the case. There is no such thing as command influence in that regard.

As a matter of fact, the general court-martial convening authority in the Navy generally operates on a geographical basis in the sense that he convenes the court to try the people who are attached to the commands located at a certain geographical area, and the members of the court come from all of the commands within that geographical area and not from his immediate command, because normally he has no command from which he can draw court members.

So in the case of our general courts, command influence over the actions of the members of the court is most unlikely. Furthermore, I subscribe fully to what General Hodson says about the integrity of the officers who make up these courts.

General MANSS. I agree with both General Hodson and Admiral Hearn.

There is one other thing I can add from my personal experience. I have sat as a member of a lot of selection boards for promotion, and I have never yet seen an effectiveness report on any officer which made any comment on whether he was a good court member, a bad court member for the accused or the Government or anybody else.

We also in many cases have courts comprised of officers from several different units which are not necessarily part of the same chain of command.

Now, the reason for this is not because we are afraid there will be command influence, but because under our system we usually, on one base, for example, will have one officer who exercises general court-martial jurisdiction, and he will have on his base a lot of units as tenants who are members of another command.

Well, if he is going to do their work, he insists on them giving him a little help, so he does not have to tie up all his officers for court-martial cases involving everybody else as tenant units, so they furnish members for the court, and so far as the convening authority is concerned, there is nothing he can do about it.

As I say, we do not do it for the reason that we think there is command influence, because we do not think that there is, but it just happens to work that way.

I think another thing that indicates that at least on the part of most of the accused in our court-martial cases they do not seem to think there is very much command influence as far as officer courts are concerned, or we would have more requests for enlisted personnel on the courts. At least in the Air Force we very seldom have any requests.

Mr. CREECH. General, I did not mean to imply that command influence could be only at the very highest level. The subcommittee was told in the course of its investigations on a number of occasions by junior JAG officers, for instance, that they had found in their experience when some JAG officer became very proficient at his defense work that he was transferred then to prosecution, something of that sort, and that we had the allegation made several times in visiting various bases and talking to various JAG officers, and in the numerous pieces of correspondence which we received from them, that frequently officers who had been very effective in defense work were transferred to the prosecution or that attorneys who were JAG officers, who were requested in some instances, would not be made available.

There were a number of these type accusations which have been made in the past. I wonder if you would care to comment on any of these things.

General MANSS. Well, as far as transferring an officer from duties as defense counsel to trial counsel, there is here a routine problem. It works the other way, too, because you must remember that most of these officers who are trying these cases are in the young brackets. This is part of their training.

Now, obviously, we cannot very well afford to give an officer training leading toward becoming qualified to be a law officer and have him do nothing but defense work.

By the same token, we do not want him to prosecute only.

A lot of times the only comment that I could make is if an officer tries, defends a lot of cases, and he is successful in a high number of those cases, that probably we had better not start looking at him.

They had better start trying to figure out whether the cases should have been referred for trial in the first place.

But, be that as it may, I do not think that this is a legitimate complaint. I think in many instances that this may be the product of an officer, for example, becoming so involved personally in the defense side of the case, which a lot of them will do after they defend enough cases, that they think that any change is done on purpose because they were doing too good a job there. I do not believe this is true, and actually—sir?

Senator ERVIN. Of course, General, there are exceptions to general rules, and any testimony that would indicate to me a total absence of any command influence in any court martial would be sort of on a par with that old story about the lawyer who was summoned down to the jail to see his client. The lawyer asked him, "What have they got you here for?" And the client told him. The lawyer said, "Well, they can't put a man in jail for that." And his client said, "Well, I am here." [Laughter.]

The Court of Military Appeals has held, as a matter of fact, in an instance or two, and has set aside convictions on account of command influence.

General MANSS. Yes, sir; this is true.

Senator ERVIN. I do not think that the Army or the Air Force or the Navy are always quite entirely free of that attitude exhibited to me by a juror one time when I was presiding over a first degree murder trial. They had a special venire summoned in from another county, and I asked one of these jurors if he could give him a fair trial. He said, "I think he is guilty of murder in the first degree and he ought to be sent to the gas chamber. I can give him a fair trial." [Laughter.]

Now, there are instances of courts-martial in this country that had that attitude and did not hesitate to communicate it or make it known.

General MANNS. I think, Mr. Chairman, that when you say that the Court of Military Appeals has had cases of command influence, they have, this is true. But I think we have all learned a lot from this and, to my knowledge, they have not had one in the last couple of years. But here again in this particular type case, I think the command influence comes in when we run into a commander, for example, who has given some instructions or written a letter in which he will say that anybody who does such and such a thing should not be a member of the Air Force, for example.

I have seen this done. That particular case never did get to the Court of Military Appeals. We got that one busted pretty fast in the field. But these are the things we have to avoid. He is not talking about a particular accused. I know we have, in the Air Force, pretty well gotten our commanders convinced that command influence is a bad thing, and this starts right at the top and works all the way down, and is an educational proposition.

Even if you had a court composed of members from another command, if you have a high-ranking officer making statements like this, I will agree that it is bad and it should be avoided. But we could not do this by getting members from another command.

Senator ERVIN. I have a high respect for the commanding officers in the armed services. I would put them up, as a rule, above those of us, far above us on the average, who are in the civilian population.

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Of course, you have got a situation here where you have some power that has to be exercised, and this power has to be exercised by human beings and, of course, all power that is exercised by human beings is subject to abuse in some cases. It is a question of whether you need further legislation to prevent this abuse. Two questions arise: Whether you need any further legislation beyond that in the military code on the question of command influence or whether it is a problem which cannot be dealt with very adequately by legislation, and you just have to trust to the fact that in a great majority of cases officers who serve on courts-martial have got enough manhood to stand up and go by their own convictions.

I think you might argue very well that any effort, any direct effort, to exert command influence might produce the opposite results, because the average man, when he is charged with a very solemn duty to judge his fellow man, his fellow traveler to the tomb, is going to perform that duty pretty seriously, and would resent any undue pressure that might be brought on him to return a certain kind of a verdict or to propose a certain kind of a sentence. It might have the opposite effect in many cases. In other words, a man might lean backward the other way to keep from doing that. He would resent it. That would be the normal human reaction.

General MANSS. Well, Mr. Chairman, I know of at least one instance in my experience where a court found an accused not guilty in the face of a plea of guilty and a complete confession. I do not know whether they got mad at the commander or were just stupid, but this is one instance where it kind of worked the other way. This is one of the reasons why I feel that in that respect actually there is not much possibility of it.

Senator ERVIN. As counsel stated, the Committee did have a great many statements largely from persons who are now in civilian life and who served temporarily in the Army, Navy or Marine Corps, who complained of command influence.

It is one of these things, as I said a while ago, wherever power exists and has to be exercised over a human being, as it always does, it will be abused in some cases. The question is whether these cases are so rare that they need no more legislation or they need no stringent legislation on the point, or whether it is an area of life in which legislation can wipe out the evil.

I think you have got those two things when you are passing on the question of legislation in this field.

Isn't it true, especially with respect to the higher, the more serious, crimes under the Code of Military Justice that courts-martial are convened largely upon the recommendation of the appropriate judge advocate who has investigated the matter?

General MANSS. Well, in all courts-martial, at least all general court-martial cases, the staff Judge Advocate renders an advice and recommendation to the convening authority.

Senator ERVIN. In other words, in the ordinary case of a serious offense, the commanding officer, the convening authority, relies heavily upon the——

General MANSS. Has legal advice.

Senator ERVIN (continuing). Relies heavily upon the recommendation of the Judge Advocate, the appropriate Judge Advocate.

General MANSS. That is required by the statute, Mr. Chairman.

Senator ERVIN. It is required by the statute?

General MANSS. Yes, sir.

Senator ERVIN. And, as a practical matter, even in the absence of statute that was true, was it not?

General MANSS. Well, in the Air Force I would say it is generally true in the case of all types of courts down to and including summary because, again, as we are organized we have a legal office on each base, and we usually will require that any convening authority, even a summary court-martial convening authority, will consult the staff Judge Advocate before he does it.

Senator ERVIN. In other words, the Judge Advocate has got a specialized duty, specialized competence in this particular field.

General MANSS. Yes, sir.

Senator ERVIN. And the commanding officer ordinarily who has authority to convene the court-martial is a man who has got a multitude of different things to be concerned with besides that of purely the question of whether this case or that case should be brought to trial.

Admiral, did you want to say something?

Admiral HEARN. With respect to command influence, Mr. Chairman, I think we have reached the point in time where, as General Manss and, I think also General Hodson, have stated, that the senior officers are educated to the fact that command influence is not legal and that now our problem with command influence is really a question of the exercise of judgment, and we cannot legislate good judgment.

I would like to comment, too, about the defense counsel who, after a while, is rotated to other duties.

Yes, that is the practice in the Navy. Our law firms in the Navy do many types of legal work, admiralty, claims, disability retirement boards, many types of work, and it is the practice to rotate every officer through all the various phases of the work to make him a well-rounded legal officer. He may prosecute, he may defend, he may be the claims officer, the routine may be reversed. But in any event they are all rotated in and out for the purpose of giving them a broad experience to make them of better service to the Navy. That is all.

Senator ERVIN. An officer who has considerable experience both as a prosecuting officer and as a defending officer, in either capacity, is going to be able to appraise the validity of the case better, is he not?

Admiral HEARN. He certainly is. And that is the type of advice that General Manss says that these staff judge advocates give to their commanders with respect to recommending courts.

We frequently find in the Navy where a commanding officer will send a case up to a general court-martial convening authority and recommend that the case be tried by general, and the flag officer won't agree with him. He will send it back and say, "This case does not warrant a general, try him by special."

Senator ERVIN. Proceed.

Mr. CREECH. Thank you, Mr. Chairman.

General HODSON. I would like to add one point. I know that in the earlier hearings there was talk about transferring defense counsel out when they got too good.

The Army has had a longstanding policy with reference to rotating counsel, that you should not keep a man on the defense side for his entire career, and you should not keep him on the prosecution side for his entire career, and we constantly rotate counsel as a matter of policy.

Mr. CREECH. I should make it clear——

General HODSON. So it may be that counsel from time to time will feel that policy has caught him just when he is the best defense counsel in that command. I do not know.

Mr. CREECH. I think, General, perhaps that must have been the case because these have been the types of criticisms we have received, and they were not necessarily all that isolated. We did have a number of instances like that.

I think also, General, although each of you has indicated that commanders today are aware of the position the services have taken with regard to command influence, and that we have not had cases in the last several years, but I recall at the time of the subcommittee's hearings initially, there was a case which had just been handed down by the Court of Military Appeals the year preceding, the *Kitchen* case, and I recall also that the Army, I believe, felt the necessity for issuing regulations precluding a commanding officer from giving instructions to courts-martial, so apparently the services have taken action in the last few years to see that command influence has been overcome. So apparently you have placed much more emphasis in the last few years on overcoming command influence, and you apparently have recognized at one time there was a problem in this area.

I know that at the time of the subcommittee's investigation in Europe that we were shown copies of orders which had been issued by commanding officers at bases criticizing in some instances the types of convictions that had been found for certain types of crimes. Specifically I recall one base where we were told that the commander had issued a memorandum which was very quickly picked up once the JAG officer called it to their attention that this was not in accord with the procedure, and it obviously would be having an effect on the administration of military justice, in which he said that the convictions were not—those convicted of speeding, I believe, and in minor wrecks and what have you, were not receiving stiff enough penalties, and that they were having too many of them.

So I think that this type of memorandum from a commanding officer might have an impact upon members of a court-martial.

General HODSON. As General Manss mentioned, command influence will continue to exist. I believe Senator Ervin mentioned the same thing, when you have got power there is a chance of its being abused.

General Manss mentioned, and I certainly concur in this, that this is a continuing educational problem. It is something which I am sure all of us have to work at all the time to assure, as new commanders come to the top, that they are instructed with respect to their powers.

Mr. CREECH. Do you feel, sir, that having a statute pertaining to this subject would be a further deterrent to command influence?

General HODSON. Well, are you talking about article 37 now or what?

Mr. CREECH. I am talking about S. 749 which would amend article 37.

General HODSON. Well, generally speaking, as I indicated, we do not really object to S. 749.

Senator ERVIN. I believe you stated in your statement, and stated again here, that you did not object to that part of that bill.

General HODSON. We have no objection to it. We have some suggestions with respect to changing the language.

Mr. CREECH. Technical changes, I believe.

General HODSON. Certain wording in there that we would not like and then, of course, I object on the general principle that we do not want to put command influence with respect to administrative boards in the Uniform Code of Military Justice.

Mr. CREECH. Sir, moving now to S. 752, on page 4 of your statement you say that "It is our view that the detail of a law officer to special court-martial should be reserved for those cases in which the legal or factual issues are sufficiently complex to require his services."

Sir, I would like to inquire how can a case before a special court-martial progress when the parties are represented by legal counsel but there is no officer legally qualified to rule on legal issues?

General HODSON. You say how can it progress?

Mr. CREECH. Yes. You have two legally trained officers who are asking for rulings on legal issues, and you do not have a legally trained officer, legally qualified to rule on these issues.

General HODSON. Perhaps I should defer this answer to General Manss because he, in the Air Force, has been in the practice of appointing legally qualified officers to represent both sides without a law officer. Would you care to comment on that?

General MANSS. Well, the way we have to work this necessarily is—for example, we come down to the problem of instructions before findings and before sentence. The way we do it, the trial counsel draws up a proposed set of instructions and submits them to the defense counsel, and then they try to thrash the thing out, and he gives it to the president of the court, and those are usually the ones he uses.

Now, occasionally we get into a situation where we have counsel on both sides who are in agreement as to what a ruling should be because you have to remember actually that the trial counsel is not a prosecutor in the sense that he is to prosecute at all costs and get a conviction. He is supposed to see that justice is done. So that he should be just as interested in getting proper rulings on the legal questions involved, and getting proper instructions as anyone else in the courtroom.

So that we have a situation in which we have the trial counsel and actually the defense counsel, to a great extent, helping the president of the court.

Now, in simpler cases this does not present very unusual problems. I recall one case that we did have not too long ago where both counsel were in agreement on a ruling and so advised the president of the court. But under the rules he had to make his ruling subject to objection, and one of the members objected, and they went into closed session and overruled him. Well, that made the case bad, but this does not happen too often.

We have found, even in the BCD cases which come up to our Boards of Review, that our system works very well with the counsel handling it even though the president is a layman in most cases.

Now, it has been mentioned here, I think Admiral Hearn said, that in the Navy they put a qualified lawyer on special courts as a senior member.

We tried this from time to time, and almost every time we do we have counsel on the defense, I think, more from the standpoint of figuring out that if he gets a lawyer up there who knows what he is doing he cannot get very much error in the record, will always challenge him off, and this does not help us very much.

But generally our experience has been pretty good, and we have had corrective actions in a few cases when we get to the Board of Review level. But generally the record in the Board of Review and in the Court of Military Appeals in our BCD cases with lay presidents has been real good.

Mr. CREECH. Sir, what is your feeling on the provision of S. 752 with regard to a man's waiving trial by full court, and then the law offcer is changed for some reason? Should he be permitted, in your view, to reconsider his waiver?

General MANSS. Well, of course, under our proposed DOD bill, we have a provision that he should be told who will be the law officer before he elects to waive or not to waive. I think that this is a good thing because then—the law officer may get a reputation, you can't tell, and it may be that if he knows who it is, that he would rather have the jury, so to speak, than he would the court alone. I think really that the accused should be given that privilege or that right.

Mr. CREECH. In any such instance, if the law officer were changed, that he would be permitted to reconsider his waiver?

General MANSS. Be permitted to withdraw his waiver.

Mr. CREECH. Yes, sir.

With regard to the bills S. 761 and 762 can you describe the procedures that are now in force to maintain law and order in American communities attached to military establishments overseas?

For instance, how great is your problem there with maintaining law and order and what do you do with delinquency or law and order problems in those areas?

General MANSS. It depends upon the offense. For the minor offenses, traffic offenses, for example, where there is no personal injury or a death, more or less minor, we can use the point system, and we can prevent the offenders from driving on the base. Admittedly in the more serious offenses we do have a problem.

Now, we could probably split these offenses into two different categories. One are the offenses committed on the base property within our control or concerning an employee or a civilian employee or a civilian dependent.

In those cases, most of the time we have no jurisdiction, and the receiving State under most of the agreements, even if they have concurrent jurisdiction, are not very much interested in it because, after all, it costs money to hold trials, and if there is a conviction they have to put the people in jail and feed them.

Right now, there is a former wife of an Air Force sergeant who was convicted in a Greek court of murdering her two children. She was tried by the Greek court and convicted and sentenced to life imprisonment. She has been in jail in Athens for 7 years. We are still trying to get her out.

We had a case not too long ago involving the wife of a civilian employee, military assistance advisory group in Taiwan who—he incidentally was a U.S. national of Japanese extraction.

They had two children. They had been stationed in Tokyo. They were transferred to Taipei. He was in the process of bringing another Japanese woman down from Tokyo in a position which his wife did not think was quite suitable, so she waited for him one night in the living room when he came in the door, and she shot him with a .22 rifle. It did not kill him right away, and she put him out of his suffering by shooting him in the head.

At that time she had diplomatic immunity, and the result of this thing was that she never was tried by anybody. She was brought back to the United States.

Now, some people would probably think she had provocation for killing her husband, but this is neither here nor there.

She was brought back to the States and, interestingly enough, is now living with her deceased husband's father and mother.

We had another case where the stepdaughter of an Air Force sergeant in Japan shot and killed him. The Japanese declined to assume jurisdiction, and we had to bring her back. In other words, what we have in those particular cases are a couple of murders on the house.

We think there is a need in this area, but as General Hodson said, this has been the subject of a lot of discussion, and we have just had bills similar to S. 762.

There have been various objections, ranging all the way from constitutional grounds to practical grounds. We are hopeful that we some day may be able to come up with some proposed legislation or that somebody else will which will kind of bail us out of a hole on this things.

Frankly, my own personal opinion is that we probably should have a constitutional amendment if we are going to get the complete answer. I am practical enough to realize that this will probably never fly, so that I do not think that we are going to get this solution to it.

Senator ERVIN. General, I think I have heard a lot about those problems that arise out of that because, as General Hodson knows, I served on the subcommittee that has been studying the operation of the Status of Forces Treaty and related problems. I have about come to the conclusion that it is going to take a legislative body that can unscrew the inscrutable to bring forth a piece of legislation that can deal with this adequately and overcome the constitutional objections in this field.

General MANSS. Well, Mr. Chairman, as General Hodson said, we have started out with a legislative package now. It does not include a constitutional amendment, but it does include one bill which is similar to S. 762.

As I said, there have been some objections to it. To me, the most serious objections are practical because where we have an offense committed in a foreign country, and we are going to try it over here, it is a little hard to get witnesses, despite the fact that somebody remarks that if you offered to pay for all the expenses of somebody to come over here from almost any place in the world they would do it. I am not quite that optimistic about it.

We have another problem that I do not think you have covered in your bill, that we have tried to cover in our proposed package,

and that is one of authority to arrest and confine pending disposition of charges which could present quite a problem particularly in the foreign countries.

So that actually this is the reason that we are of the opinion now that action in this particular area should be withheld until we see what the other agencies, interested agencies, in the Government, particularly the Department of Justice and the Department of State think about this thing that we have started out with, which is actually very similar to these bills.

Mr. CREECH. Would you care to comment?

General HODSON. Mr. Creech, you asked in the first part of your question if we had any statement with respect to the magnitude of the problem. I have prepared a chart which I would like to present to the committee.

Senator ERVIN. The chart will be received and printed as part of the record at this point.

(The document referred to follows:)

CHART A.—*U.S. civilian involvement in cases abroad, Oct. 1, 1964, through Mar. 31, 1965*

Offenses	Total	Subject to local jurisdiction	Local jurisdiction exercised	Sanctions imposed by U.S. authorities				
				Dismissal or suspension from employment	Denial or suspension of privileges	Revocation of POV operator's license	All other administrative action (including return to U.S.)	Total
Murder								
Rape								
Manslaughter and negligent homicide	6	*(1)	*(1)				1	1
Robbery and larceny	234	*(21)	*(3)	11	34		58	103
Arson	4						4	4
Burglary and housebreaking	17	*(2)	*(2)					
Aggravated assault	21	*(12)	*(3)		2		8	10
Forgery								
Other serious offenses	10	*(11)	*(2)	2			4	6
Total serious offenses	292	*(44)	*(11)	13	36		75	124
Traffic	3,354	*(109)	*(79)	3	44	87	983	1,117
Other minor offenses	629	*(58)	*(36)	31	73	181	1,085	1,370
Total minor offenses	3,983	*(167)	*(115)	34	117	268	2,068	2,487
Total	4,275	1,178	222	47	153	268	2,143	2,611

*Raw data as submitted precluded more precise or complete internal breakdown of cols. 2 and 3 statistics; asterisked numbers represent cases as to which additional information permitting categorization is available: Such numbers are not necessarily category totals.

Source: Compiled by OTJAG, DA; data supplied by DAF (ATJALB).

General HODSON. As the Chairman knows, once each year we report to the Special Status of Forces Subcommittee with respect to these matters.

This chart was prepared on the basis of the figures which were especially requested to see if we could illustrate the magnitude of this problem.

As the Chairman knows, we had originally opposed enactment of legislation in this area because we felt there was no need for it. Subsequent to that time, we went out to the field and tried to get evidence to indicate that there is some need.

I call your attention to a couple of items on the chart. You will notice there were 1,178 offenses subject to local jurisdiction. That is in the second column. Of those 1,178 cases, the foreign courts exercised jurisdiction in only 222 cases.

Of more particular importance, I would say, if we would go up in column 2, to total serious offenses, 44, which is not a completely clean figure, but it is the best one I could come up with, there were a total of 44 serious offenses. By this I mean serious felonies, such as burglary, robbery, embezzlement, aggravated assault, of which the foreign courts exercised jurisdiction in only 11 cases.

This illustrates, I believe, the magnitude of our problem, this percentage, which is usually about one-fourth, of the cases they will take jurisdiction in, and we handle the rest administratively.

On the right-hand side of the chart it will indicate that we have handled some rather serious offenses by administrative means. For example, if you will look up at robbery and larceny, which is the fourth item down, you will notice that of the 234 cases, there are 21 subject to local jurisdiction, and the foreign courts exercised jurisdiction in 3 cases; and in 58 cases, in effect, what we did was to send the man home.

Mr. CREECH. General, do we infer in these cases where you sent the man home that either he was the defendant in the action or else one of his dependents was?

General HODSON. It is possible, either way.

Mr. CREECH. Either way. There is no breakdown.

General HODSON. It might be a civilian employee or it might be a dependent.

Mr. CREECH. Yes.

In which case there are situations in which a man or woman might be returned to the United States because of the action of a minor accompanying him or their spouse?

General DODSON. Yes.

As I say, this was to illustrate somewhat the magnitude of the problem.

Mr. CREECH. Yes.

General HODSON. When you get down to sanctions there are various types of sanctions.

Mr. CREECH. General, does the failure of the host country to assume jurisdiction present a great problem? You have indicated here the serious offenses, where you had 44 in a local jurisdiction, that the local jurisdiction exercised that jurisdiction in 11 cases, one-fourth of the cases. Does this create a problem for you?

General HODSON. One-fourth.

Mr. CREECH. And also does the host country usually impose penalties that would be comparable to those in this country, imposed by a court in this country?

General HODSON. Generally speaking, we have got several problems in this area. Some countries such as Japan won't exercise jurisdiction.

For example, our latest figures from Japan indicated that they refused to exercise jurisdiction in three serious cases out of three during the last year. Their prior record was that they refused to exercise jurisdiction in seven out of seven serious cases in 1964.

On the other hand, Germany last year—these are Army cases only, I do not have all of the forces yet—Germany, on the other hand, exercised jurisdiction in 34 out of 50 serious cases last year, and this will partially answer your question with respect to the sentences.

The sentence adjudged by the German courts in some rather serious cases, we felt, were certainly lighter than they would have received had they been tried by a U.S. court. For example, in a murder case of a wife killing her husband, she was released from confinement—she was given confinement, I believe, but she was released from confinement, after about 32 days in jail upon conviction of murdering her husband.

Italy, on the other hand, is a different situation. In Italy the authorities there exercised jurisdiction in almost every case, and the sentences are reasonably similar, by our standards. So it varies from country to country.

It is an unhappy situation in that it does vary from country to country.

Of course, we—if we had the type or jurisdiction we could exercise in the United States, it would prevent trials by foreign courts of the type of offenses when one of our people kills one of our people or steals his property.

One other problem, I might point out is that we now are in a very odd position with respect to countries where we have exclusive jurisdiction, and I will point out Ethiopia, for example; Iran, for example; Ascension Island, for example.

I know the chairman will remember the story that I told the SOF committee about the man who committed homicide on Ascension Island, and the difficulty that was experienced because we could not exercise jurisdiction because of the wisdom of the Supreme Court, and it was necessary to bring the British authorities in from St. Helena.

The British authorities asked us to provide officers to serve as lay assessors because there were no lawyers on the island.

We could not let our officers serve as lay assessors because they might be abdicating their offices under the Constitution, and they had to import more people. There were no lawyers. There were not enough British people there to form a jury. They had to try the case by a judge.

The appeal was taken to Kenya, Nairobi, Kenya. Kenya in the meanwhile had become independent, and for awhile they did not know who the appellate court was. The result was that the man is now serving 7 years' confinement for homicide in Wormwood Scrubb outside of London, at considerable cost to him.

We estimate the cost to this man, this American citizen, was $12,000 in defense fees alone, and he is now, of course, serving in a foreign country to carry out his confinement.

I think that one case illustrates the difficulty you have if you have no jurisdiction, and we had none in that case.

In official duty cases, of course, generally speaking, acts of misconduct committed while engaged in official duty are subject to our primary jurisdiction, and in the case of military personnel we take action. In the case of civilian personnel, as odd as it may seem, the only court that can punish them would be the foreign court, punishing them for official duty acts.

There is another problem that may come up, and that is pretrial confinement. The right-hand side of the chart illustrates what we do by way of administrative sanctions, which is not very much, and we have concluded, as General Manss has indicated, we need to provide remedies in three areas. We do not contemplate trying everybody who commits an offense overseas. So what we really need, in the first place, is some kind of jurisdiction to try petty offenders for the minor offenses where administrative sanctions are not quite proper or just do not fit the case.

Secondly, we need some kind of jurisdiction to try the exceptionally serious case, mostly a homicide case, I would say, where the foreign courts are not interested, but where it shocks the U.S. sense of justice, and there should be some way to handle the case, as in the case of the Ascension Island man.

If we could have brought him back to Miami, Fla., and tried him in the Federal court, it would have been easier on him, easier on us, easier on the British, and it would have been better all the way around.

As General Manss mentioned, we need some authority to restrain these people in advance of trial, to turn them over to the foreign authorities under our SOF agreements, to return them to the United States, or to get them out of the country at the request of the foreign authorities.

Although a trial in the U.S. district court is a very, very expensive thing, I think it might be something we would have to indulge ourselves in in these exceptionally serious cases.

Mr. CREECH. General, this morning Secretary Morris told the subcommittee there is no agreement at the moment in the executive branch of feasible remedies, and that the Department of Defense is now drafting substitute legislation upon which you hope to obtain agreement and propose to the subcommittee in lieu of S. 761 and S. 762, and you have asked that consideration of those bills be deferred.

Can you tell the subcommittee when you expect to have these substitutes ready for consideration?

General MANSS. That is hard to say, Mr. Creech, because it has gone over to the Bureau of the Budget, and they will send it probably to State and Justice. We do not know just how long it is going to take before we get comments from them.

General HODSON. The biggest interest in this legislation, of course, comes from the Department of Justice, who would assume the burden, and they naturally have a very inspired interest in just what kind of legislation we are going to come up with, and it is because of that that I think it would be hard to estimate just when we might get it.

Mr. CREECH. General, Mr. Everett has some questions he would like to pose.

Mr. EVERETT. General Hodson, as I understand it from the previous testimony, there is a divergence between the three services with respect to the authority of the correction boards. Does this all arise from an interpretation of the same statutory provisions, namely 10 U.S.C. 1552 or is there, I believe—yes, 1552 or is there a divergence of wording of the three services?

General HODSON. I believe the three services are all basing their actions on the same opinion of the Attorney General in this area, and I am limiting this opinion right to this area because I do not want to go into a lot of other aspects. The opinion of the Attorney General in this area was to the effect that this board could take every type of corrective action in a court-martial case to remove an injustice or to prevent an error except setting aside the fact of conviction by court-martial.

The Attorney General said that the board for the correction of military records is not a part of the appellate hierarchy of the establishment, of the administration of military justice and, therefore, cannot go into the evidence, review the evidence, the findings, and so forth, as an appellate tribunal. It would be debarred from that. But it could take every type of corrective action to make the accused whole except setting aside the fact of conviction.

Now, the various boards have interpreted this in various ways. I am giving you the Army board's interpretation; and the Air Force, I think, achieves exactly the same result with slightly different wording. So I do not think there is really any difference except one of semantics.

Mr. EVERETT. Admiral Hearn?

Admiral HEARN. I have here the language of the opinion of the Attorney General which is under consideration here. It reads:

> On the other hand, the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings and judgments of the court martial so as to disturb the conclusiveness of such judgments, which has long been recognized by the courts.

That was an opinion of the Attorney General in 1948.

Now we in the Navy have used the board for the correction of naval records to correct injustices. I can recall a series of cases known as the Nation cases, where a group of individuals were convicted of violating an order of a local command, and in one of those cases which was considered by the Court of Military Appeals, the court held that the order was not a lawful order. As a consequence, the man was tried for what, in the opinion of the court, was not an offense.

Now, the other cases involved in this same area were not cases that got to the Court of Military Appeals, but were finalized at the local level because of the amount of punishment that was meted out.

Now, in each of those cases the board for the correction of naval records restored the rights that had been lost by each of those individuals pursuant to those courts.

I think perhaps it is more a matter of semantics between the services as to how we apply this opinion of the Attorney General.

Mr. EVERETT. But at least under the Navy's interpretation of this provision in the statute, there would be no authority of the correction board to expunge the fact of conviction so that the individual who had applied to the correction board would still be convicted, for example, for purposes of questionnaires as to whether he had ever been convicted of a crime.

Admiral HEARN. That is my understanding. I will check it. If I am wrong, I will so inform the committee.

I might say, as I said this morning, that we eliminate this question of interpretation by the proposal which the Department of Defense has made to give to the Judge Advocates General the power to consider these cases which have been finalized but which did not get to a board of review for consideration. They are part of the Department of Defense legislative proposal in this area.

Mr. EVERETT. General Hodson, there was recently called to the attention of the subcommittee a decision of, I believe it is the first circuit court of appeals in *Ashe* v. *McNamara* which is also discussed in some detail in a recent national magazine, pertaining to the setting aside of a dishonorable discharge that had been administered by court-martial back in the forties and, as I recall it, this case involved a construction of the power of the correction board.

Now, was that holding by the first circuit more or less at odds with the interpretation by the Attorney General, as you understand his opinion?

General HODSON. No, sir.

Mr. EVERETT. This was only as to the sentence rather than the fact of conviction.

General HODSON. The only thing the court in the first circuit did was to order the Secretary of Defense to issue this man an honorable discharge, and we have always held in the board of correction of military records that it has the power to change the sentence, change the type of discharge from dishonorable to honorable, and so forth and, therefore, this case, although it is an unusual case from the administrative law standpoint, the result was not unusual.

Mr. EVERETT. The analogy has been called to the attention of the Subcommittee of the Armed Services Board of Contract Appeals which represented a uniform board to handle appeals in contractual disputes arising out of defense procurement, and superseding, as I understand it, three separate boards maintained by the three separate services, and it was suggested that this provided a helpful analogy for substituting a unified board of correction of military and naval records in lieu of the present three separate boards.

Would you comment on the applicability of that analogy?

General HODSON. I would be very happy to. As a matter of fact, the Armed Services Board of Contract Appeals does exactly what we suggest the defense board for correction of military records would have to do, that it would have to divide up into panels for each armed service in order to handle the work. That is what the Armed Services Board of Contract Appeals does, it usually splits up into Army, Navy, and Air Force panels so, in effect, it is operating as three separate boards, but it is under one general administrative head.

Mr. EVERETT. Do you think it would be helpful to substitute that framework in the correction field, that is, have the board, even if there were separate panels for the three services, to have——

General HODSON. Maybe this is covered by General Berg later on—I may be getting ahead of him here, but I would rather leave it up to him because he is to cover this part of the presentation.

I personally do not feel—this is the Department of Defense position—that this would improve the work of the correction boards. They are already adequately supervised by the Secretary of Defense under the statute insofar as uniformity is concerned.

For the most part, they are implementing or looking at, reviewing records, policies, regulations, statutes which pertain to the particular service in which they are sitting, so if you created a Department of Defense board, you would probably break it out into panels anyway, and they would continue to do about what they are doing now, and they would still be supervised as they are now. We see no advantage.

General MANSS. May I add something to that, too? So far as the armed services board of contract appeals is concerned, their decisions always go back into departmental channels, plus the fact that you have to remember, as General Hodson pointed out, the board for the correction of records would be working with different departmental regulations, whereas the armed services board of contract appeals operates under a common regulation, the Armed Services Procurement Regulations which, in turn, are based upon the Armed Services Procurement Act.

In other words, the rules are uniform as to contracting in the entire Department of Defense. It is only a question of who has the procurement authority in these particular cases. It is the Secretary of the military department or his designee. So that actually, I do not think, is a very good comparison to draw between that board, although, as he pointed out, they do have panels for each of the departments, and those are divided into divisions, and they have one top man in each one. I think primarily the reason for the whole thing being operated the way it is is because they have such a great volume of business that they discovered that the way they were operating before they were getting away from their uniformity. They were having one board in one service decide a case on almost all fours with one in another, and in exactly the opposite direction.

So that the way they have it now they have control, which is not necessary, I do not think, in the correction board proceeding because they are generally proceeding under different regulations and, again, the cases in the armed services board of contract appeals are generally heard de novo by one of the panel members taking the evidence as more or less an examiner.

So we do not have this same system in the correction board because they are primarily sort of an appellate agency, and they very seldom take any testimony. They decide the case on the record, as it has been made below.

Mr. EVERETT. General Hodson, in your statement on page 16 you refer to the proposed legislation to create appellate review of questions of law by the Court of Military Appeals when they arise out of administrative matters, with a comment that it is impossible to deter-

mine from the bill what effect the direction by the Court of Military Appeals is intended to have on the discretion of the Secretary under the statutes.

Isn't it true that at the present time this same type of review, as a practical matter, is being performed by the Court of Claims and various district courts, and would it not be desirable to centralize this type of review in the Court of Military Appeals or in a single tribunal?

General HODSON. Well, of course, the court of claims and the district courts, for that matter, are involved in these from time to time, and it would be our view that it is better to leave the correction of the extraordinary case to the existing Federal courts and the court of claims rather than to load the Court of Military Appeals down with work for which it is not equipped and, particularly, within the terms of this legislation which would require the review literally of every board case that comes up and, as we envision this particular legislation, what you would be doing would be adding two additional appellate steps to a general court-martial case.

The general court-martial case would go through the convening authority, after being advised by his staff Judge Advocate, to the board of review, we will say it is that kind of a case in which the accused is represented by counsel, and he files a petition for view by the Court of Military Appeals.

He is heard there. As soon as he has been turned down by the Court of Military Appeals, and his sentence becomes final, he then goes to the board for correction of military records, if they turn him down he then goes right back to the Court of Military Appeals. So you are applying two additional steps in appellate review before a case literally would become final.

Mr. EVERETT. In light of the *Ashe* v. *McNamara* decision, under the procedure today, wouldn't it be the same except for the substitution of a district court or the Court of Claims for the Court of Military Appeals as the last stage of these five steps that you mentioned?

General HODSON. Well, the outcome or final result of the case, if that is what you are referring to, would be the same.

Mr. EVERETT. The counsel would take it the same way, and finally, instead of the correction board, go into the district court, so wouldn't it be better and simpler if he went back to the Court of Military Appeals on some type of petition for review?

General HODSON. I do not know, Mr. Everett, because I have a feeling that the average Federal district court is more familiar with this type of law than the Court of Military Appeals would be.

Maybe they could acquire this knowledge over the years, but I am personally, and the Department of Defense feels, that we should not burden the Court of Military Appeals, which is strictly a criminal appellate court, with administrative matters; that they have enough to do handling the criminal appellate matters, and leave the extraordinarly administrative case to the existing Federal courts and the Court of Claims, as we are doing at the present time.

These cases comparatively are quite rare. There is also another advantage to this under the recent amendment to title 18, and that is, as Ashe did in this case, he was able to file the petition in his local Federal district court. He did not have to come to Washington to

do it. There is a certain advantage to this particularly if you live in Montana, you can file the case there now and ask for the mandamus and get your hearing and get the order.

So there is some advantage to the geographical distribution of the Federal courts.

Mr. EVERETT. Admiral Hearn, with respect to your comment about time of war, did you have in mind a time of war would be construed as including the undeclared type of conflict as well as a formally declared war?

Admiral HEARN. No; I had in mind that it would not, and that is why we cannot be restricted solely to time of war for an exception.

Mr. EVERETT. So that if it were construed in this other sense, as I believe has been done with respect to some provisions of the uniform code, there this would obviate your objection?

Admiral HEARN. It would.

Mr. EVERETT. All right.

Admiral HEARN. May I go to the *Ashe* case for a moment? That is a Navy case, and we do not accept the position at the moment that the decision is correct.

As a matter of fact, it is being studied by our department and by the Department of Justice to see whether or not it will be petitioned for a writ of certiorari to the Supreme Court.

I might say further about the *Ashe* case, a situation which apparently was not disclosed to the circuit court of appeals, that Ashe had not completed his administrative remedies before he went to court. Ashe went to the board of corrections of naval records about 1950. Right at the time the Congress passed the uniform code, including article 73, I think it is, which authorized petitions for new trials. At the time that he went to the board for correction of naval records he was advised that his avenue of relief was to file the petition for a new trial, and which he failed to do. He let the time pass, and then finally some years later went back to the board for correction of naval records, and so far as I can find out at the moment, this failure to exhaust his administrative remedies was not before the circuit court of appeals at the time they considered the Ashe case.

Mr. EVERETT. General Manss, may I ask you one final question? You commented in your testimony that you were not in favor of the practice of interservice use of legal personnel; that, for example, you would not favor using a member of the Army field judiciary in an Air Force general court-martial. I would like to inquire what would be the basis for that objection in light of the fact that the legal rules and legal issues would presumably be the same under a uniform code.

General MANSS. Well, I do not think necessarily, Mr. Everett, that they are the same. Here again you have, even though the code is uniform, some variations in detail. But I am just generally not in favor of using law officers from one service in courts convened by a commander of the other service except under very exceptional circumstances.

I think that we should run these through because, for example, the Army and the Navy both negotiate pleas of guilty. We do not. I won't say we do not, but it is contrary to our published policy, and every once in a while we see a case in which we know it was done, but nobody will admit it.

Also we require in the case of a plea of guilty that the prosecution prove a prima facie case. Those are just two examples of a couple of differences in our procedures.

Now, all the procedures are legal under the code, but we just do not operate the same way.

Mr. EVERETT. Would your views be the same on that, General Hodson and Admiral Hearn?

General HODSON. We have no objection to complete interchange of law officers.

Admiral HEARN. Our position is that we do interchange legal talent between the services on an ad hoc basis, and there is no reason why we would not and could not on situations on an ad hoc basis exchange law officers.

I would not, however, want to establish a firm plan where there would be a permanent designated interchange, but I think it should be operated on an ad hoc basis, as is authorized now under the law, and as is practiced by the Navy and the Army.

Mr. EVERETT. Thank you, Mr. Chairman. I have no further questions.

Senator ERVIN. Gentlemen, we are confronted by a predicament in which one of the witnesses, Mr. Sidney Wolff, chairman of the Military Law Committee of the New York State Bar Association, who has come down here at our invitation to express his opinions about some of these bills, has to catch a 5:30 plane, and he also has to leave the country so he cannot come back later. I do not believe we can finish with you gentlemen this afternoon.

Tomorrow morning we cannot sit because the full Judiciary Committee is going to sit, and under the Senate rules the subcommittee cannot sit while it is sitting. I wonder if you all could come back tomorrow afternoon, say, about 2:15?

General HODSON. Yes, sir.

General MANSS. Yes, sir.

Admiral HEARN. Yes, sir.

Senator ERVIN. Thank you very much. We will let you go now. Also, General Berg, it won't be possible to hear you this afternoon, so if you could come back tomorrow afternoon without inconvenience we would appreciate it.

Mr. CREECH. Mr. Chairman, the next witness will be Mr. Sidney A. Wolff, chairman of the Military Justice Committee of the New York State Bar Association.

Mr. Wolff?

STATEMENT OF SIDNEY A. WOLFF, CHAIRMAN, MILITARY JUSTICE COMMITTEE, NEW YORK STATE BAR ASSOCIATION, NEW YORK, N.Y.

Mr. WOLFF. Thank you, sir.

Senator ERVIN. Mr. Wolff, we are delighted to have you, and we appreciate your coming down and giving the committee your views and those of your committee on these bills.

Mr. WOLFF. I will try to be brief, Mr. Chairman.

In appearing here today, I do so in my capacity as chairman of the New York State Bar Association Committee on the Administration of Military Justice.

Our committee consists of 10 members, each of whom has served with the Armed Forces either as an enlisted man or as a commissioned officer. Their military service has spanned both world wars, the Korean hostilities and the so-called cold war.

In the course of their military service, the members of our committee have handled different assignments relating to military justice, and a majority has had extensive experience in the field of military justice.

Mr. Chairman, while the welfare of all the members of the Armed Forces is of concern to us, yet our committee recognizes in particular its obligations to the citizens of our State, of whom more than 200,000 are now on active service, as well as, of course, to their families.

It is with this sense of obligation that we reviewed the pending legislation.

Our committee approves the legislative program before you, and wishes to take this opportunity publicly to express its appreciation for the penetrating and exhaustive study made by you and your committees and the proposals resulting therefrom.

In view of time limitations I propose to confine my remarks to but two phases of the proposed legislation, the subject of administrative discharges and command control.

During the course of the study by Senator Ervin's committee we advised the committee and, with your indulgence, I quote:

> With respect to administrative discharges, it was felt that the present procedures lend themselves to abuse. While it is true that an administrative discharge is not equivalent to a dismissal from service under conditions less than honorable, yet in itself it is looked upon with disfavor and should be administered with a great degree of caution and fairness. * * * It is believed that administrative discharges are handed out in many instances where they are not warranted. Too often service personnel are urged to acquiesce in a discharge for the good of the service without any real effort made to investigate the facts which might possibly show no legal basis for a discharge. Definite standards should be set up with the services of a lawyer always available to the dischargee. Members of JAG should play a far greater role in the processing of administrative discharges.

The proposed legislation, we are happy to observe, meets our objections. Senate bill 750 provides that in proceedings leading to such an administrative discharge, the right to counsel is guaranteed except that in time of war, the Secretary of War is authorized to suspend this requirement.

We are confident in that event the Secretary will adopt appropriate regulations in keeping with the intent of the legislation and, if not, there is always the Congress.

Senate bill 758 is a decided improvement. This bill will grant the serviceman the right to demand trial by court-martial when faced with an administrative discharge based upon alleged misconduct. This, coupled with the provisions of Senate bill 756 barring an administrative discharge for an offense of which the serviceman has been acquitted by court-martial, will give the serviceman the protection of the fifth amendment prohibiting double jeopardy.

Senate bills 754 and 760 are vital. These provide that a board empowered to recommend a discharge under conditions other than honorable must have a law officer with the qualifications of a law officer of a court-martial.

With such an administrative discharge under conditions other than honorable tending to have an effect upon the recipient as adverse as that of a punitive discharge awarded by a court-martial, we should take every precaution that the administrative board adheres to the standards of due process which, in the absence of independent and impartial legal advice, may be difficult to obtain.

Senate bill 754, granting the right of subpena so as to compel the attendance of witnesses, civilian as well as military, will provide a respondent the right to confront his detractors before an administrative tribunal, a denial of which our courts find constitutes, in turn, a denial of due process.

After all, we realize that a discharge under other than honorable conditions, like a bad conduct discharge, will deny the serviceman certain veteran benefits. As a matter of fact, it was only yesterday that I had occasion to speak with the legal officer at the Veterans' Administration, and he told me that the Administration examines each case of a general discharge separately, that each case must stand on its own facts, and that if their investigation shows that the discharge was granted because of some dishonorable act—and what is dishonorable they have not been able to tell me—then the veteran would be denied any benefits.

In many instances a serviceman with such an undesirable discharge will meet with difficulty on returning to civilian life. This is as much a black mark on his record as a bad conduct discharge or even a dishonorable discharge so far as future employment is concerned.

As a matter of fact, with such a discharge, I believe he is not even guaranteed the reemployment rights of a returning veteran because the statute says that he must present a certificate of honorable discharge.

We ask why should a man, faced with a board decision that may have a serious impact upon his future, not be granted the guarantees of our Constitution, the right not to be deprived of his life, liberty or property without due process under the fifth amendment, or the right to the assistance of counsel, and the right to be confronted with witnesses against him as guaranteed by the sixth amendment.

It was once believed, that on entering military service, one left behind him his constitutional rights as an American citizen. That theory has long since been dispelled and, as President Johnson stated, and as you quoted in your report to the Congress: There is no reason why our servicemen should not remain "first class citizens in every respect."

Now, the other subject which has concerned our committee for many years, and we got into this right after World War II, is that of improper command control over the deliberation of our military courts. This, from our own personal experience, has proved to be particularly disturbing. Some commanding officers, a few no doubt, not accustomed to the judicial process, somehow are under the impression that they can disregard at will the basic principles which support our entire judicial system.

Senator ERVIN. If I may interrupt you without interrupting or changing your line of thought——

Mr. WOLFF. Yes, sir.

Senator ERVIN. Are there not some circumstances which indicate that some commanding officers at times have had the attitude of considering courts-martial as disciplinary measures rather than as measures for administering military justice?

Mr. WOLFF. Yes, sir. I think you put your finger right on it, and I have a remark on that.

The sine qua non of a fair trial requires a court that is not subject to the influence of the commanding officer no matter how good intentioned he might be. Somehow or other some military minds have not been able to distinguish between the maintenance of discipline, which is essential, and our concept of a fair trial for a soldier accused of a crime, whether civil or military.

In our opinion, this is equally essential, and we suggest that in the long run it may improve rather than damage discipline in a command.

The present code goes a long way toward the eradication of improper command control, but still the problem persists.

Today the commanding officer is prohibited from exerting undue influence, improper influence, over the members of a court-martial, but this prohibition is not sufficient. Too often, in my own experience, it was the executive officer who interfered, not the commanding officer himself.

Now, Senate bill 749 will plug this loophole by extending the prohibition to a staff member or, for that matter, to any member of the services subject to the code, and it also extends the prohibition to improper interference with administrative boards whose decisions will adversely affect a serviceman's future as much as a court-martial.

Now, the present procedure, which was touched on a few moments ago whereby the chairman of a military board of review rates the efficiency of his board members, should be ended, and Senate bill 755 was drawn to accomplish this.

Also highly desirable is Senate bill 749 which proposes that the services of a member of the administrative board or court-martial shall not be considered when such member is being rated. This will avoid the indirect attempt to control the actions of a member or to inhibit defense counsel.

It may be too much to expect a junior member of a board to make findings contrary to that of the senior when he realizes that he must rely upon that senior for a rating which, should it be unsatisfactory, might deny him future promotion or a desirable assignment.

Also there may be the tendency on the part of defense counsel not to defend too vigorously, particularly in an unpopular cause for fear that a vigorous defense might bring him an unsatisfactory rating.

In other words, this legislation, this program, is aimed at giving our military courts and boards absolute independence so that their decisions shall be completely impartial—an essential in the true administration of justice, the American way.

Mr. Chairman, this entire legislative program is desigend to upgrade the procedures of our military tribunals in conformity with well-established principles that govern the judicial process.

We urge its adoption, confident that it will assure the servicemen adequate protection of his constitutional rights consistent with the requirements of military service.

I thank you.

Senator ERVIN. Do you have to catch a plane pretty soon? You do, don't you?

Mr. WOLFF. What is that?

Senator ERVIN. You have to catch a plane pretty early.

Mr. WOLFF. Thank you very much.

Senator ERVIN. What time is your plane leaving?

Mr. WOLFF. 5:30.

Senator ERVIN. I expect unless somebody has some very essential questions to put to you we had better let you go because by the time you get out to the airport——

Mr. WOLFF. Thank you, sir.

Senator ERVIN. You made such a clear statement that I have no questions myself to ask you. I want to commend you on the clarity of your statement and also on your willingness to come down here and give us the views of yourself and your committee.

Mr. WOLFF. Thank you, sir. If there should be any questions I would be happy to answer them.

Senator ERVIN. Senator Thurmond?

Senator THURMOND. I would just ask you one question. I am not going to delay you. I presume you will agree with the Defense Department when they take the position that it would be unwise to allow a single law officer to impose the penalty of death?

Mr. WOLFF. I am not speaking now for the members of the committee, but I think that is too much of a responsibility to place on any one man today or at any time. That is why I think we have the jury system in civil life.

Senator THURMOND. Thank you very much. I just wanted to get your reaction.

Mr. WOLFF. Thank you very much, sir.

(Additional views of the association follow:)

JANUARY 10, 1966.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

HONORABLE SIR: As chairman of the New York State Bar Association Committee on Administration of Military Justice, I have the privilege of advising you that after reviewing the legislative program, (S. 745 to 764, inclusive, as reported in vol. 3, Congressional Record, Jan. 26, 1965, No. 17), designed to further safeguard the constitutional rights of our service personnel, our committee approves these bills and hopes they will be enacted into law.

Under date of December 4, 1962, in response to your inquiry for the committee's comments on the overall administration of military justice, I sent along to you a summary of the opinions expressed by the committee. (A copy of that communication is attached.)

In our opinion your legislative program is aimed to overcome the inadequacies found existing in the present administration of military justice and the committee wishes to record its appreciation of the exhaustive and penetrating study made by your subcommittee and the legislative program now proposed to improve the administration of military justice.

The committee is firm in its belief that this legislative program should be adopted in order to assure to our servicemen an adequate protection of their constitutional rights consistent with the requirements of military service.

Merely for informational purposes, please be advised that our committee consists of 10 members, all of whom are practicing lawyers in New York State. Each one of them has served with the Armed Forces, either as an enlisted man or commissioned officer, and their service spanned both World Wars, the Korean hostilities and the cold war. In the course of their military service, members of the committee handled the different assignments relating to military justice, and a majority had extensive experience in this field.

On behalf of the committee, may I again express our appreciation for the efforts taken by you to improve the administration of military justice.

Respectfully yours,

SIDNEY A. WOLFF.

DECEMBER 4, 1962.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SIR: In accordance with the request contained in your letter of June 18, 1962, I have circulated the various questions listed in your letter of March 15, 1962 among the members of the administration of military justice committee of the New York State Bar Association, of which committee I have the honor to be chairman.

1. This committee consists of 10 members, all of whom have served in the Armed Forces and during the course of which most of them handled military justice matters in all its phases. There follows a summary of the various opinions expressed by the committee members.

2. *As to administrative discharges.*—It was felt that the present procedures lend themselves to abuse. While it is true that an administrative discharge is not equivalent to a dismissal from service under conditions less than honorable, yet in itself, it is looked upon with disfavor and should be administered with a great degree of caution and fairness. The regulations giving Army boards the power to process and issue administration discharges are very broad and indefinite and thus susceptible to subjective and arbitrary consideration by military boards. It is believed that administrative discharges are handed out in many instances where they are not warranted. Too often, service personnel are urged to acquiesce in a discharge, "for the good of the service", without any real effort made to investigate the facts, which might possibly show no legal basis for such discharge. Definite standards should be set up, with the servcies of a lawyer always available to the dischargee. Members of JAG should play a far greater role in the processing of administrative discharges.

3. *As to changes in the administration of military justice.*—What seems to trouble this committee is the inadequacy of procedures of the special court-martial level. General courts-martial are supervised by attorneys. Both the prosecution and defense is staffed with members of JAG with the presence of a law officer providing adequate safeguards against procedural abuses. A verbatim record of the trial is kept and a complete review is readily available. Unfortunately, these safeguards are not available to an accused in a special court-martial. The prosecution and defense is usually handled by the younger officers from post or battalion headquarters. Indeed, it is rare for a member of the court itself to have a trained lawyer. No stenographic record is made; instead, only a sketchy summary of the trial record is prepared and, although each finding is reviewed by the post judge advocate, it is difficult to see how, with the exception of clear blunders, an adequate and comprehensive review can be effected. Since special courts have the power to sentence an accused to confinement, forfeiture, reduction in rank, and even a punitive discharge (where there is a verbatim record), the present procedures leave much to be desired. It has even been suggested that special courts be abolished and that general courts should have exclusive jurisdiction of all cases involving serious misconduct, with the summary court, or the jurisdiction of the company commander, under article 15, adequate as to minor offenses.

4. *As to command control.*—The answer to the problem of command control is rather difficult since it largely depends upon the personality of the particular commanding officer. When no attempt is made to influence the outcome of a court-martial case, there is no problem. Unfortunately, the converse is true when the commander has taken a personal interest in a pending matter and has made his views known. Officers must depend upon the rating of their com-

manding officer. If his view is known, obviously, this may carry great weight and prevent an unbiased evaluation. The answer to the problem, to a great extent, lies in the professional competence and independence of the law officer. The committee feels strongly that his task should be free of any possible interference. This might be accomplished by rotating the law officer from post to post at frequent intervals and to hold him accountable only to JAG headquarters in Washington.

5. *As to military justice under combat conditions.*—With the concepts of warfare being changed at a pace never equaled in the past, it is difficult to conjecture as to the adequacy of present procedures in the event of an all-out conflict. However, nothing has been shown to indicate that these procedures would be adequate.

6. *As to Court of Military Appeals.*—The committee feels that the review by the Court of Military Appeals has had a very salutary effect upon the administration of military justice and the court should be continued. It is suggested that the Code of Military Justice be amended so as to conform completely to the decisions of the court of appeals wherever a discrepancy should exist.

7. *Whether military justice has become too technical.*—It is believed that military justice, as presently administered, is not too burdensome or technical. It is doubted that so-called technicalities and legal safeguards can be eliminated without seriously prejudicing the rights of the accused.

Respectfully submitted.

SIDNEY A. WOLFF, *Chairman.*

JANUARY 10, 1966.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

HONORABLE SIR: In sending along the enclosed report, I wish to advise you that two of the members of my committee disapprove of portions of the proposed legislation, and another, Mr. George Spiegelberg, while not critical of the report, nevertheless has sent in his comments, a copy of which I enclose for your attention.

Respectfully yours,

SIDNEY A. WOLFF.

JANUARY 5, 1966.

Re Committee on the Administration of Military Justice of the New York State Bar Association.

SIDNEY A. WOLFF, Esq.,
New York, N.Y.

DEAR SIDNEY: If I had realized that you were going to act quite as quickly as you did, I would have written you before this.

I have read with some care, the extract from the Congressional Record which you sent me, and to me it is continually amazing that all of the law on the subject, and there undoubtedly have been improvements, fails to take the one step which should be taken to minimize command control. Not only should the military judge be appointed by someone other than the officer convening the court-martial, as provided in the memorandum accompanying Senate bill 745, but also the court should not be appointed from the command of the officer convening the court-martial, at least in general courts-martial. The court should either be appointed from another command by the Judge Advocate General or should be a traveling court, such as was used in north Africa, appointed from available officers by the JAG.

I also question the wisdom of section 866, article 66, establishing courts of military review, nor do I believe it wise to include a civilian in such courts because of my belief as to the type of civilian who would be appointed.

I think that subdivisions (d) and (e) of section 837, article 37, is pure waste of language, and as I remember it, the same starry-eyed attitude is already in the law in some other form. The same remark applies to Senate bill 749, dealing with article 37, which prohibits all people connected with the commanding officer from censoring, etc., members of a court.

Senate bill 750 provides for protection with respect to a bad-conduct discharge, "except in time of war," unless the accused was represented by counsel. The one time the protection is needed is in time of war.

I close as I started. The 15-page memorandum has many excellent points, but the main point has been missed again, as it has in all legislation and proposed legislation to date. As long as the C.O. prefers the charges, selects the jury from his own command, reviews the sentence, and directs that it become effective, the potential of command control is inevitable. That some commanders will not take advantage of the situation, or that its presence is ordinarily less noticeable in times of peace than in times of war, is beside the point.

I have never been able to understand why the attempts of myself and my committee of the American Bar Association first enunciated over 15 years ago to divorce the C.O. from selection of the court and to require its selection by the J.A.G. Department from a command other than the command involved (as of course was done in the traveling courts in north Africa) have not been translated into law. In my opinion, the sine qua non of a fair trial for the military requires a court not subject to the influence of the commanding officer preferring the charges.

The military has never been able to distinguish between the maintenance of discipline, which is essential, and a fair trial for a soldier accused of crime (whether military or civil), which is, in my opinion, equally essential and which, I believe, would improve rather than damage discipline in a command.

During the almost 3 years which I spent in Europe during the war, although not a member of the J.A.G. Department, I was repeatedly amazed at the almost universal miscarriage of justice in general court-martial cases, to which I limit my remarks. It was not that innocent men were found guilty, although that happened, as indeed it does in civilian life, but what was amazing was the totally outrageous sentences that were meted out in many instances as the direct result of command influence. With the law as it exists today, the same potential is present, and in wartime at least there will be little chance of any change for the better in our court-martial procedures, so long as the commanding officer retains his present opportunities to influence the court.

I am sending an extra copy of this letter along so that should you desire to forward it to Senator Ervin and his committee, you are free to do so.

In writing this, I am not in any way critical of the report of the committee, although I do dislike the participation of civilians in military boards of review, since I believe they will add little but window dressing; they may not be available in wartime; and they add no more than the possibility of adding noncommissioned officers to a general court. All of this deals with paragraphs Nos. 4 and 5 of your letter to Senator Ervin, dated December 4, 1962.

With the season's greetings,

Yours sincerely,

GEORGE A. SPIEGELBERG.

Senator ERVIN. The committee will stand in recess until 2:15 tomorrow and, General Berg, we are sorry we could not get to you today. Thank you.

(Whereupon, at 4:45 p.m., the subcommittee was in recess, to reconvene on Wednesday, January 19, 1966, at 2:15 p.m.)

MILITARY JUSTICE

WEDNESDAY, JANUARY 19, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND
SPECIAL SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:40 p.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., chairman of the Subcommittee on Constitutional Rights, presiding.

Present: Senators Ervin and Thurmond.

Senator ERVIN. The committees will come to order.

I apologize to all of our witnesses for the delay. We had some live quorum calls. The Senator is about as reluctant to miss a live quorum call as a buck private during his first week in service to miss reveille or any other call.

I think the witnesses who were testifying at the close yesterday will come back to the stand.

STATEMENTS OF MAJ. GEN. R. W. MANSS, BRIG. GEN. KENNETH J. HODSON, AND REAR ADM. WILFRED A. HEARN—Resumed

Senator ERVIN. General Hodson, am I correct in summarizing your opposition to the bills which would provide for mandatory membership of civilians upon review boards, in this way: That in your opinion, such provisions would have a detrimental effect upon the capacity of our armed services to recruit trained men for law positions in the armed services?

General HODSON. That is correct, sir.

Senator ERVIN. Passing to another phase of the matter, I have been much concerned by the number of protests we have received in respect to discharges other than honorable, such as undesirable discharges and general discharges. These complaints are to the effect that a person who is released from the armed services under a discharge less than honorable, and particularly when it is an undesirable discharge, is almost as much handicapped in later life as if he were given a dishonorable discharge. I am inclined to think, and especially with respect to undesirable discharges, that there is much substance to that claim.

Now, what protection does the man have when the service gives him an administrative undesirable discharge for an offense which is subject to prosecution under the Uniform Code of Military Justice?

When a man is confronted with a charge that could be the basis for prosecution under the Uniform Code of Military Justice, and the

service proposes to discharge him without trial for that act, what objection can there be to giving that a man at his election to demand a court-martial?

General HODSON. Well, there are various objections, I believe, Senator, some of them technical. Some of them are, you might say, substantial.

From the technical standpoint, the statute of limitations might have run to bar trial. I realize that your legislation would try to preserve that right of trial in spite of the running of the statute of limitations.

The second point that I might make is that he may have been convicted by a civil court of an offense and we would not try him in that case even though we might have the right to try him under court-martial, but we would accept his conviction on the trial in civil court. We would not apply this, I judge, to a man who has been a.w.o.l for a long time, and we do not know where he is, but we desire to discharge him to get him off the rolls.

There is another point which I believe is more important and I believe will be covered in detail in General Berg's statement. That is, you have the problem of ridding the armed services of a man who is unsatisfactory and I don't believe you should put the burden on the armed services to prove that he is unsatisfactory beyond a reasonable doubt.

In a criminal conviction, of course, the burden of proof would be on the prosecution to establish the commission of this offense beyond a reasonable doubt; whereas, the question really should be whether we should retain this person in the armed services, not whether he has committed a criminal offense beyond a reasonable doubt in a court-martial.

So you have these conflicting interests.

Another point I might make is the offense which might warrant his discharge administratively might not be sufficient to warrant a punitive discharge, such as a bad conduct or dishonorable discharge, under our existing table of limitations. In other words, even if you tried him and discharged him for this misconduct, the table of punishments might bar the administration or the awarding of a punitive discharge. So you would be trying him, convicting him, and still you would have him on your hands unless you turned around and used this conviction then as the basis for the administrative discharge, which would involve two proceedings.

Senator ERVIN. I can see that there are grounds for a valid distinction between releasing a man from the armed services where he is simply a nitwit or something, and for that reason incompetent to serve, and discharging a man from the armed services because he has committed a crime. I can also see that there would be some merit in your position that where the man's guilt has been established in a civil court, he ought not to have a second day in court in a military court, where he is to be discharged essentially because he has committed an offsense which happens to be a military offense as well as an offense against the civil laws.

But the situation is different in the case of a man whose service record is otherwise good, who has been a good soldier outside of the

fact that he may be charged with a single criminal offense, and the service is seeking to discharge him, not because he has been an unsatisfactory soldier, but because he has committed a crime. It seems to me that he ought to have the option of a trail. Every discharge from the Army other than an honorable discharge had to be by court-martial until just prior to recent times, didn't they?

General HODSON. I am not certain when that came into being. I don't have the information available.

But I would like to add one thing to the statement I made that is based on actual experience, Mr. Chairman. That is, most of the discharges for misconduct are not based on a single act of serious misconduct. Those cases actually are tried. Most of the cases involving a discharge for misconduct administratively involve a number of minor involvements with either the military or the civil authorities, not one major act of misconduct.

Now, I say this is a general rule and I realize that there are exceptions to it.

But I would take it that probably more than 99 percent of the cases involving discharge for misconduct involve discharges for a course of minor misconduct which establishes that the man is not suitable for further service.

Senator ERVIN. Well, I can see some validity to that point, because you have civil courts sitting every day trying the same man on the same old charge of public drunkness, for illustration.

A man who has 10 or 15 violations, convictions, I would say, is not the shorn lamb the law is to temper the wind to. But it does seem to me that where a man's discharge is based primarily upon his commission of a crime, he ought to have the right to demand that he be court-martialed, that his crime be established in a judicial manner before he is discharged.

I would be glad to hear any other comments on this.

General MANSS. Mr. Chairman, if I may address myself to that last point, General Hodson mentioned a civil conviction. We have many cases in which an airman, a soldier, or a sailor is convicted by the civil courts of a fairly serious offense. Under these circumstances, generally, we would institute proceedings and, of course, even here, unless he waives board action, he is entitled to a hearing.

Now, admittedly, if we want to apply the technical legal reasoning to this, if he demanded trial, we could try him again, but this is contrary to our policy with certain exceptions. Generally, if a person commits a civil offense, the military doesn't try him the second time for the same offense. So we are faced with the proposition here that he has been convicted by a court of competent jurisdiction.

Senator ERVIN. I don't have any trouble with your position on that. I give my assent to that proposition without difficulty.

General MANSS. Now, we can have another type case in which the man has not committed a series of offenses, a series of minor offenses for which he might have had punishment under article 15 imposed or been convicted by a summary or special court. But we run into cases such as the child molestation cases, which I think have been brought up before in your prior hearings, in which for various reasons, we are not able to produce witnesses. A lot of times we can get sworn

statements from the witnesses, and this may include the wife of the person who is accused of the offense. Even then, if we tried him by court-martial, under the current COMA rulings, she could not be compelled to appear as a witness. As a matter of fact, in some of these cases, they say she is not the injured party, so she cannot testify against the husband even if she herself is willing to waive her part of the privilege.

Let us assume a little further as we have in a lot of these cases that we have a full, free confession from the guy who did this. But you see, we cannot get the confession corroborated. Now, we are morally certain and we have sufficient evidence that the board would be convinced that this man is no good, he should be eliminated. We do not think that it is right that we should be forced to give him an honorable discharge because we do not have sufficient evidence to satisfy all of the formal rules.

Senator ERVIN. General, would you not agree with me in the proposition that giving a man an undesirable discharge is punitive in nature, that it has consequences which follow him as long as he travels the ways of this earth?

General MANSS. Yes, sir; I agree. That is true.

Senator ERVIN. Well, do you agree with me that it would be very indefensible for a civil court to take and punish a man when they cannot prove his guilt?

General MANSS. Mr. Chairman, a civil court upon his conviction can sentence him to confinement, they can fine him, dependent, of course, upon the authority of the court, but generally, they can deprive him of his liberty. This we cannot do. The only thing we can do is discharge him from the Armed Forces.

Senator ERVIN. They cannot deprive him of his liberty if he can raise the bond. They cannot deprive him of his liberty until after the trial comes, and when the trial comes, if they haven't sufficient evidence to prove he is guilty, they must turn him loose, and they cannot further punish him. That is one of the objections we have received. It is not only voiced by the people who have felt the halter draw, but also by many very fine lawyers now in civilian life who have served in the Armed Forces.

General HODSON. Mr. Chairman, could I ask you a question with reference to the more typical case? Where you are basing the administrative discharge on frequent involvement, we will say, with the military authorities and perhaps he has been punished under article 15 two or three times, tried by summary court once, and you are basing his administrative discharge on these punishments or convictions, which are established, I suppose you would say, judicially, you would have no objection to discharging a man under those circumstances, would you?

Senator ERVIN. General, I would have no objection to discharging a man by administrative process provided the administrative process was so fixed by the law that they had to give him the basic rights of due process, such as right of notice of accusations against him, the right to be defended by a lawyer, the right to have the compulsory process to obtain witnesses, and the right to confront his accuser and the right to cross-examine.

General HODSON. What I am asking about, though, are cases that have already been concluded. In other words, several convictions by courts-martial, several punishments under article 15, and the basis for the discharge are these items.

Senator ERVIN. Yes, sir.

General HODSON. In that case, I do not know how we could afford him an opportunity for a trial because we do not have any additional misconduct. He has already been tried for the misconduct.

Senator ERVIN. I realize that no man has a vested right to remain in the Army, the Air Force, the Navy, or the Marine Corps, and that it is essential for the services to get rid of men who are of no value to the Nation. I do not have the feeling any man is entitled to a vested right to remain in the armed services. To have the armed services efficient, as they must be because our freedom depends upon their efficiency, there should be practical methods by which the Armed Forces can rid themselves of an incompetent person, whether the incompetence arises out of physical or mental or moral reasons.

But I am frank to state I cannot understand the resistance. I agree with you on the proposition—I will withdraw that I cannot understand—I will agree with you on the proposition that there should be some valid distinctions made between things which properly belong to the judicial field and things which probably belong to the administrative field. But I sometimes wonder whether there is adequate protection for a man, under existing law, where he is discharged administatively. Now, it has been proposed that the law be amended so as to allow the review by the Court of Military Appeals from an administrative proceeding where a man is given a discharge which is undesirable or less than honorable. What is the objection to having those matters, the administrative matters, reviewed by the Court of Military Appeals where there is an allegation that there has been a denial of a substantial portion of due process of law in the administrative proceedings?

Admiral HEARN. Mr. Chairman, may I reply?

Senator ERVIN. Yes, sir, Admiral.

Admiral HEARN. I think the chairman correctly stated that the services must have a right to relieve themselves of those members of the services who are unfit and those who are chronic offenders, those who are not making their contribution. I think I can correctly say—and at least I know I am speaking for the Navy—we do not process people administratively who have committed a single offense.[1] We try them by court-martial. That is what the court-martial system is for. The only exception to that, and I would say the largest portion of the people involved in the exception, are those who are charged with homosexuality.

Suppose the person is charged with a homosexual act—maybe you can prove the offense, I do not know. But in any event, he shows in his statement a long period of involvement, instance after instance of homosexual acts. That man has demonstrated a pattern of conduct which is not compatible with the services. Perhaps you cannot prove his last incident of homosexuality. There is no case that we are con-

[1] A subcommittee inquiry resulted in an expansion of the matters discussed at this point. See the letter appearing at p. 783.

fronted with that gives us more difficulty from the standpoint of proof than trying to prove a homosexual act. You often cannot get any witness to testify.

Senator ERVIN. Well, it is a crime, of course, that is committed ordinarily—well, virtually always committed in secret.

Admiral HEARN. That is correct.

Senator ERVIN. And the person who participates in it is engaged in as disreputable conduct as the alleged offender.

Admiral HEARN. That is right, and the discharge is not based upon that act. The discharge is based upon this long pattern of conduct, the fact that he is not fit for the service. We have to get rid of him, and administratively is the only way it can be accomplished.

I certainly agree with the chairman when he says that when a person has committed a specific act which is a crime and provable, the court martial process should be used in that case, unless of course he admits the offense and elects to be discharged with a less than honorable discharge in lieu of the court martial. I think you will find generally that is true throughout the services.

I reiterate that this the services have to have a means of ridding themselves of the unfit and in so doing they characterize the discharge on the basis of the total services performed.

Now, while you might say it is a little bit unfair to take a man who is a habitual violator of all the rules and regulations and administratively give him a less than honorable discharge, it is totally unfair to the thousands and thousands and thousands of good people we have in the service to give this person the same type of discharge as we give the man who does his duty.

Senator ERVIN. I agree with your statement on that perfectly, Admiral. The thing that concerns me, though, is being sure the man gets due process of law as a matter of procedure. I think if the man is a chronic offender, the service is justified, even for the most trivial conduct or lack of soldierly or sailorly bearing, in this instance that it is better to get rid of him.

Admiral HEARN. I think they are accorded due process, sir. As has been mentioned already and will be testified to later, we have a new directive which insures representation. Unless the individual waives the hearing, he is furnished counsel. There are really no questions of law involved, just questions of fact.

I feel that those who appear before these boards are getting proper representation, that they are getting due process of law, and that their discharges are correctly being characterized on the basis of the service performed.

Senator EVRIN. I think that in many cases, where the armed services give a man an undesirable discharge, it is an act of mercy rather than an act of a punitive nature.

Admiral HEARN. I agree, sir.

Senator ERVIN. In other words, in the great majority of those cases, if the man is given his option of a court-martial in a specific offense and going out with an undesirable discharge, he will take the undesirable discharge, because that way he evades the punishment and the service gets rid of him. But it seems to me there ought to be some statute, and I like statutes better than regulations, because regula-

tions can be changed rather quickly—they are rather fluid—there ought to be some statute which secures to each man in the armed services the right before he is given an undesirable discharge to consult with either a lawyer of his own choice or some lawyer furnished to him by the service. And then, after he does that, if he waives the right to a trial on the specific offense, or waives a hearing before the board if it is on general grounds of unsuitability, then the service ought to be allowed to give him that kind of discharge.

I have had some cases called to my attention where they really gave him that, but they did not require the man to make his waiver in writing and he later says he has never been given that chance.

Then another thing. I think there ought to be some statute to give the right of appeal to the Court of Military Appeals from an administrative proceeding, not for the purpose of reviewing the wisdom or the correctness or incorrectness of the decision of the board, but on the question solely as to whether the man has been accorded the fundamentals of due process. I would like for you gentlemen to think as these hearings progress and we consider this legislation, whether such a statute can be drawn, because we like to have your help rather than draw it ourselves, because you have so much experience.

But I agree perfectly with what General Manss and General Hodson said about the case of a man who has been convicted in a criminal court; I do not think he ought to have a second trial.

I agree with what you say, that where he is discharged for a specific offense, it is better to have him court-martialed. But I also agree with the general proposition of giving him the right when you rid the armed services of an incompetent man or a man whose incompetence may be either on sound physical grounds as you now have or on mental grounds or on moral ground by administrative procedure, to be assured that he can contest the question whether he has been accorded fundamental due process.

Admiral HEARN. Of course, he has a right of review aside from the final decision which is made in his case. He can always present his case to the Discharge Review Board, he can present his case to the Board for the Correction of Naval Records.

I would certainly hate to see the court-martial system, which is compact and autonomous, be broken down or broken into by bringing into it any phase of the administrative board practice, be it at the lower court or be it at the highest court, the Court of Military Appeals. I think in the end we would destroy our system, which is peculiar to the military. I think it is essential to keep it in its present form.

Senator ERVIN. I thank you, gentlemen.

I am going to ask Senator Thurmond to preside for a few minutes, because I have been called on to perform another duty.

General HODSON. I have just one factor I think should be considered in this connection. That is that under our present provisions of the Uniform Code of Military Justice and the Manual for Courts Martial, if you take a man to court for a minor offense and he has two minor convictions, the court can sentence him to a bad-conduct discharge. We discourage our commanders from utilizing this any more than they absolutely have to, because if it is a minor offense, we think it is better for the man to receive an administrative discharge.

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If we established tough, hard ground rules that the man has an absolute right to trial, I have a feeling that many of our commanders would seek the way of two prior convictions and the next offense, out he goes with a bad-conduct discharge rather than to process him administratively for what amounts to a series of minor acts of misconduct.

He has never committed any offense for which he really ought to get a punitive discharge.

So we feel that this man should be separated administratively, because there is not as much stigma attached to even an undesirable discharge as there is to a punitive discharge by court-martial.

Basically, that statement is true because of the personnel history statements that he must fill out. "Have you ever been convicted?"

I don't believe there is a personnel form in existence that does not have that question.

A man who is separated administratively can answer that "No." But if we drive the commanders into utilizing the court-martial system in order to make sure that, as compared to their good men, a bad soldier is stigmatized by a punitive discharge, this man will now have to answer that, "Yes, I have been convicted." It may be a very minor offense, and I don't think that is a fair use of the court-martial system.

So I think this is a factor that we have to consider, that if you make administrative discharges too strict, too hard, there will be a tendency to turn to the court-martial system.

Senator ERVIN. General, I agree with everything you say there. But I also notice that on a lot of the personnel questionnaires, that prospective employers submit to people, they also ask if you have ever been discharged from the armed services under other than honorable conditions. If they answer that yes, that is about the end of that job.

There are a lot of instances where undesirable discharges certainly ought to be issued. But the thing I am concerned about is whether the system has sufficiently guaranteed the fundamentals of due process in those cases.

General HODSON. One thing I have been concerned with in this field, also, Mr. Chairman, I have never heard anybody suggest that a Federal employee who is being administratively separated for misconduct should have a right to a trial in the Federal district court. I don't think that anybody really has ever proposed such a matter. Yet the separation of a civilian employee of the Federal Government is in many respects much more rapid and without the protection of rights than the separation of military personnel.

Senator ERVIN. I just wonder, though, if under the Administrative Procedure Act, if a civilian employee is being separated from employment, he does not have the right to have a review under the Federal courts.

General HODSON. He has eventual right, but I am talking about trying him for the criminal offense. I am sure their procedures do not say that if he has been charged with misconduct, he should have the right to trial in a Federal district court.

Senator ERVIN. I agree with you, but what I am thinking about is where a man comes up and says, "I am innocent of this crime" and they propose to discharge him for a specific crime and he protests his

innocence, why the services don't give him a trial. I don't think many of them demand a trial. Most of them take the discharge and go out of service by their own volition. In a lot of cases, it is a kindness on the part of the service to give him that opportunity, because if they are tried under court-martial, those that are guilty will have punishment. So they escape maybe imprisonment or fine, or both, by accepting the undesirable discharge.

But where a man stands up and protests his innocence of a crime, I think that is a good case for the position that he ought to have an option.

General HODSON. Mr. Chairman, I assume you are talking about the serious offense?

Senator ERVIN. Yes; I am not talking about the trivial, because many of the trivial offenses which are oft repeated really show the man's unsuitability for the service. In that case, I have no objection to the administrative discharge, because I think the administrative discharges save an awful lot of time on the part of the armed services; a lot of money, and a lot of expenditure of energy.

I think in the majority of the cases where the man has accepted it, it is sort of an act of benevolence rather than anything else. I certainly am as strong as any of you gentlemen for the proposition that it is essential that the armed services have adequate means by which to rid themselves of men who are incompetent upon physical or mental or moral grounds to remain in service. I am just wondering if something can't be done by statute that would except from any trial those cases where people have already been convicted of an offense in the civil court—I wouldn't require a court-martial in that case. I think a man is not entitled to 2 days in court; 1 day ought to be enough. But it seems to me there ought to be some method of reviewing the administrative procedure. A practical method on the question solely of whether there has been a compliance with the fundamental principles of due process, not on the question of his guilt or innocence or anythink like that. If the board has given due process and there is evidence to sustain their findings that the original board or the review board has given major findings of fact and they are supported by evidence, it ought not to be reviewed at all.

That is all I have to say. I just want you to think about these things and see if my feeling is sound or unsound. And if, while you think it is unsound at present, maybe on further consideration you may be led to different conclusions. I would certainly be willing to solicit your aid or advice or suggestions on whether it is possible to secure to those concerned fundamental due process by statute and yet not substantially affect the power of the services to get rid of incompetent people.

I am going to have to go, so I am going to ask Senator Thurmond to preside.

Senator THURMOND. I want to ask you one question before you leave, to clear up on this. As I understand what you are contemplating or giving consideration to, if the man is given a dishonorable discharge—is it dishonorable?

Senator ERVIN. They can't give him a dishonorable discharge without a court-martial.

Senator THURMOND. Or undesirable. Which category did you have in mind that they should give him a choice?

Senator ERVIN. Certainly on an undesirable discharge, I have the thought, or at least consideration, in my own mind on any discharge less than Honorable—because a general discharge rather handicaps a man.

Senator THURMOND. Then did you have in mind, for instance, if he had been convicted previously of a series, say, over a period of years, and finally the service reaches a point where they say we just can't keep him any longer, would we have to commit another specific crime and give him a choice then? Just where is your mind——

Senator ERVIN. My mind is where the discharge is based upon the commission of a specific crime, it ought to be a crime of a serious nature. I do not know where the statute would draw the line.

No; I agreed with the views of all three of these gentlemen.

Senator THURMOND. You seem to be pretty close to their thinking. That is the reason I was trying to see just what the difference is between you. As he mentioned here, suppose you have a man who is guilty of homosexuality. I would like to ask the admiral this question: In those cases where you say he had a record of homosexuality over a period of years, does that record mean that he has been found guilty of that, he has been suspected of that, or what?

Admiral HEARN. No, sir; in the course of the investigation, he discloses the fact that he is a habitual homosexual. He admits it.

Senator THURMOND. He admits it?

Admiral HEARN. He admits it.

Senator THURMOND. I see, but he has never been tried?

Admiral HEARN. He has never been tried because it is so far after the fact that you can't try him for the prior offenses and you can't actually, speaking practically, get a conviction for the latest offense.

But I agree with the chairman that a person who commits a serious offense should go before the court and not before a board.

I assure the chairman that is not our practice, that we have strict regulations on this point and when a person has committed a specific serious offense, he goes to court rather than being processed administratively.

Otherwise, you defeat the system.

Senator THURMOND. Suppose you have a man who admits his homosexuality in the course of an investigation, do you let him plead guilty to something, or what type of punishment does he receive? Is that considered a serious crime or a minor crime?

Admiral HEARN. We process him administratively as undesirable.

Senator THURMOND. After the first offense?

Admiral HEARN. Yes, sir; absolutely.

Senator THURMOND. Then you wouldn't have a history of sexual misbehavior over a period of years. It would be just the first offense, the first time you encounter it, would it not?

Admiral HEARN. You would if, during the course of questioning him, he admits the fact that he——

Senator THURMOND. That he has been doing it for a number of years?

Admiral HEARN. Yes, sir.

Senator THURMOND. But this would be the first time it has come to light. As far as the military is concerned, this would be the first time the military would have the evidence that he is guilty of that offense?

Admiral HEARN. That is correct.

Senator THURMOND. In that case, I presume the line of demarcation would be right there. That is where I presume the chairman's suggestion would come into play.

Admiral HEARN. I would certainly hate to think that——

Senator THURMOND. You give him a choice, then, of being tried for sexual misbehavior or take an undesirable discharge.

Your thinking is if he wants to take the undesirable rather than go through the trial if they are willing to give it to him, what ought to be done is he ought to sign in writing that he waives his trial by a court before you deprive him of the discharge and accept an honorable discharge; is that your thinking?

Senator ERVIN. My thinking is if they are going to discharge him on the basis of one act of homosexuality, that if he desires, he ought to have the chance to deny his guilt.

Admiral HEARN. He doesn't deny his guilt in this case.

Senator ERVIN. Where he admits his guilt, I think there ought to be a law allowing the services to get rid of him by administrative procedure. If he admits it, waives a hearing before the board, he ought not to even have to go to a hearing on that proposition.

Admiral HEARN. That is our practice.

Senator THURMOND. I think you are getting closer together. That is the reason I thought a few moments ago you were close together.

Senator ERVIN. Except I thought first he ought to have the right to consult with a lawyer of his choice, or if he is unable to furnish a lawyer of his choice, some law officer furnished him by the service.

Admiral HEARN. That is the regulation, sir.

Senator THURMOND. Then as I understand it, the point would be this, that if he denies his guilt, then you would have to convict him of if before you could give him a dishonorable discharge or any discharge other than honorable?

Admiral HEARN. I think that is correct. If he denies his guilt, I think our practice is——

Senator THURMOND. If he denies guilt. Where he denies his guilt, then unless you had some eye witness and if he didn't admit his guilt, you would have to prove it some way, wouldn't you?

Admiral HEARN. That is correct.

Senator THURMOND (presiding). If he says, "I am not guilty," then you wouldn't give him a discharge in that case unless you did convict him of it.

Admiral HEARN. In that case, we would not give him a discharge under other than honorable conditions.

Senator THURMOND. It seems to me you are doing now what the chairman suggests.

Admiral HEARN. We are doing substantially what the chairman is talking about.[1]

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[1] A subcommittee inquiry resulted in an expansion of the matters discussed at this point. See the letter appearing at p. 783.

Senator THURMOND. Substantially what the chairman is suggesting, but if there is any little change that could be made there by maybe some technical lawyer, who wants to say maybe some of them are not getting their rights, maybe some revision might be made that would clarify that so the whole world would see there is no question that he is afforded every constitutional right and not deprived of any right.

Admiral HEARN. Our regulations are published and it is spelled out very carefully.

Senator THURMOND. I think you made a very fine presentation, Admiral.

I want to commend all of you judge advocates for the presentation you have made here.

I noticed in General Hodson's summary of his testimony, he stated that the Defense Department, I believe, is in substantial agreement on the bills S. 747, 750, 751, 752, and 757. Is that correct?

General HODSON. I believe that is correct, Mr. Chairman.

Senator THURMOND. With the exception, as you noted subsequent thereto.

Now, as I understand, when you say you are in substantial agreement, you mean you would favor those bills if a few little changes were made or some changes were made as you followed up with thereafter in that statement. The fact that you said here, "We favor qualified counsel at special courts before bad conduct discharges are authorized."

One of these bills provided that, I believe. So you would have no objection to that.

General HODSON. Actually what we have done, Mr. Chairman, is propose substitute bills which would incorporate all of the objectives and the purposes of the bills that you just read, 747, 750, 751, 752, and 757. These two substitute bills have in them the technical changes which we think are desirable to make it possible for us to implement this legislation effectively and efficiently.

Senator THURMOND. In other words, you have prepared two separate bills that embody the best of these five bills, leaving off the objectionable portions of these five bills, is that it?

From your summary that you have of this statement—do you have a copy of that before you?

General HODSON. I have it now. I just received it.

Senator THURMOND. You said "bills in substantial agreement."

General HODSON. Yes.

Senator THURMOND. Then you list them there, those five bills.

General HODSON. Right, sir.

Senator THURMOND. Then you said below there, "We favor," and you tell what you favor. You favor three things, qualified counsel at special courts before bad conduct discharges are authorized, permitting waiver of trial by full court for trial before a law officer alone, and then permissive appointment of law officers for special courts.

General HODSON. Yes, sir.

Senator THURMOND. And you favor those portions of those five bills? Is that right?

General HODSON. That is correct.

Senator THURMOND. Over whatever portions of those bills they cover.

General HODSON. Yes, sir.

Senator THURMOND. Then you oppose certain things: "requiring a law officer to sit on a special court before a bad conduct discharge may be imposed (right of counsel plus review will protect the member's rights); allowing the member alone to choose trial by single law officer." Then you make the statement that rule 23(a) of the Federal Rules of Criminal Procedure requires Government consent for the waiver of a jury trial. "There are sound reasons for requiring a full court in some cases."

General HODSON. Yes, sir.

Senator THURMOND. In other words, you are not in accord with one of these bills that provides that maybe a man can be tried before a judge alone. You are saying that the court ought to pass on it because it involves a death sentence.

General HODSON. No—well, we have two points there, Mr. Chairman. We do think that a single law officer should be able to try a case, but he should not adjudge the death penalty; if the death penalty is adjudged, it should be adjudged by the full court.

Senator THURMOND. One of these bills provided that, did it not, one of the bills introduced here that is before us now?

General HODSON. Well, it made no restrictions on the punishing power of the law officer.

Senator THURMOND. Therefore, it would permit it under your interpretation, I presume, or otherwise you would not have raised this point?

General HODSON. That is correct. Under the bill that is introduced, he could impose the death penalty and we do not think he should do this.

Senateor THURMOND. I am in accord with you on that. I was circuit judge in South Carolina for 8 years and I had to impose the death penalty on 4 people. In every case, the jury first found them guilty and did not recommend mercy. It was my duty under the law, therefore, to impose the death penalty. I think it is a big responsibility for any one man, even a judge, to decide whether a man should be executed. I think you are very wise to make this suggestion that you have here.

But that is one of the things that you do oppose that is now in the legislation as you interpret it?

General HODSON. Yes, sir.

Senator THURMOND. Another thing you oppose here is allowing the death penalty—that is one we just discussed. Then you go on to say we favor giving authority for pretrials and the language should be improved.

General HODSON. Yes, sir.

Senator THURMOND. So you do not object, then, to pretrial but you just want to broaden it—not only general court but special court?

General HODSON. Yes, sir; we want to clarify it with technical changes.

Senator THURMOND. Then you said the Department of Defense substitute bill is in accord with these suggestions.

General HODSON. Yes, sir.

Senator THURMOND. As I construe that, you mean the suggestions that you mentioned above. That is only to apply to what is said above there and not below there.

General HODSON. That is right, what we favor and what we oppose are incorporated in these two substitute bills.

Senator THURMOND. Then you proceeded on, still considering these five pieces of legislation, that you favor extending the time for a new trial to 2 years.

General HODSON. That is right.

Senator THURMOND. It is now 1 year, I believe, and you favor 2 years?

General HODSON. That is right.

Senator THURMOND. Now you oppose the creation of DOD boards for correction of military records and for discharge review. "Such boards should not be transformed into appellate tribunals, the questions are rarely legal in these cases. Corrective authority should be granted to the Judge Advocate General." Do you have any further comment on that?

General HODSON. No, sir; except that our substitute bill would, we feel, take care of the problem that was attempted to be solved by giving the DOD board, the proposed DOD board, the power to review, revise, modify and set aside findings and sentences in cases not reviewed by boards of review. We would suggest, and our substitute bill carries this out, that this appellate power be placed in the Judge Advocate General to correct records of trial which are not reviewed by boards of review rather than in a DOD correction board, which is not normally concerned with legal problems.

Senator THURMOND. They are usually concerned with correction of facts, points of law?

General HODSON. What the Judge Advocate General would do would be to take a place, in a sense, in the appellate hierarchy of the administration of military justice with respect to correcting records of trial that are not reviewed by boards of review. Thereafter, the defendant could go to the board for correction of military records if he felt there was an error or an injustice.

But the legal correction of those records in the event of fraud on the court, in the event of lack of jurisdiction on the court, in the event of error prejudicial to the substantial rights of the accused, in the event of newly discovered evidence, the corrective action could be taken directly by the Judge Advocate General without the man going to the board for correction of military records.

Senator THURMOND. Then you follow that up by saying the Department of Defense substitute bill is in accord with these views?

General HODSON. Yes, sir.

Senator THURMOND. Which substitute bill is that? You have referred to two substitute bills.

General HODSON. I am sorry, Mr. Chairman. We have two substitute bills. One substitute bill refers to those matters which are included in S. 750, 752, and 757, I believe. The other substitute bill—I am sorry. Let me rephrase that.

Our second substitute bill would be a substitute for S. 751 and a part of S. 747, which would create a single board for correction of military records under the Secretary of Defense.

Senator THURMOND. So one of these two substitute bills you refer to would also cover these last two points down here as to which you favor and which you oppose, here at the bottom of the page.

General HODSON. Yes, sir.

Senator THURMOND. You do not have but two substitute bills as I understand.

General HODSON. I beg your pardon?

Senator THURMOND. I say you are not advocating but two substitute bills.

General HODSON. Two substitute bills that have been drafted. We recommend with respect to other matters certain changes.

Senator THURMOND. And they pertain to these five bills and those five bills only, is that correct?

General HODSON. Yes, sir.

Senator THURMOND. All right, let us go on to here now. We oppose, you say, legislative creation of a field judiciary. The Air Force feels they do not need—flexibility should be retained. You are opposed to appointing civilians, and you say—and you prohibit and you oppose prohibiting preparation of efficiency reports on review board members by other members. The objective should be accomplished by strengthening the command. I might ask you before I go any further here, do these same two substitute bills embrace these points I am now reading or is that—

General HODSON. No, sir. They do not.

Senator THURMOND. You are merely expressing an opinion now on other legislation.

General HODSON. Yes, sir.

Senator THURMOND. So beginning at the top of page 2 then, does not pertain at all to the first five bills that you referred to.

General HODSON. That is correct.

Senator THURMOND. Now, I notice you are opposing prohibiting preparation of efficiency reports on review board members of other members. The point has been made that if some senior member of the court or ranking member feels a certain way and expresses a strong sentiment that some junior officer might be embarrassed to a degree. You do not think there is any merit in that.

General HODSON. No, sir; we do not. We think that the junior member is likely to be rated as high or higher for expressing an independent judgment as he is if he agrees. We think that the chairman of the board——

Senator THURMOND. As if he agrees with the senior officer of the court.

Now for the record you might tell us the highest ranking officer that serves on these courts.

General HODSON. On the boards of review that we are talking about the highest ranking officers in any of the services at the present time is a colonel. Or a captain in the Navy. The boards are generally composed of colonels and lieutenant colonels or captains and some commanders, I believe, in the Navy.

Senator THURMOND. Is it very often that the ranking officer does rate the other members of the court, are they under his jurisdiction generally speaking?

General HODSON. Well, they work in the same room, Mr. Chairman. In the Navy and in the Army, the chairman of the board of review does not rate his fellow members. In the Air Force, however, the chairman does rate the members of the board of review, because it is considered in the Air Force that the chairman is in the best position to give them an efficiency rating. He knows more about their work than anyone else. In the Army the chairman no longer rates the board of review members because at the time we created the independent appellate judiciary, we decided to make a complete break and make it as independent as possible. Accordingly the Assistant Judge Advocate General rates the members of the board of review.

There has not come to our attention any evil in this rating of the members by the chairman. In the Army we felt, however——

Senator THURMOND. In the Air Force.

General HODSON. In the Air Force or the Army.

Senator THURMOND. The Army no longer does it now as I understand it. Just the Air Force now, as I understand it, now does it.

I would like to ask the General, the Judge Advocate General of the Air Force, if he has had any complaints along that line or if any information has come to his attention that that is an unwise situation.

General MANSS, No, Mr. Chairman. I have had no complaints, and I know of no complaints, and I made quite a statement on this yesterday. We really think that this is a good practice because if we do not permit the chairman of the board of review to rate or prepare the effectiveness report on the junior members, we are depriving those junior members of the right that every other officer in the Air Force has, and that is to have his immediate superior rate his performance. If we have to have another officer rate the performance of the junior members of the board, he will necessarily have to rely on some advice from the chairman of the board, and this gets it further away, it gets the rating into the hands of an officer who is not familiar with the performance on a day-to-day basis, and we are afraid that we would get into a situation where the poor officer could just go along without anybody ever finding him out, and the good officer, who is very good, could actually be a brilliant lawyer and a brilliant judge, would not even be recognized and consequently we think that we would be doing these people an injustice.

Now, under our practice in the Air Force, of course, we have a reporting officer who in this case is the chairman of the board of review, and an endorsing officer who is a colonel, and happens in this case, is the Director of Military Justice who has the overall supervision of the board of review and appellate counsel and the other matters pertaining to military justice in the headquarters.

Now, I see all of these. I don't necessarily put another endorsement on, but in some cases—if we have the case of an outstanding officer, I put an additional endorsement on it. Actually, of course, I am also familiar not on a day-to-day basis but I am familiar with the work that the members are doing, because in every case that is reviewed by a board of review in our office, the decision and the notes and in some cases parts of the record are always read by the Judge Advocate General personally. I always sign the letter of transmittal that returns the case to the field, or if I am not there, whoever is acting in my place.

So we are familiar with the members of the boards, and if we felt there was any injustice, we could always reverse the proceedings and take necessary action. But I have had no instances that have come to my attention, and I have seen all of these effectiveness reports before they were filed, and we think it is a good system.

Senator THURMOND. Since the Air Force system is different from the Army and the Navy system, I was just wondering if you three gentlemen had considered and decided in your own minds which is the preferable system?

General MANSS. Well, I think generally, Senator, that this is dependent upon the organization as much as anything else.

Now possibly—I am not familiar enough with the procedures in the Army and the Navy to say whether theirs is better than ours. But we think that under our system that ours is best suited to that particular organizaion.

Senator THURMOND. Another thing I know you opposed was the requirement that the JAG review all cases before these boards for transmission to the Court of Military Appeals, which involve some 15,000 cases since the bills are not limited to——

General HODSON. Those are administrative cases being referred to.

Senator THURMOND. Do you have any further comment on that?

General HODSON. Well, I indicated yesterday that this would place a manpower requirement on us that would, we felt, be unacceptable under the circumstances. We did not, as is indicated in the summary, favor having the Court of Military Appeals review this type of case, administrative discharge case. We felt that the Court of Military Appeals should not be burdened with matters that are not concerned with the administration of military justice.

As to the technical aspects of the legislation under question, which would require the Judge Advocate Generals of the services to review all actions of the Board for Correction of Military Records, and determine whether the cases should be referred to the Court of Military Appeals, and would require the Judge Advocate Generals to furnish counsel to each petitioner before the Board for Correction of Military Records with a view to determining whether to petition the Court of Military Appeals. This would place an unusual manpower requirement which would not be, could not be, justified under the circumstances.

Senator THURMOND. Do you think it is desirable, would this just require more manpower or do you think it is just unnecessary?

General HODSON. We feel it is unnecessary in the first place. As I indicated yesterday, it would lay on two additional levels of appellate review in courts-martial cases, and few people have been critical of the administration of military justice in the last 15 years. This bill would provide the accused with an automatic, in a sense, an automatic appeal, first to the Board for Correction of Military Records, and secondly, a further petition for review to the Court of Military Appeals, at which he would be represented by counsel, and in our opinion, it would provide the defendant in a court-martial, as an example, with the opportunities at Government expenses to petition, repetition, and repetition the Court of Military Appeals as long as he lived at the rate of maybe 3 or 4 petitions per year, and if he had a

longevity of 50 years, this would mean that he could petition the Court of Military Appeals 150 times, and we would be required to furnish Government counsel on every one of these petitions.

So there are technical defects in the bill even if we agreed with the principles of the bill.

That is what I was talking about when I talked about unacceptable manpower requirements. We feel that certainly, that once a case is reviewed by the Court of Military Appeals, the man should not be able to approach the Court of Military Appeals through another door on the same grounds.

Senator ERVIN. If I may interrupt the Senator, I realize in Federal courts we used to have a law that a person had a day in court; that is all he had and res judicata applied to his case. That objection could be remedied by a simple amendment that a man could have a right to only 1 day in court. In other words, have a doctrine of res judicata apply.

General HODSON. Well, each case, each time he petitioned, as I look at it, he would probably think or look to a different page of his record of trial, and take up a different legal error.

Senator ERVIN. All you would have to do is restore the law that ought to prevail now. I think unfortunately during the latter years it has been thrown out of the windows by some courts, but when I studied law and when I practiced, they said that a judgment was conclusive not only to the things actually litigated but to everything that could have been litigated. Now, of course, the Supreme Court of the United States has thrown the doctrine of res judicata out of the window and a man can petition about every 15 minutes for a new hearing. I am sort of reluctant to criticize the Court. I am reminded of a case in which a lawyer made a will which was contested on the grounds of lack of testamentary capacity. They offered proof that he often disagreed with the court but the court disagreed and held that that was no evidence of insanity. [Laughter.]

Senator THURMOND. Thank you, Mr. Chairman.

General HODSON. We feel, as I say, the accused has adequate remedies at the present time. We think that if we put ourselves in a position as this bill would put us, of having to furnish counsel to every accused or every respondent who wished to have his case considered by the Court of Military Appeals, involving the review of some 15,000 cases a year, many of which really would not involve substantial error at all, would place an unacceptable demand on the services.

Senator THURMOND. My attention has just been called to a provision in the bill S. 753, page 2 beginning——

General HODSON. S. 753.

Senator THURMOND. S. 753, page 2, beginning line 16, reading this way:

> The applicant in any case reviewed by the board referred to in subsection (c) (4) of this section has 30 days from the time he is notified by the board of the decision in his case to petition the Court of Military Appeals for review. The court shall act upon such petition within 60 days of receipt thereof.

General HODSON. Yes, sir.

Senator THURMOND. Now, General, another point I believe that you oppose is the abolition of the summary court, and that is on the basis that you feel a man should have a choice between a summary court and

article 15 and not force him to a summary court, I mean if he is willing to it, and not force him—to a special court if he is willing to take a summary court.

General HODSON. That is correct; in other words, our experience since February 1963 when we obtained the new punishing power under article 15, indicates that there still is a need for the summary court. We had hoped, and we expressed the opinion at the time that legislation was enacted, that we would be able to abolish the summary court, but our actual on-the-ground experience indicates that there is still a need for it, in our opinion.

Senator THURMOND. That is what I was going to ask you, if your experience since the court-martial manual has been amended in the last 15 years, if your experience reveals whether the summary court is helpful.

General HODSON. Well, for example, I cited figures yesterday that of the 17,000 summary courts-martial in the Army last year, 2,500 cases involved accused who had refused to accept punishment under article 15; and, as to those who had refused to accept punishment under article 15, we felt that the summary court was the appropriate tribunal to make the decision in that case, rather than to, in effect, force the accused to be tried by a three-man special court with counsel.

Senator THURMOND. Now, if he did not want to be tried by article 15 and he did not want to be tried by summary court, then could he go to the special court?

General HODSON. He would have no right to do so in accordance with the Uniform Code at the present time. He has right to refuse punishment under article 15. If he refuses punishment under article 15, he may be tried by summary court-martial over his objection. If his case is initially referred to a summary court-martial, he may object to trial by summary court and in that case he would be tried by special court if he is tried at all.

Senator THURMOND. Now, is it your opinion that if he does not want to be tried under article 15 and he does not want to be tried before a summary court but is willing to go to a special court and take his chances, is it your feeling there should be some change to allow this?

General HODSON. I would not favor it because I do not favor criminal jurisdiction which is organized too much along the lines of giving the option to the defendant as to whether he is going to be tried or how he will be tried. I think the Government has an interest in this also, and the types of offenses that he would normally be offered article 15 for or sent to a summary court-martial would be so minor in terms of the expected punishment that you should not take up the time of five or six or seven officers to determine this issue when perhaps the punishment that could be imposed might only amount to 3 or 4 days pay, a punishment which is well within the authority either of the article 15 officer or the summary court.

Senator THURMOND. I believe the last point you mentioned here is that you opposed giving subpena powers to investigative procedures under article 32; article 32 is analogous to a grand jury, this power would not be granted in civil courts.

General HODSON. That, Mr. Chairman, is not correct. We do not oppose giving subpena power to the article 32 investigating officer.

We have no objection to that bill subject, of course, as I indicated yesterday, to limitations which we think we should build right into the statute to make sure that the subpena power is not abused by the article 32 investigating officer.

Senator THURMOND. Is this statement of page 2 of the last paragraph, the first sentence of the last paragraph there?

General HODSON. It should read we favor giving subpena power.

Senator THURMOND. I was thinking that was the import of your testimony but this ought to be corrected then. That is the summary of General Hodson's statement, the last paragraph which says "We favor," instead of we oppose. The ones above that were "We oppose."

Now, General, with the suggestions that have been made, you would favor those five bills if the changes are made in the light you suggested, and you have prepared substitute bills to incorporate your suggestion that you feel will implement the ideals of the Defense Department from your experience.

General HODSON. Yes, sir. We have proposed these two substitute bills and they have been approved by the Department of Defense and we recommend their adoption in lieu of the five bills enumerated in the summary.

Senator THURMOND. Now, as to the other pieces, the other bills that have been introduced such as 745 and——

General HODSON. We oppose 745.

Senator THURMOND. And 748.

General HODSON. We oppose the mandatory requirement that the boards of review have a chief judge who is a civilian and that a civilian judge shall serve on each three-judge panel.

Senator THURMOND. 749.

General HODSON. We have no objection to 749, with certain modifications in the language.

Senator THURMOND. 755.

General HODSON. 755?

Senator THURMOND. That is right.

General HODSON. We oppose 755.

Senator THURMOND. Board of review ratings.

General HODSON. Yes, sir; we discussed that a moment ago.

Senator THURMOND. The first page of your summary refers to the five bills. The second page of your summary refers to the other legislation.

General HODSON. Yes, sir.

Senator THURMOND. Which, in effect, means that you——

General HODSON. It does not refer to all of the other legislation but it refers to parts of the rest of the legislation which deal with the administration of military justice.

Senator THURMOND. Which means that you are not in accord with the other bills pertaining to military justice, and that the ones that you are in accord with are the five bills, with the suggestions you have made, and your suggestions have been incorporated in your two substitute bills.

General HODSON. Plus, we have no objection to several of the bills.

Senator THURMOND. The subpena power which you mentioned.

General HODSON. With minor technical amendments.

Senator THURMOND. I just want to get your position clear on each of these bills.

General HODSON. Yes, sir.

Senator THURMOND. You feel then that from your entire study of this matter that so far as military justice is concerned, that your two substitute bills incorporate all the changes that should be made for the reasons you have given in your testimony.

General HODSON. They incorporate the changes which we advocate. However, we have indicated that we have no objection to certain of the other bills, such as tightening up the statute dealing with command influence in military justice matters, and with giving the investigating officer under article 32 subpena powers.

Senator THURMOND. Do you have any remarks on any of the other bills that I have not mentioned?

General HODSON. I believe, Senator Thurmond, that you have mentioned them all that are within the field of the administration of military justice. Of course two bills you did not mention are S. 761 and S. 762 which I touched on briefly yesterday. Those deal with the exercise of criminal jurisdiction over civilians, employees, and dependents overseas, and the criminal jurisdiction over former servicemen.

Secretary Morris yesterday asked that the consideration of these two bills be deferred because the Department of Defense is now staffing some legislation in this area, but we have not been able to get an agreement within the executive department yet.

Senator THURMOND. I think you have covered very adequately the legislation, and I want to commend you gentlemen on the testimony. Thank you very much.

Senator ERVIN. I will just ask you one or two questions and make several observations. You speak of 15,000 cases in all branches of the service where the discharge is on an administrative basis.

Do you not agree with me that very few of these cases are even taken up to the boards or review?

General HODSON. Well, the 15,000 figure which I was using, of course, is just an estimate.

Senator ERVIN. Yes, sir.

General HODSON. That number of cases, I believe, we figured out that the various boards for correction of military records now handle each year. We do not know in how many of those cases the respondent or petitioner would come to us and ask for a review by the Court of Military Appeals. But as my statement said, I believe it could involve as many as 15,000.

Senator ERVIN. Yes. But frankly I think you are stirring up a lot of ghosts that will not appear.

General HODSON. In my experience, when you furnish a person in this position with counsel at the Government's expense, we find that a great many people, particularly if they are in prison, have time to ask that counsel to do something for them.

Senator ERVIN. On that point, do you not agree with me that whenever the question reaches the Supreme Court of the United States, they are going to decide that the Government will have to furnish counsel?

General HODSON. Wait a minute, I do not want the committee to misunderstand me. As General Berg will indicate, I believe, when he is called as a witness, the Department of Defense in effect favors furnishing legally qualified counsel to respondents in administrative discharge proceedings, so he will have the benefit of legally qualified counsel. I was talking only, Senator, about this unusual, we think, provision to permit him to take a question of law to the Court of Military Appeals when the Judge Advocate General would be required to furnish him counsel and furnish the Government counsel.

Senator ERVIN. Yes; but, General, you and I are both aware of the fact that during the last few years, despite many decisions to the contary from 1789 down to date, the Supreme Court of the United States has practically held that you have to furnish counsel to every man in every case. They have virtually imposed that obligation on the States. Now of course——

General HODSON. These at least are criminal cases.

Senator ERVIN. Yes; and just one other question. My point is this: that out of these 15,000 cases, hundreds and hundreds of them, up in somewhere in the thousands I would surmise, would accept a discharge because they are not prepared to resist it.

Then, a great majority of the rest of them will accept the decision of the board in the first instance. A large percent of those remaining will carry their case before the board of review and accept the decision of the board of review. It would be a comparatively small number of appeals out of the 15,000 cases that would ever reach the Military Court of Appeals.

In North Carolina we have a supreme court to which everybody can appeal as a matter of right, not as a matter of discretion on the part of the court.

General HODSON. Does North Carolina furnish all those people counsel?

Senator ERVIN. They do in all criminal cases.

General HODSON. There are not too many of them.

Senator ERVIN. And we try thousands and thousands and thousands of cases in our courts, and only a handful of them, comparatively speaking, ever get to our supreme court.

General MANSS. Mr. Chairman, may I ask, does furnishing counsel require the counsel to take the case all the way up on appellate review or is his job done when he finishes in the trial court? Generally it is true under those circumstances if you have an indigent accused and he is tried, then counsel is no longer required.

Senator ERVIN. I saw a decision of the court of appeals from Virginia the other day reported in a newspaper—I do not take all my law from the newspapers, but I do on this point—and they held that a man had a right to take an appeal notwithstanding the fact that his lawyer said there was no merit whatever in the case. I do not know how courts are going to force lawyers to appear for a man when they do not think there is any merit in his appeal, but apparently that is about what they are going to do.

I want to thank you gentlemen for your very helpful suggestions, and both personally and also as chairman of the subcommittee your testimony has been most illuminating, and I might state in some instances has shaken my faith in some proposals.

General HODSON. Thank you, Mr. Chairman.

Mr. CREECH. We do have questions which I would like to pose, if I may, and ask these gentlemen if they would answer, perhaps, in writing some statistical information we wanted and some other data.

Gentlemen, there are some other questions, but in view of the lateness of the hour, and your great courtesy to the subcommittee in giving so much of your time, if it is agreeable with you, the subcommittee will pose additional questions to you in writing which will be made a part of the record of the hearing and will be placed in the record.

Specifically the subcommittee would like some additional statistics and we would also like to ask you for reports on certain cases and so, if we may, we will pose those in writing, and you should have them in the next day or two.[1]

But before you leave, I thought one thing that, perhaps, should be clarified for the record. Yesterday, in discussing S. 746, which would create a Navy JAG Corps, I do not believe we ever gave Admiral Hearn an opportunity to comment on that bill, and with regard to the Marine Corps, and the colloquy with Senator Ervin, I wonder, sir, do you envision the Navy JAG Corps including the Marine Corps and, if so, how would the Marine Corps be woven into the Navy JAG Corps?

Admiral HEARN. Well, you have asked me a rather difficult question to answer extemporaneously.

I think, as the JAG Corps proposal exists today, it is not envisioned that it would include lawyers in the Marine Corps. That being my understanding, I am not able to answer the second part of your question as to how they would be woven into the organization.

As you know, there is a JAG Corps bill which was mentioned by Secretary Morris yesterday, which is a part of the Bolte package, and which the Department of Defense desires to be considered along with the other personnel legislation which comprises the package.

Mr. CREECH. Now, with regard to the Bolte bill, the subcommittee has been told that the Defense Department is studying the general problem of professional careers in the military, and that the creation of a Navy JAG should await completion of that study.

Now, is the problem of professional careers in the military, is that a part of the study that was carried on and resulted in the Bolte bill?

Admiral HEARN. Sir, may I ask if there is someone present who can answer that? I am not familiar with the study that you have in mind. May I introduce Captain Williams, who is in the Manpower Division of the Office of the Secretary of Defense and is a part of Secretary Morris' staff.

Captain Williams.

STATEMENT OF CAPT. G. D. WILLIAMS, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER

Captain WILLIAMS. The Bolte bill, in principle, was the result of a study in 1960. At the time of that committee's consideration, the Navy JAG Corps bill was a separate proposal, and the committee refrained from any recommendations with respect to it.

[1] The questionnaires referred to, and the answers received appear as Appendix B, to be published separately.

At a later day, at the request of the Navy, Navy JAG Corps provisions were incorporated in suggestions that moved from that committee.

Now, the reference to the study really has nothing much to do with the Navy JAG Corps. We have a great deal of interest in the professional categories in the Armed Forces generally, and they pose a lot of problems, but that is not tied really to the creation of a Navy JAG Corps.

Mr. CREECH. Sir, you have mentioned the Navy JAG Corps was proposed as far back as 1960.

Captain WILLIAMS. Yes, sir.

Mr. CREECH. Do we understand that legislation has been pending in the Congress since 1960?

Captain WILLIAMS. No, sir; not continuously. There was——

Mr. CREECH. Not continuously?

Captain WILLIAMS. There was a bill introduced in Congress at that time. Later when the new legislative program came out, the question came out as to whether that should be carried as a separate item. Since it was relevant to Bolte, and because Bolte largely would change the structure of the personnel laws, it was most logical to fit it into the Bolte legislative proposal.

Mr. CREECH. Now, the Bolte proposal has been introduced in the last two Congresses; isn't that correct, sir?

Captain WILLIAMS. It has been transmitted to the Congress but it has not been introduced.

Mr. CREECH. Well, now, is there any legislation pending or is the Defense Department taking any action to have legislation introduced which would provide for a separate JAG Corps?

Captain WILLIAMS. Not as a separate piece of legislation; no, sir.

Mr. CREECH. So the only piece of legislation pending before the Congress concerning the establishment of a separate JAG Corps is S. 746?

Captain WILLIAMS. That is all.

Mr. CREECH. Is there any—does the Defense Department, to your knowledge, intend to introduce any other legislation?

Captain WILLIAMS. No, sir.

Mr. CREECH. Concerning it? It does not.

So there is, to your knowledge, or is there any reason why this subcommittee should not consider S. 746 with regard to the establishment of a JAG Corps vis-a-vis any other proposals of the DOD?

Captain WILLIAMS. Well, of course, that is a matter for the subcommittee to decide.

Mr. CREECH. Yes.

Captain WILLIAMS. We hope you have hearings on the larger piece of legislation in this session. But——

Mr. CREECH. Is that the Bolte bill?

Captain WILLIAMS. Yes.

Mr. CREECH. That bill has not been introduced, you say.

Captain WILLIAMS. It has never been introduced.

Mr. CREECH. And what leads you then to feel that hearings will be held on it?

Captain WILLIAMS. I do not feel that I can quote any assurances that can be considered to be any assurance to this committee.

Mr. CREECH. Thank you.

Captain, do you envisage any harm, any irreparable damage, being done to the manpower situation if S. 746 were enacted?

Captain WILLIAMS. Personally—you are asking for an opinion here which is strictly my personal opinion—I do not see any harm. I am not sure that it might prove to be a useful exercise if Bolte were taken up. Probably the bill would be merged with that bill anyway.

Mr. CREECH. Thank you, Captain.

Well, gentlemen, if you have no objection, and in the interest of time, the subcommittee will transmit to you later today or tomorrow some additional questions which we would appreciate your answering for the record, and also a request that you provide reports on certain cases and also provide certain statistical information that would be helpful to the subcommittee.

On behalf of the chairman I have been asked to say that the subcommittee is exceedingly grateful to each of you for your time and consideration and assistance as well as your numerous aides who have rendered such outstanding service to the subcommittee over such a long period of time. Thank you very much.

Admiral HEARN. It has been a great pleasure to appear.

Mr. CREECH. Thank you.

Mr. CREECH. The next witness will be Mr. Frederick W. Read, Jr., chairman of the military law committee of the Association of the Bar of the City of New York.

Mr. Read will be accompanied by Mr. Donald J. Rapson and Mr. Vincent McConnell.

STATEMENT OF FREDERICK W. READ, JR., CHAIRMAN, COMMITTEE ON MILITARY JUSTICE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. READ. Gentlemen, my name is Frederick W. Read, Jr., of New York City. I am a member of the bar of the States of New York and Massachusetts. I am admitted to practice in the U.S. Supreme Court and Federal courts, and my position in the practice of law in New York City is general counsel to the Home Life Insurance Co. However, I do not appear in that capacity today, but rather as the chairman of the committee on military justice of the Association of the Bar of the City of New York; and, with your permission, in order to set into proper perspective the position of our association in regard to these bills, with your indulgence, I should like to read the following statement.

Mr. CREECH. Mr. Read, please proceed in any manner that you would like. The chairman has asked me to say that the subcommittee is grateful to you and to Mr. McConnell and Mr. Rapson for coming here today to give the subcommittee the benefit of your experience in this area of the law, and that the subcommittee has benefited at other times from the fine work, exceptionally fine work, which your bar association has done in various areas of the law. We are very

happy to have you here today. We welcome you and look forward to your statements.

Mr. READ. Thank you.

The Association of the Bar of the City of New York acting through its committee on military justice considers it an honor to have been invited to appear at this hearing held jointly by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a special subcommittee of the Senate Committee on the Armed Services. It is a distinct privilege for me as the chairman of that committee on military justice to be present here this afternoon in that capacity. Moreover, it is my good fortune to be accompanied by two of the most able members of that committee, Donald J. Rapson, Esq., chairman of our subcommittee on legislation to amend the Uniform Code of Military Justice, and Vincent M. McConnell, Esq., chairman of our subcommittee on administrative discharges, who I understand will follow me in appearing before this hearing and who will submit separate statements prepared by their respective subcommittees. All of these statements have had the approval of the membership of our full committee given at a succession of committee meetings but in their present form at a meeting held expressly for that purpose at the house of the association in New York City on Tuesday evening of last week, despite the transportation difficulties encountered by all of us because of the transit strike in that city which was then in its second week.

Our association, acting through its committee on military justice, has long been concerned with the administration of military justice in the Armed Forces of the United States. Not only did that committee play an active and not inconsiderable role in the formulation of the Uniform Code of Military Justice but after the code became operative in mid-1951 and continuing ever since, it has maintained a constant and active interest both in the functioning of the code and in efforts to improve its administration.

Like other committees of our association, we have a gradually rotating membership but I can assure the distinguished members of your respective subcommittees that the one respect in which our committee does not change is its dedication and that of its members, as lawyers in civilian life and as representatives of an association two of whose stated purposes since its founding in 1871 have been (1) "promoting reforms in the law," and (2) "facilitating the administration of justice," to lend whenever and wherever possible all aid and assistance to your respective subcommittees in furthering our common objectives—viz., improvement in the administration of military justice in the armed services and the safeguarding of the constitutional rights of the country's military personnel. It is in that spirit and with that objective that Messrs. Rapson, McConnell, and myself welcome this opportunity to appear before you at this hearing.

As further evidence of the keen interest taken by the members of our committee in this general subject and in these hearings, I believe that you will find among those attending this hearing as observers or spectators several other members of our committee. I am appreciative of their support and I thought you would like to know of their presence.

As I am sure you are aware, our committee some years ago conducted a thoroughgoing study and made a detailed analysis of two bills which were designed to effect a number of major changes in the Uniform Code of Military Justice as originally enacted. The first of these was the so-called omnibus bill drafted by the Department of Defense and introduced in the 86th Congress in 1958 as H.R. 3387, and the other was a corresponding measure proposed by the American Legion introduced at about the same time as H.R. 3455. These studies resulted in the formulation by our committee of a written report dated March 1, 1961, which in addition to constituting an appraisal of those two measures also served to describe the provisions of a third bill drafted by our committee and offered by it as an alternative to the two earlier bills and in its opinion an alternative to be preferred. This third bill was introduced in the 87th Congress in 1961—in the House of Representatives as H.R. 6255 by Congressman Lindsay, and in the Senate as S. 1553 by Senator Javits. Copies both of that report and this last bill were furnished at about the time of their preparation and drafting to the Senate Subcommittee on Constitutional Rights.

On March 1, 1962, it was the privilege of our committee to have its then chairman, Everett A. Frohlich, Esq., and two of its other members, Arnold I. Burns, Esq., and Donald J. Rapson, Esq., testify before the Subcommittee on Constitutional Rights in connection with a hearing then being conducted in respect to the constitutional rights of military personnel.

Now once again it is the privilege of our association's committee on military justice to appear before subcommittees of the Senate, this time to present its views in respect to 18 bills first introduced in the Senate by Senator Ervin in 1963 following the conclusion of the earlier hearings—bills proposing improvements in the administration of military justice.

To facilitate a more systematic consideration of these bills and to permit of their study by its appropriate subcommittees, our committee on military justice has placed in one or the other of two classifications, 15 out of these 18 bills which were first introduced in the 88th Congress and which have been reintroduced in the 89th Congress.

Ten of these bills I believe can be said to deal generally with procedural aspects of the code and accordingly they have been the subject of a review and study made by our subcommittee on legislation to amend the Uniform Code of Military Justice. The chairman of that subcommittee as I have stated is Donald J. Rapson, Esq., and the bills considered by his subcommittee hear the following numbers: S. 745, S. 747, S. 748, S. 750, S. 751, S. 752, S. 755, S. 757, and S. 759. That subcommittee has also reviewed and studied the so-called G and H bills sponsored by the Department of Defense and recommended by the code committee, which, as introduced in the 89th Congress, are identified as H.R. 273 and H.R. 277, respectively.

Five of these bills plus portions of 2 of the previously mentioned 10, have been found to deal with the matter of administrative discharges and as a consequence they have been the subject of a review and study made by our subcommittee on administrative discharges.

The chairman of this subcommittee is, you will recall, Vincent M. McConnell, Esq., and the bills considered by his subcommittee bear the following numbers: S. 749 (insofar as it pertains to administrative boards), S. 750 (insofar as it pertains to administrative boards), S. 753, S. 754, S. 756, S. 758, and S. 760. This subcommittee has also reviewed and studied the provisions of Department of Defense Directive No. 1332.14 dated December 20, 1965, dealing with administrative discharges.

Before requesting the chairman of our respective 2 subcommittees to detail our committee's analysis and recommendations in respect to the above 2 groups of bills, it would seem appropriate at this point to note our committee's position in respect to the 3 remaining measures of the original group of 18 introduced by Senator Ervin in the 89th Congress, viz, S. 746, S. 761, and S. 762.

First in respect to S. 746, our committee considers that the establishment of a Judge Advocate General's Corps in the Navy would be a highly desirable development thereby achieving in the Navy the condition which now obtains by statute in the Army and by administrative regulation in the Air Force. If this were the only way to secure that development in the near future the committee would urge the enactment of S. 746. However, our committee has been given to understand that a comprehensive study is currently in progress in the Departmentof Defense which seeks the most desirable resolution of various factors which are involved in the consideration of this end other parallel staff positions of a career professional nature in the military services. Under these circumstances our committee considers it advisable to await what it is hoped will be an early completion of that study to be followed presumably by the introduction of appropriate legislation to achieve, among other things, the objective now sought by S. 746. Our committee will continue to remain very much interested in that development as well as attentive to the introduction of proposed measures designed to effect this legislative change.

Secondly, as to S. 761 and S. 762, which would accord to U.S. district courts jurisdiction over persons who were in military service when an offense was committed but who no longer have such status at the time of trial (S. 761), as well as over civilians with the U.S. Armed Forces abroad who commit offenses in violation of the Uniform Code of Military Justice (S. 762), our committee considers that these measures should receive the attention of the United States Department of Justice, among other departments. Pending a report from that Department based on its analysis and study of these measures, our committee prefers to make no comment at this time aside from noting the discussion which has occurred in respect to the two areas with which these measures are designed to deal. In addition, it is to be hoped that the Justice Department report might set forth with some particularity the extent of any problem considered to exist in these two areas at the present time.

Again permit me to express my thanks and appreciation and those of our committee for the privilege and opportunity accorded us to be present at this hearing and to present our views as to the matters under consideration.

I would like to ask that Messrs. Rapson and McConnell be permitted to present before you the statements authorized by their respective subcommittees, and if one or more of us can orally supplement or amplify the positions set forth in these statements, we shall be most happy to do so in response to your questions.

Thank you.

Mr. CREECH. Mr. Read, would you prefer to have each of the gentlemen make his statement before any questions are posed?

Mr. READ. I think that would be preferable, Mr. Creech, I believe so.

STATEMENT OF DONALD J. RAPSON, CHAIRMAN, SUBCOMMITTEE ON CHANGES IN THE UCMJ, COMMITTEE ON MILITARY JUSTICE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. RAPSON. Mr. Chairman, my name is Donald J. Rapson. I am a member of the bars of New Jersey and New York, and engaged in the general practice of law, with offices in Asbury Park, N.J., and in New York City. I am making this report in the capacity indicated by Mr. Read.

First of all, I would like to express my appreciation for the opportunity to appear before you again, and also express my appreciation for the efforts of Mr. James Cardinal and Mr. John Manning of the New York bar who assisted in the preparation of the report of our subcommittee.

We have furnished you with copies of the report of our subcommittee. With your permission, Mr. Chairman, I would like to deviate somewhat from the straight text of the report in order that I may paraphrase the remarks therein in the light of the testimony presented by General Hodson, and in the light of the questioning presented earlier today.

Mr. CREECH. Mr. Rapson, the chairman has instructed me to say that you are to proceed in any manner in which you desire.

Mr. RAPSON. Thank you.

This report deals with those 10 of the 18 pending bills which deal directly or indirectly with the administration of military justice under the Uniform Code of Military Justice, to wit:

S. 745—Field Judiciary System.
S. 747—Unified Board for Correction of Military Records.
S. 748—Courts of Military Review.
S. 749—Command Influence.
S. 750—(Sec. 1)—Counsel at Special Courts-Martial.
S. 751—Petitions for New Trial.
S. 752—Single Officer General and Special Courts-Martial Law Officer on Special Courts-Martial.
S. 755—Board of Review Ratings.
S. 757—Pretrial Proceedings.
S. 759—Abolishing Summary Courts-Martial.

In analyzing these bills we had two fundamental guidelines. First of all, we operated within the framework of the previous report and recommendation of our association contained in a report dated March 1, 1961, and testified to in substance in March 1962.

Our general impressions under that guideline were that the two sets of proposals, i.e., both the 10 Ervin bills, and "G" and "H" bills submitted by the Department of Defense, substantially reflect the recommendations made by this association in 1961. It was with a great sense of gratitude and appreciation that we were able to make that observation.

Our second guideline was a comparison of the two sets of proposals, particularly in light of the overall history of these legislative proposals, bearing in mind that starting with 1957 we had the so-called omnibus bill from the Department of Defense; then these committee hearings in 1961 which resulted in the 18 proposals by Senator Ervin; which were then followed by the "G" and "H" bills which, in large part, reflect the reaction of the Department of Defense to the Ervin proposal.

Our primary conclusion, when we state at the outset, and will implement in detail, is that immediate enactment of substantially all of the military justice proposals contained in the above 10 Senator Ervin bills, and the "G" and "H" bills is both desirable and readily attainable.

A preliminary reading of General Hodson's testimony substantially confirms this view, and it was brought out, I believe, in the questioning conducted by Senator Thurmond.

Accordingly, for reasons that should become evident as we make our report, our emphasis this time has been on the desirability of the general principles set forth in both sets of proposals rather than an intensive analysis of each proposal as to its language and the technical aspects of each proposal.

We took these two sets of proposals, particularly the 10 bills submitted by Senator Ervin, and developed four major groupings. In group I are the proposals that are substantially adopted by the DOD bills: S. 751, S. 752, S. 750 (section 1), S. 757 and S. 747 (section 1(b)).

Significantly, on page two of General Hodson's testimony, the exact same conclusion evolves. To quote General Hodson:

> I would now like to discuss five of the bills which clearly involve areas in which there is substantial agreement in objectives and purposes between the Department of Defense and the sponsors of those bills insofar as they relate to the administration of military justice. These bills are S. 747, S. 750, S. 751, S. 752, and S. 757.

These are the same bills that we have placed in group I, viz., proposals that are substantially adopted by the DOD bills.

In group II are the proposals which are substantially similar to previous association recommendations which have not received DOD approval, but which really should be unobjectionable to DOD. These are S. 745, the field judiciary system, S. 749, command influence; and S. 755, board of review ratings.

Our third grouping consists of proposals that are substantially similar to previous association recommendations, which should be enacted despite lack of approval by DOD. In that category we place S. 759, abolishing summary courts-martial.

Our fourth grouping consists of proposals that the association does not approve. Here we have S. 747 (section 1(a)), the provision for a unified board for correction of military records, which we oppose; and

S. 748, provision for civilians on courts of military review, which we also oppose.

We will now discuss each group seriatim.

In group I and throughout our report, wherever possible we have made reference to the proposal emanating from Senator Ervin and the comparative proposal set forth in the "G" or "H" bill.

In group I, first of all, we have S. 751 and sections 1(1) and 1(2) of H.R. 277, both of which would (a) extend the time within which a petition for a new trial could be filed to 2 years and (b) broaden the scope of relief available in that proceeding. We are in favor of the principles espoused by both proposals.

We also take note at this point that the Department of Defense proposal would also make provision for the review of inferior courts-martial within the Judge Advocate General's office. This is an extension of Senator Ervin's proposals, and we are in favor of that aspect of the Department of Defense legislation.

We do note, however, that in the sectional analysis provided by the Department of Defense, its proposal is not intended to limit the powers of the boards for correction of military records. Hence we would have two complementary levels of extraordinary review of inferior courts-martial.

The second grouping within group I is S. 752 and several sections of H.R. 273 which generally provide for (a) a law officer on a special court-martial as a condition to the adjudication of a bad conduct discharge and (b) the accused's right to elect to be tried by a single officer general or special court-martial composed of a law officer.

Now, making reference to the previous testimony, we agree with the point made by the Department of Defense as to the lack of desirability of having the single law officer have authority to impose the death penalty.

On the other hand, we do not agree with the Department of Defense, insofar as it would condition the accused's right to a single officer court-martial, upon the government's consent.

In our 1961 report we stated:

> As a general matter it (meaning the association) does not think it desirable to condition the available of the new judicial procedure upon prior convening authority approval. It recognizes that the Navy may experience difficulty in providing qualified legal personnel to conduct single officer special courts-martial on Navy vessels. Moreover, it believes that in time of war or national emergency the military authorities should not be hamstrung by an absolute right in the accused to demand a special court-martial before a qualified law officer. Accordingly, in its proposed legislation, your committee has modified this provision to require convening authority approval only in cases of personnel aboard vessels and in time of war or national emergency.

The association endorses the principles contained in S. 752 and H.R. 273, but is concerned with the following problem:

Would not the detailing of a law officer for a special court-martial by the convening authority perhaps influence the members to adjudge a bad conduct discharge on the theory that such punishment was desired by the convening authority? If so, is the accused almost compelled to exercise the waiver and elect to be tried by the single law officer rather than by the members?

The association previously recommended that the authority of special courts-martial to adjudge bad conduct discharges be repealed.

It still regards this as the most effective solution to the problem, but, nevertheless, endorses the pending proposals, albeit less effective. We might take note at this point that the Army has got along for at least 10 years without the authority to adjudge punitive discharges at special court-martial levels simply by the administrative expedient of not providing court reporters at special courts-martial.

Notwithstanding our endorsement of the pending proposal, we do feel that consideration should be given to the above problem, and recommend that some safeguards be created.

As one suggestion, the law officer might be required to specfically instruct the members on the point upon request by defense counsel.

The third grouping within group I is section 1 of S. 750 and section 1(4) of H.R. 273 which provide for representation of the accused by qualified counsel at a special court-martial as a condition to the granting of a bad conduct discharge. The comments made above concerning law officers on special courts-martial are equally applicable to this particular problem.

We again endorse the concept of having representation of the accused at special courts-martial but reemphasize our previous recommendation that the authority of special courts to adjudge bad conduct discharges should be repealed.

The fourth grouping in group I is S. 757 and section 1(12) of H.R. 273 both of which provide for the conducting of pretrial conferences at general and special courts-martial, to which there should be no disagreement whatever with the principle involved. Pretrial proceedings are clearly an enhancement of any judicial system.

The fifth grouping in group I is section 1(b) of S. 747, which would expressly authorize the boards for correction of military records to take full corrective action in a court-martial case that has not been reviewed by a board of review, including the removal of the fact of conviction, and section 1 of H.R. 277. At present, as a result of administrative actions, the boards are exercising such authority in the Air Force and Army, but not in the Navy. Inasmuch as such authority is always subject to change by reason of a later administrative interpretation, the association urges that the extraordinary review authority be expressly granted by statute so as to remove any doubts. This was a key proposal originating in the 1961 report of the association.

Section 1 of H.R. 277 would give the Judge Advocate General similar corrective authority. Inasmuch as the boards for correction of military records are usually guided by the requested recommendations of the Judge Advocate General in the boards' review of inferior courts-martial, the two proposals are, as a practical matter substantially similar. Moreover, the sectional analysis of H.R. 277 states that this amendment would not limit the power of the boards. Hence, both proposals complement one another, and both can and should be enacted.

We now come back to major grouping number II: Proposals that are substantially similar to previous association recommendations which have not received DOD approval, but which should be unobjectionable to all DOD.

(*a*) S. 745 provides for the establishment of the field judiciary system throughout the services for use in general courts-martial. At

present, the Army and Navy operate judiciary systems substantially as contemplated by the bill. By and large, the systems have effected a manifest improvement in the administration of military justice. The system should be made mandatory for each of the services. Nothing that we have heard today causes us to deviate from this position. This was a key feature of the association's previous recommendations.

(*b*) S. 749 provides for the broadening of the provisions of article 37: UCMJ, which prohibit the exercise of "command influence." To the extent that the provisions apply to courts-martial, there is no reason to suspect that the DOD could or would oppose such proposals. In fact, it might be noted that section 1(7) of the original "omnibus bill" recommended by DOD broadened article 37. However, to the extent that the proposal would also make article 37 applicable to administrative proceedings, such provisions should be placed with the statutes governing such proceedings, rather than in the UCMJ which is concerned solely with the military judicial system.

(*c*) S. 755 would prohibit any member of a board of review from preparing or taking other action with respect to an effectiveness, fitness, or efficiency report of another member of the same or another board of review. This, too, was a key recommendation of the association in 1961. There is no sound reason for DOD to oppose the proposal. Nothing we have heard earlier today changes our position. If there is a problem, legislation is needed; if there is no problem, legislation can do no harm and will terminate what is on its face an undesirable aspect of any judicial system.

Major grouping III consists of one proposal that is substantially similar to previous association recommendations and which should be enacted despite lack of approval by DOD.

S. 759 would eliminate summary courts-martial. This proposal originated with the association and was one of its major recommendations. In fact, the association conditioned its approval of expanded article 15 punishment powers upon the simultaneous abolition of summary courts-martial, stating in language equally pertinent today:

> 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 forefeiture 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 courts-martial and its bill abolishes that forum. The result should be a substantial reduction in the number of criminal convictions for minor offenses. 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.

The military has had 3 years of experience with the increased article 15 punishment powers, and the experience has been excellent. The summary courts-martial rate has declined sharply, and there is no justifiable reason to continue such a forum. Moreover, if the pending

proposals for a single law officer court-martial are enacted, the offenses that are relatively minor, but too serious to justify nonjudicial punishment should be tried by that law officer, rather than by the nonlawyer officer now constituting the summary court martial. As a corollary of this proposal, and in view of the provisions of article 15(a): UCMJ permitting an accused to demand trial by court-martial in lieu of nonjudicial punishment, it should be provided that an accused who exercises this right will be tried by the single-officer special court-martial, but that the punishment imposable by such officer shall not exceed the present punishment authority of summary courts-martial. This was covered in the former association proposals, but does not appear to have been covered by S. 759. This also meets the point and objection raised by General Hodson on page 17 of his testimony.

Major grouping number IV consists of proposals that the association does not approve.

(*a*) S. 747 (sec. 1(a)) would provide for the establishment of a single board for the correction of military records to replace the comparable Army, Navy, and Air Force boards. The association takes the view that as long as the services are not unified, there will continue to be problems peculiar to the particular service. For that reason, the boards, which have extraordinary powers of correction and review, should necessarily be composed of men from the particular service, so that the maximum expertise and experience can be applied to the wide variety of problems, some of which are quite complex, that regularly come before the boards. Accordingly, the association disapproves the unification proposals of S. 747.

(*b*) S. 748 would replace boards of review with courts of military review consisting of three-man panels, with at least one civilian on the panel who would be chief judge. The association sees no need to put civilians on the boards of review. Although surely not intended, such action could be construed as a manifestation of congressional mistrust of military lawyers. This association has the highest respect and regard for the military lawyer and urges that nothing be done which could possibly erode their prestige, and detract from the attractiveness of a legal career in the military service. To the extent that some improvements might be needed in the operation of boards of review, the proposals contained in S. 755 should have a significant effect.

CONCLUSIONS

Group I reflects significant areas of agreement between the Ervin proposals and the DOD bills on the following subjects: The justification for courts-martial consisting only of one law officer; the desirability for pretrial procedures; the need to furnish the accused with qualified counsel at special courts-martial as a condition to the authority of that court to adjudge a punitive discharge and the desirability of having a law officer sit at that forum; and the need for expanded extraordinary review authority for erroneous inferior courts-martial.

A study of the remaining proposals contained in the DOD bills reveals that the main thrust therein is the expansion of the authority of the military law officer so as to constitute him a true trial judge.

This surely is consistent with the objectives of Senator Ervin's proposals.

Thus, it is quite clear that a blending of the aforesaid Ervin proposals and the DOD bills could be readily accomplished. There is very little disagreement between the two sets of proposals in these areas.

In addition, it is highly probable that the DOD could approve the Ervin proposal contained in groups II and III, particularly if its G and H bills were also approved.

Under these circumstances, the association urges that a new omnibus bill containing the substance of the proposals in S. 745, S. 747 (section 1(b)), S. 749, S. 750 (sec. 1), S. 751, S. 752, S. 755, S. 757, S. 759, H.R. 273 and H.R 277 be immediately drafted and enacted into law H.R. 273 and H.R. 277, as evidenced by General Hodson's testimony, are in large part directed to modifications designed to improve the comparable proposals set forth by Senator Ervin.

We agree that some of the modifications suggested by the Department of Defense are desirable. However, rather than take firm positions on these modifications now except to the extent that we already have in this report, the association would prefer to first see the preparation of this new omnibus bill which would, in effect, be a blending of the best of the two sets of proposals. Undoubtedly most of the areas of disagreement would by then be resolved.

The enactment of such an omnibus bill would effect the first major changes in the administration of military justice (except for the increased powers under article 15, U.C.M.J.), since the enactment of the Uniform Code of Military Justice over 15 years ago.

The enactment into law of such a bill would result in major improvements in the administration of military justice and greatly enhance the rights and protections accorded to servicemen.

This action should be the first order of business. By this we mean that the military justice features of the 10 Ervin proposals discussed in this report should be attended to first, ahead of the administrative discharge proposals, which are more controversial. This emphasis on the military justice proposals is urged in view of the very obvious likelihood of quick agreement by and between all parties concerned. This association stands ready to offer its maximum assistance and cooperation in such an endeavor.

Thank you.

Senator ERVIN. Mr. Rapson, on behalf of the subcommittees and on behalf of myself, I wish to thank you and your committee for your most helpful and illuminating exposition of views.

Mr. RAPSON. Thank you, Senator.

Senator ERVIN. You point out very forcefully what started to become apparent this afternoon in the colloquy between myself and Admiral Hearn and General Hodson and General Manss: the differences between us on these matters are differences of form rather than substance. You have pointed out that it is quite possible to produce a bill that would reconcile the slight differences of view with respect to matters of form, and get a bill which would be very beneficial both to the military services and also those servicemen who have to be dealt with under the code of military justice as well as in administrative proceedings.

Your paper has also been extremely helpful to me in that instead of taking positions with respect to approving the bills in cases where you thought there were merits, you have taken the occasion to point out what bills you deem inappropriate.

Mr. RAPSON. Thank you, Senator. In the language of the vernacular, this case can be settled very easily.

Senator ERVIN. I was very much impressed with your observation that where a serviceman is offered nonjudicial punishment, and he has refused it, his case should be tried not by the summary court, which you think should be abolished, but by one law officer sitting as a special court, and that the jurisdiction of the single law officer special court-martial should be restricted to the punishment which would be permitted under present law by the summary court. I think that goes a far way to meet one of the very strong objections voiced by General Hodson.

Mr. RAPSON. Yes, sir.

Senator ERVIN. Do you have any questions?

Mr. McConnell, we will be delighted to hear from you at this time.

STATEMENT OF VINCENT M. McCONNELL, CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE DISCHARGES, COMMITTEE ON MILITARY JUSTICE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. MCCONNELL. Thank you, Senator.

My name is Vincent M. McConnell. I am an attorney admitted to practice before the New York State Bar. I am associated in the general practice of law with Lord, Day and Lord at 25 Broadway, New York City.

I am also admitted to the U.S. Court of Military Appeals, U.S. District Court for the Southern District of New York, and the U.S. Supreme Court.

Let me first add my thanks to those already expressed by Mr. Read, chairman of our committee on military justice and by Mr. Rapson, chairman of our subcommittee on legislation to amend the Uniform Code of Military Justice for the invitation given to us to appear here today.

I would also like to express the appreciation of the subcommittee on administrative discharges of which I am chairman for the work that has been done by the subcommittee on constitutional rights over the past number of years in drafting and proposing legislation to protect the constitutional rights of the members of the armed services of the United States. Our subcommittee has been enabled to keep abreast of the status of the various bills which were introduced to the 88th Congress, as well as in the 89th Congress, by the courtesy of your chairman and staff counsel.

I perhaps should at this point make some note of the fact that at the time of the 1962 hearings the members of the military justice committee who testified at the hearings made some reference to the fact that a study was then in process as to proposed legislation in the field of administrative discharges which would be ready in a matter of months. I must say in all candor that such a study has never

been completed in large measure due to the turnover in the personnel of this subcommittee, the chairmanship of which I myself assumed only some 3 months ago.

Not having had the opportunity to conduct a comprehensive study as to the proposed legislation in the field of administrative discharges, our committee has nevertheless considered in detail the text of each of the seven proposed bills, as outlined by Mr. Read, dealing with this matter, together with the text of the 1962 hearings, the summary-report of hearings prepared by your subcommittee, and various other materials and has also used the services of a Columbia Law School student to research the entire question of administrative discharges.

For the purposes of our subcommittee's recommendations the bills can be broken down into two groups: one comprises the five bills dealing, in certain instances only in part, with the following matters: command influence over board proceedings (S. 749); right to counsel before administrative discharge boards (S. 750); the presence of a law officer at administrative discharge boards (S. 754); double jeopardy as to administrative discharge boards (S. 756); and the right of compulsory process as to witnesses and other evidence before administrative discharge boards (S. 760). The second group comprises the two bills dealing at least in part with the following matters: first, the review by the Court of Military Appeals of cases already reviewed by the boards established under sections 1552 and 1553 of title 10, United States Code, viz, boards for the correction of military records and discharge review boards (S. 753); and secondly, the right to demand court-martial in lieu of an administrative discharge board hearing, where action is proposed to administratively discharge or separate a member of the Armed Forces under conditions other than honorable on the grounds of alleged misconduct (S. 758).

As to the first group consisting of five bills, there is general agreement among the members of our subcommittee, as well as among the members of our full committee, that the essential safeguards sought to be enforced by these bills should be enacted into law. There are, however, some minor reservations as to certain aspects of these bills, as for example, whether under S. 754 there is a need of a law officer qualified under article 26(b), Uniform Code of Military Justice rather than simply a member of the bar of the highest court of a State or of a Federal district court who is not certified as a law officer for a general court-martial, and whether under S. 750 it is not sufficient to obviate the requirement of counsel certified under article 27(b) if the convening authority states on the record the unavailability of certified counsel or whether only in time of war such counsel need not be supplied.

I advert here to the Department of Justice directive dated December 20, 1965, which would provide that in all administrative discharge board proceedings counsel will be supplied, and that counsel will be counsel certified under article 27(b) of the Uniform Code, unless the convening authority certifies on the record not only the availability of such counsel but the qualifications of the person who is serving.

I should note here that while our committee agrees with the purpose of this first group of five bills, there is considerable sentiment among us that the precise form of these bills is objectionable. As Mr. Rapson has already stated as to certain features of the same bills,

statutes dealing with administrative discharges should not be placed in the Uniform Code of Military Justice which is concerned with the judicial system. This has been strongly expressed by the representatives of the Department of Defense who preceded us, not only Mr. Morris, but General Hodson and others expressed this view. These bills should be enacted into law as a separate chapter of Title 10, U.S. Code, concerned solely with administrative discharge board proceedings to which might well be added additional provisions dealing with the entire scope of such administrative discharge proceedings. To add these provisions to the Uniform Code of Military Justice would cause the unnecessary and undesirable merging of the judicial and administrative systems—unnecessary since the benefits of the legislation could be achieved in other ways, as, for example, by a separate chapter of title 10, and undesirable because the grafting onto the essentially integral system which is the Uniform Code of Military Justice, of legislation dealing with an entirely different system, namely, administrative discharge proceedings, could only cause confusion and the possibility of dilution of the concepts of judicial due process now firmly established in the Uniform Code.

This leads us to the remaining two bills, dealing with the Court of Military Appeals review and the right to demand trial by court-martial, S. 753 and S. 758, respectively. Our committee has not, I must state, taken a uniform position on these bills. On the one hand, there are those of us who believe that any proposal which results in the merging of the administrative and judicial processes is undesirable, and when the proposals, as here, would go further and effectively supplant one system with the other, it must be opposed. This group feels that the proposal for review by the Court of Military Appeals of cases certified to it by the Judge Advocate General after review by a board of correction of military records or by a discharge review board, or upon petition and grant of review by COMA itself, would place upon this court, that is, the Court of Military Appeals, not only the duty of deciding legal issues raised by administrative discharges without and statutory standard of administrative due process other than the existing orders, directives and regulations applicable to such proceedings as are existing, which it is submitted are inadequate, but might well be taken as an implicit grant of authority in the Court of Military Appeals, to use the standard of criminal due process applicable under the Uniform Code to administrative board proceedings. The remaining proposal which would grant to servicemen the right to demand trial by court-martial in lieu of a hearing by an administrative discharge board when discharge under other than honorable conditions for alleged misconduct is proposed, would be, we submit, the death knell of the administrative discharge board proceedings.

On the other hand, there are those among our committee who would accept the proposals for Court of Military Appeals review and the right to demand trial by court-martial in lieu of administrative board proceedings, as necessary in order to fully insure the protection of the constitutional rights of servicemen in view of the possibility of their receiving an undesirable discharge.

Since it is precisely the stigma of a discharge under other than honorable conditions that has led to the proposed legislation in the field

of administrative discharges as well as the division in our own committee noted above, perhaps a constructive service can be rendered by posing the question of whether the purpose of this legislation and perhaps future legislation in the field of administrative discharge board proceedings can be achieved only by the complete removal of the label or characterization of a discharge or separation from the armed services under administrative discharge proceedings. Those who would grant the right to an individual to demand trial by court-martial in lieu of a board proceeding where an undesirable discharge is proposed, and who would provide for COMA review of legal questions arising from the review of administrative discharges and other matters by the boards established under sections 1552 and 1553, United States Code, will undoubtedly never be completely satisfied until a proceeding in which it is proposed to discharge a serviceman under other than honorable conditions is surrounded by every standard of due process and every statutory protection now given to those accused of crimes or offenses under the Uniform Code of Military Justice. On the other hand, those who wish to prevent the confusion and possible dilution of the concepts of judicial process set forth in the Uniform Code that might occur by the grafting on to it of provisions dealing with administrative discharge board proceedings and are also motivated by the belief that the various branches of the Defense Department have the right to discharge a serviceman for breach of security, for unfitness and for misconduct, without the necessity of trying the individual by court-martial, are frank to admit that the stigma of an undesirable discharge is a high price to be paid for such right.

Would it not then be profitable to explore the question whether it is indeed necessary to characterize any administrative discharge by such terminology as "undesirable"? While the first thought of a petty offender, a homosexual, or one who consistently shirks his duty receiving a certificate of discharge or separation which is the same, insofar as it is unlabeled, as that received by one whose performance of duty is excellent, does it really achieve any substantial and legitimate purpose by characterizing such people as "undesirable"? Would the serviceman whose conduct is above reproach be any less motivated if he did not expect to receive an honorable discharge? Does the risk of receiving an undesirable discharge actually serve as a deterrent to those who are tempted to experiment in the use of marihuana, stimulants, tranquilizers, or narcotics, for example—one of the categories under the current regulations dealing with the discharge of servicemen for unfitness?

These and other considerations have convinced our committee that it would be worthwhile to explore in depth the true necessity and usefulness of characterizing administrative discharges with labels such as undesirable. As to the matter of service benefits, these could just as easily be determined according to the regulation pursuant to which the individual was discharged or separated. As to the questionable right of a civilian employer to know the circumstances of a man's military or naval service, the discharge certificate or certificate of separation might cite the regulation under which the individual was discharged, and it would be left to the employer to obtain the individual's consent to further explore the quality of his service.

While our committee does not know the answers to these questions, it considers them important enough to ask, and offers its assistance and cooperation in seeking a foundation grant or other financing for such research if it is felt by the members of your subcommittee that a worthwhile purpose might be served.

Thank you.

Senator ERVIN. Mr. McConnell, you have made a most excellent, a very excellent, statement. You have made the very intriguing suggestion that, perhaps, a study should be made of solving some of the conflict that arises in this area in administrative board proceedings by establishing some system under which there is no derogatory characterization of service. This, I think, is a suggestion which merits the study and consideration of the Department of Defense and various branches of the services, as well as of this subcommittee and of the Congress.

Offhand, the only objection to that course that occurs to me is that it might be urged by the military that one of the greatest things which a man receives as a result of his service in the Armed Forces is the honorable discharge, and that if you release people who have proved their unworthiness by a discharge that does not brand them with dishonorable conduct or undesirable conduct, that it might remove from the armed services one of the greatest incentives to good service, and one of the strongest deterrents to bad service.

But you certainly have made a suggestion that is worth considering—whether or not you could not modify the present method of discharge by administrative boards in a manner which would elimniate the undesirable character rather than the undesirable consequences flowing from such discharges.

Mr. MCCONNELL. The consequences surely would flow due to Veterans' Administration directives. These would be determined by the nature of the proceedings or regulations under which the person was discharged. For example, our present Department of Defense directive lists the various reasons under which an individual can be discharged.

I think this matter is worth considering and looking into. The military has expressed the view, and many people hold it, that it is an incentive to an individual to serve meritoriously in order to obtain an honorable discharge certificate and, likewise, that it would be a deterrent to those who would otherwise engage in conduct which would lead to their discharge for unfitness, security, misconduct.

But as long as the undesirable label is given to a person who is discharged under administrative board proceedings, there is going to be a problem between the constitutional due process necessary to safeguard his rights and, on the other side, the absolute need of the service to get rid of people who simply do not assist in the military effort, in fact detract from it. So that one of two consequences can follow: Either that administrative discharge board proceedings will eventually be surrounded by so many rights that they will become, in effect, courts-martial and we will have the burden of proof, the reasonable doubt, the entire rules of evidence and all the other safeguards and then boards are in effect, turned into courts-martial and the service is considerably hampered.

Whereas, on the other side, the right of the services to get rid of unwanted and unnecessary personnel, possibly results in stigmatizing them for the remainder of their lives, and leads to the consideration by committees such as yours, Senator Ervin, of legislation necessary to safeguard their constitutional rights.

Senator ERVIN. You have made some very fine observations on that point.

Mr. READ. Senator Ervin, if I may, may I say a word?

Senator ERVIN. Yes.

Mr. READ. I should like to take you behind the scenes just a little bit in the philosophizing by our committee in coming to these conclusions. We, as civilian lawyers, are prone to draw analogies to our civilian experiences. We realize, however, that the military services are sui generis, they are not like a private employer.

In private life the employment of an employee comes to an end in one of three ways, it seems to us. That is either through retirement by reason of age or disability, or through resignation, or by being discharged.

But under those circumstances, usually there is no stigma attached to the fact of termination which prevents him from getting another position.

Now, we concede that in private employment the private employer can as to both employment and discharge be more selective to a degree than can the military service. But we did endeavor, insofar as possible, to draw an analogy here.

On the other hand, the types of discharge which are accorded a serviceman can have detriments to him, it seems to us, in one of three ways. It may place an intangible stigma upon him for the rest of his life. It may prevent him from securing civilian employment thereafter. Also it may curtail benefits which he might otherwise obtain as a veteran. It seems to us a consideration of these factors along with a more thorough study, perhaps, than the military services have been in a position to make thus far of the scope of administrative discharges might be helpful in pointing up more clearly some of the issues which we face; and, in that connection, sir, I would like to pledge you the cooperation and assistance of the committee on military justice of the association of the bar in that area.

Senator ERVIN. Thank you, Mr. Read. Your philosophizing has been very helpful to me. I think we have got the possibly here, perhaps, of getting a solution; something along the lines suggested by Mr. McConnell to the subcommittee. This may be a solution in a great majority of the cases.

It may not be a solution in cases where the conduct of a man has been rather outrageous, and the military feel he should be discharged by administrative proceedings, but it is certainly something that, I would say, I hope some of the brightest minds in the Department of Defense will go to work on.

Mr. READ. We hope so, too, Senator.

Senator ERVIN. I think all of us have a common objective. Of course, I think you and I, perhaps, as lawyers, would have to confess that sometimes we are so convinced about the rectitude of the law that we would like to extend the protections to the fullest degree to those

who are involved in legal matters, either in civilian life or in the military. And we may get to the point where we even think that maybe a man has, after all, got a vested right to remain in the military—that he ought not to be put out unless a civilian would be punished or have resulting damages or have some other curtailments of his freedom taken from him in the same circumstances.

After all, there is a distinction: the military man has no vested right to demand that he be retained in service. At the same time, he ought to be fairly treated so that he is not unjustly released or discharged from military service. He ought to at least have fair processes. In other words, he ought to have fair processes to determine whether he ought to be expelled from the military service. I think we are all trying to reach the same objective, because none of us want to do anything to impair the discipline, the necessary discipline, of the Armed Forces. We have got to recognize the necessity for discipline; at the same time recognizing the necessities for the substance of justice, and see if we cannot find a way to reconcile those two things without either one of them destroying the other.

Mr. READ. I am sure our committee would wholeheartedly endorse that.

Senator ERVIN. Thank you very much for those remarks.

I may have to leave before the questioning is completed, which I hate to do, but I want to thank each one of you gentlemen for some very fine contributions to the problem that is confronting us and, in some aspects baffling us.

Mr. READ. Thank you.

We would like to bring to the committee the greetings of Judge Rosenman, the president of our association.

Senator ERVIN. I understand some of the other members of your committee are present. We would like to have them identified so that their public service in coming here can be at least recognized when the Congress considers these bills.

Mr. READ. Mr. Peter A. Jaffe, a member of our committee, and Mr. Charles Lee Nutt, another member of our committee. There would have been two others, Senator. They are down here on active duty for training as Reserve officers but they have been sent out of the city for the day. I think it is only a coincidence. [Laughter.]

Senator ERVIN. If you gentlemen have no objection, I will ask the chief counsel to proceed with any questioning he may have in my absence.

(Discussion off the record.)

Mr. CREECH. Mr. Read, if I may, I would like to direct a couple of questions to you, sir.

You mentioned in your statement that the Defense Department is currently studying the problem of professional careers in the military, and that S. 746, creating a Navy JAG should await completion of that study.

Now, the subcommittee was told today, sir, that creation of a Navy JAG Corps was first proposed legislatively back in 1960.

Do you feel, in view of the long delay in the creation of the Navy JAG Corps, and the general agreement, that one is desirable, that it is essential that the Navy JAG be delayed until the general study is completed?

Mr. READ. May I express my personal opinion on that, Mr. Creech, apart from being a member of the committee? I had hoped for the creation of a Navy JAG Corps long before now, and I think if one were created it would be for the best interests of the military and the naval service. I think it would also have an appeal to attract on a career basis into the Navy capable and qualified lawyers to an extent not possible now.

On the other hand, I realize that information not known to us may be available to you—information which presumably is more current than that to which we have access along the lines expressd by Captain Williams here earlier today. If the study by the Department of Defense would implement this proposal in a way so as to more effectively achieve the objective which we all seek through a Navy JAG Corps then I would counsel some slight delay in the enactment of this bill hoping for an even more effective bill based on that study. But it is only on that basis, and I think I, personally, speaking without complete knowledge as to the background here, feel if an interminable delay were involved I would recommend the enactment of that measure now.

Mr. CREECH. Thank you, sir. Also, I should like to ask, if I may, regarding these bills, S. 761 and 762, those which pertain to extraterritorial jurisdiction, sir. Has your committee given any thought to a general amendment to section 7 of the United States Code, title 18, which now provides for special maritime jurisdiction to cover all crimes committed by Americans on foreign soil?

Mr. READ. The committee, as a committee, has not, nor have I individually. Possible one or the other of my cocommitteemen have, and I would be glad to hear them express opinions on that score.

Mr. RAPSON. Speaking for myself personally, this problem developed while I was on active duty. My own general feeling is that civilians who are civilians should not in any event be subject to court-martial jurisdiction. I think there is such a basic difference between the philosophy, atmosphere, and judicial processes in the military disciplinary system, as compared with civilian processes that a civilian should not be court-martialed. I do not mean this as a criticism, but merely to point out this difference which has been expressed by the Supreme Court.

Mr. CREECH. Well, now, sir, accepting that premise, would you care to build upon it with regard to the proposals in S. 761 and S. 762? Senator Ervin has indicated that in introducing these two bills he felt, he has indicated in regard to all of the bills, as a matter of fact, that he is not wedded to the language in any of them; that he considers them working papers in producing meaningful legislation, if it is desirable, and in these two bills he has indicated that he feels there are very grave constitutional questions and that, perhaps, the greatest constitutional issues posed by any of the bills are posed by the problem of providing jurisdiction, extraterritorial jurisdiction, over American citizens.

I wonder if you would care to expand further what you have said.

Mr. RAPSON. To the extent it is possible I would prefer to see the jurisdiction exercised by the U.S. district courts. However, I am not convinced at this point that the problem is as pressing as it perhaps has

been indicated. After all, this problem evolved in 1957, I believe, with the *Covert* and *Smith* decisions and at that time there was great hue and cry. However, it is now 1966. We seem to have managed without legislation.

Mr. CREECH. Mr. Rapson, if I may turn to another bill, S. 752, and your colloquy with Senator Ervin and earlier in your statement concerning that bill, you commented upon the danger that the detailing of a law officer to a special court might suggest to the members the commander's desire to give an accused a bad conduct discharge.

I wonder, sir, would you care to comment further on the extent to which you feel this would be a practical problem and what solution, if any, you would care to offer.

Mr. RAPSON. Well, I think it is a very practical problem. I just am worried about those three to five line officers sitting there. They undoubtedly would be familiar with the provision that the law officer would not be there unless it was required as a condition to the adjudication of a punitive discharge, and it must go through some of their minds that the convening authority had in mind that this was the type of case which warranted the adjudication of a bad conduct discharge.

We know that convening authorities do occasionally come down with directives to "educate" board members. They occasionally come up with some form of criticism with respect to the lack of severity of sentences, and this is another aspect, of the same problem. That is why we always come back to the initial proposal that special courts-martial should not have the authority to adjudicate punitive discharges. But to the extent that this proposal is made, we endorse it in principle. However, we know of no solution to the problem.

The possible recommendation that there must be a mandatory instruction upon request of defense counsel is just one, perhaps weak, solution to the problem. I do not think you can avoid the problem, to be perfectly frank with you. I think you are going to have it if you enact this proposal.

Mr. CREECH. Mr. McConnell, we have some questions for you, too, but I wonder if, for the sake of good order, it would be better if Mr. Everett and Mr. Woodard and Mr. Baskir at this time would address their questions to Mr. Rapson, and in that way dispense with these questions, and then we will address ourselves to the problem, the questions we have, with regard to the administrative discharge procedures, to you.

Mr. EVERETT. I have this question. With respect to your comment on page 6 concerning unification of the correction board, that in view of the diverse problems in the different services, the board should necessarily be composed of men from the particular service.

It is our understanding that at the present time these correction boards are composed of civilians who are civilian employees working on a part-time basis in their duties in the correction board. The subcommittee was furnished 3 years ago with statistics as to the amount of time involved.

In light of that circumstances might it not be preferable to substitute a unified board with full-time members, also civilians, just as in the present circumstance, for the existing separate correction boards while,

at the same time, providing for the diversity by retaining the three separate discharge review boards?

Mr. RAPSON. When I testified here in 1961, I recommended or advocated, in response to your question, unification.

I have since changed my position. The civilian employees, who make up the board for the particular service, do an excellent job. They have a rapport with that service. They are civilian employees, let us say, of the U.S. Army. I saw Mr. Williams from the correction board of military records here beforehand. The mere fact that they are in that civilian component of that service, enables them to develop a form of rapport and a form of knowledge of the problems peculiar to that particular service, and I think that it is this intangible, indefinable factor, which is in large part responsible for the high quality work and the excellent results achieved by the boards.

I am troubled that if you do away with this aspect of individuality and rapport by unification you are going to simply dilute this intangible factor. I think that the boards operate excellently at the present time, and I see no reason to interfere with their present operations.

Mr. EVERETT. Well, might there not be some developments of greater consistency in interpretation of the board's power and authority if there were a single board?

Referring now to what apparently has developed with some difference in viewpoint among the three services or three departments concerning the scope of the authority of the correction board to expunge the fact of conviction or would this be taken care of by the other proposals?

Mr. RAPSON. The other aspect about expunging the fact of conviction would be taken care of by the specific provisions of the recommended statute. I might say that the decision—this is my understanding but I am pretty sure that I am correct, the decision as to whether or not the particular board for the particular service has the authority to remove the fact of conviction does not lie with the board for correction of military records but actually is the decision of the Secretary of the particular Department concerned, is based upon opinions rendered by the Judge Advocate General's office of the particular service.

I think that if you left it up to the particular boards themselves to construe the extent of their authority you might have more uniformity than you have now. But the divergence is not the result of any activity of the boards at all. It is the divergence among the Judge Advocate General's offices of the respective services.

Mr. EVERETT. But does not this illustrate the divergence possible in other fields as well when there are separate boards?

Mr. RAPSON. The boards are, in essence, a board of equity or court of equity, and I do not know that uniformity is at all desirable, or a necessary feature. The only divergence that I know of among the boards is on this interpretative problem, and again it is not attributable to any action of their own.

Mr. EVERETT. Moving to one other area in your statement, in the discussion of two of the proposals as you group them, you suggest a proposal to the extent that article 37 should be made applicable to

administrative proceedings is undesirable in the present law in that such provisions should be placed with statutes governing such proceedings rather than in the Uniform Code which is concerned solely with the military judicial system.

Now, it is the subcommittee's understanding that article 37, by reason of article 98, does contain certain provisions that would be punishable by court-martial by violators. In other words, it would be a criminal offense to exercise command influence on a court-martial. I believe the American Legion has proposed at various times that this offense should even be punishable in a civil court.

Would it be your opinion that the exercise of command influence on an administrative board or proceeding should also be subject to punishment under the Uniform Code?

Mr. RAPSON. Well, we have to start off and analyze the initial premise. At lease, at the time when I left the service, I knew of no instance in which anybody was court-martialed for violation of article 37. In fact, I believe at that time there was a substantial body of opinion that article 37 itself was not a punitive article and that a violation of it was not in and of itself a punishable offense. Perhaps that has changed since then.

Mr. EVERETT. I do not believe there has been any case involving prosecution for violation of that article of any man.

Mr. RAPSON. Well, I question whether or not the problem of the exercise of command influence should be controlled by making it a punitive offense. I think that is an area where administrative procedures, such as pressure by higher authority, more exercise of control by the Judge Advocate General of the particular service, is a more effective solution to the problem rather than making it a criminal offense.

I would prefer not to see it become a criminal offense, either in the military justice area or in the administrative proceedings area.

Mr. EVERETT. I have no further questions.

Mr. CREECH. Mr. Read, it has just been called to my attention that you gentlemen are catching a plane. I hope we are not holding you.

Mr. READ. No, so long as I get back this evening.

Mr. RAPSON. We run on shuttles. That is all right.

Mr. CREECH. Mr. McConnell, with respect to the arguments raised in your committee as to the desirability of giving the Court of Military Appeals the right to review legal questions on administrative discharges, it is not unusual to have court review of administrative due process in other areas of our law, and the administration of the Court of Military Appeals of administrative regulations that were inadequate would cause, would seem to cause, a great improvement in them. Today the only reason the Court of Military Appeals, as we understand it, does not have authority to review these administrative proceedings is because there is no statutory basis for it. There is nothing to keep an individual from going to the other Federal courts.

Mr. MCCONNELL. That is correct.

Mr. CREECH. I wonder, sir, if you would care to comment a little bit more on this or to give us any additional ideas of the considerations that were before your committee, and any arguments that were propounded with regard to the provisions of S. 753.

Mr. McConnell. There is no question that if the proposal, S. 753 for review by the Court of Military Appeals of legal questions arising from cases brought before the boards under sections 1552 and 1553 of the United States Code were enacted, that it would have to do precisely what the Federal district courts are doing on petitions for habeas corpus and other proceedings, whereby they seek to determine two questions: first if they can avoid the constitutional question, they seek to determine whether the service itself has followed its own regulations, and, secondly, if necessary, they go into the constitutional question namely, regardless of what the regulations are, and the fact that they were adhered to, whether constitutional due process was followed, and cases have come before the Supreme Court, as you well know.

The danger, we felt, that is those of us who were against this proposal felt, was that it would add to the workload of the Court of Military Appeals a separate function of dealing with administrative discharges as to which the Federal district court precisely because it handles administrative matters dealing with the Administrative Procedure Act and the whole gamut of proceedings involving other branches of the Federal Government, the Post Office Department, and every other branch, would, perhaps, be the better tribunal, and secondly to add this function to the Court of Military Appeals would, perhaps, cause the court to look at the uniform code in determining whether administrative due process had been adhered to.

Also, that the procedures for administrative discharge boards, some of us felt, were simply inadequate.

Many of the regulations, for example, in the Air Force, with which I am familiar, 3916 and 3917, 3921, 3922, et cetera, dealing with discharge for unsuitability, for unfitness, for fraudulent enlistment, for conviction by civilian authorities, all of which require board proceedings in the event there is no waiver, have a very short paragraph dealing with the procedure before the boards, and most of them revert to a regulation which is identified as Air Force Regulation 11–1, which goes into some more detail, but has very generic rules, stating, for example, that the rules of evidence need not be strictly adhered to in all detail, but that the general substance of such rules should be followed and these are very vague standards.

Our thought is, perhaps, that if Congress were going to go into the area of administrative discharges, it should be by a complete enactment, forming a separate chapter under title 10, which would enumerate the rules of evidence that have to be adhered to before such boards and all other procedures, and so any review thereupon would certainly have a better standard on which to judge questions of legality.

Mr. Creech. Sir, you may recall one of the representations made to the subcommittee several years ago at the time it initiated a study into this area was the annual report of the Court of Military Appeals in which the court stated there was reason to believe, and basing it upon an assertion by a former Judge Advocate General of the Air Force, that the military were using discharge proceedings to circumvent review by the court. If the court were given statutory authority for reviewing administrative proceedings, you feel that an admission by the court that these regulations were inadequate would improve the administration of them?

Mr. McConnell. It is possible that it might. Of course, that entire question brings up other matters and I would like to mention one point which apparently was the subject of a colloquy between Senator Ervin and members of the Defense Department here in which it was stated, according to the military representatives, that administrative discharge board proceedings were not being used to circumvent trials by court martial. Although they did not expressly advert to it, I am sure they understood, as does your committee, that there is a provision in the regulation that states these administrative board proceedings should not be used in lieu of court-martial. Also the majority of cases before administrative boards deal with a pattern.

If you look at the Defense Department's new directive, it continually speaks of a pattern.

It is only perhaps in two areas where a single offense would be the subject of administrative discharge, either in a sexual perversion area, for example homosexuality, child abuse cases, et cetera, and the second is the narcotics cases. By the very nature of the crime in each case, the services justifiably have concluded that a person who engages, who would engage, in such type of conduct must be a habitue of that type of conduct. Perhaps, the very problem that was adverted to by Senator Ervin as to the right to demand a court-martial could be handled by way of a provision, either statutory or by a Defense Department directive or by a separate departmental regulation, which would provide that administrative discharge for unfitness could not be used for a single offense where there was no evidence of a pattern of similar conduct in the past. If they had a child molestation case, for example, which General Kuhfeld mentioned in 1962 before this committee, and if the man did state, either in his confession before the OSI or in, perhaps, a statement to a physician or psychiatrist who interviewed him, that he had engaged in such practices before, there you would have a basis to discharge him administratively under the concept of a general pattern, the frequent involvement concept.

Where there was no such evidence, then the services might be barred from administratively discharging this person without using the court martial procedure. One other way, if I might add, would be the procedure, already given to the various departments in this latest Defense Department directive, to discharge for the convenience of the Government, although the standards are not set out, and it is a very new regulation, whereby the services might well choose to administratively discharge this person with a general or honorable discharge.

Finally, perhaps a third alternative would be the suggestion that we made to give him an unlabeled discharge. This would obviate the real problem in that area, to see this man go with an honorable discharge when they know he is engaged in an act, an heinous act, of sexual misconduct or narcotics offense. If he were given an unlabeled discharge pursuant to a certain regulation, and if a later employer wished to inquire, he could determine exactly why he was discharged, or the reason and circumstances, surrounding his discharge.

Mr. Creech. Well, sir, the subcommittee has received a number of complaints from servicemen who had been accused of homosexuality and, as a matter of fact, we had some cases in which the individuals have denied the chrage and have insisted, having asked for, requested,

a trial by a court-martial. We have had other cases in which individuals were accused of homosexual tendencies, though there was apparently no proof of any overt action on the part of anyone.

But, now, these types of cases, if the individual is not given a court martial, and if the military, if no procedures are adopted such as that which you have proposed by having nameless discharge with reference to a section of the code, what would be your feeling with regard to the action that should be taken in these cases if they are not willing to give him a court martial?

Mr. McCONNELL. There are few cases that have come before boards of officers under the various service regulations, and I can speak only from my experience in the Air Force, where there has not been either an admission by the person concerned of the acts or the tendencies or testimony available. The case of denial that you mention is perhaps more often the case where he has admitted it already and then denied the voluntariness of the statement and demanded trial.

In any case, however, the homosexual tendencies are now covered by the Defense Department directive dealing with unsuitability discharges, and that man would not be given an undesirable discharge. He would be given an honorable or a general. That is the case of tendencies alone.

Acts would come under the sexual perversion subsection of the section on unfitness, and he would be possibly discharged under that with an undesirable discharge.

Mr. CREECH. Of course, I am talking only in those cases in which the individual denies the charge.

Mr. McCONNELL. Well, I wanted to bring out the difference between a denial at the time of trial and a former admission, which I think would be proper evidence before an administrative discharge board.

Mr. CREECH. Yes.

With regard to administrative discharges, you, I believe, were here earlier today and heard Admiral Hearn say that he felt there was substantial agreement between what Senator Ervin desired in the area of administrative discharges and the procedure which is being followed today, and I presume by that that he was making reference to the new directive which was issued on December 20 which you are familiar with, which I believe goes into effect on March 20.

Now, some of the changes in, which have taken place as a result of this directive do conform, of course, to a number of the recommendations made in the Ervin bills.

Is it your feeling, sir, and notwithstanding this directive, that it would be desirable to have a statutory basis for it, such as those Senator Ervin has suggested in his bill?

Mr. McCONNELL. Yes, it would be the recommendation of our committee that some of the areas are not covered. This directive does not cover the question of command influence. That would suitably be the subject of a statute. It does cover the right of counsel under S. 750.

It does not cover the matter which would be taken care of by S. 754, a law officer before the board proceedings. In fact you have heard the Defense Department personnel object to that, despite the

fact that currently in the Air Force not only in practice but by regulation a legal officer sits on such boards in virtually all cases and that was my experience in the military. The regulation states especially when there is—it is required especially when there is counsel on either side. So that would suitably be the subject of legislation. Perhaps it would not have to be a law officer certified under article 27(b) of the code, since these certifications are not usually granted except to field grade personnel, although there are a number of captains, I do understand, who are law officers. But a man who is a member of the bar of the highest court of the state or of the Federal district court could very conveniently serve as legal officer on such boards.

The Defense Department directive does cover double jeopardy especially by the amendment which I just received today, there is even an amendment to this very recent directive which now prohibits it. This would be taken care of in subsection (d) of S. 756, which would prevent an administrative discharge under other than honorable conditions, if the grounds for such discharge are based on in whole or in part upon misconduct for which the person has been previously tried by court-martial and acquitted.

As to the only two remaining sections concerning administrative discharges, S. 758, obviously it does not take into account. There is a division in our committee, as I have stated, as to this and many of us feel strongly that the individual should not be given the right to demand court-martial in lieu of a board action and if there is a problem—Admiral Hearn says there is not a problem, that today boards aren't used to circumvent the requirement of trial by court-martial for serious offenses—but if there is a problem perhaps it could be solved by legislation which would require that board proceedings not handle single act offenses unless there is a pattern shown. So in answer to your question, I feel that there is further need of legislation in the field to the extent that the latest directive does not entirely cover the problem.

Mr. CREECH. Sir, I believe that you indicated as a result of allowing an election of a court-martial when administrative proceedings are contemplated for alleged misconduct, that this would result in the denial of administrative hearings in this area and the objective of the bill, of course, is to eliminate the use of administrative discharges to avoid the requirements of the uniform code.

Board proceedings would still be available for administrative discharges for other reasons, such as disability or ineptitude or other actions which do not involve any misconduct.

I wonder, sir, what your feeling is with regard to this, to the fact that there still would be available, you still would have other reasons for having administrative discharge proceedings.

Mr. MCCONNELL. The problem arises because of the definition in your bill, S. 758, as to misconduct, and that is defined as any act or failure to act whether at the time of commission or omission was violative of subchapter 10 of chapter 47 of title 10 of the United States Code, in other words, the punitive articles. So misconduct is therein defined as any viloation of the punitive articles, but the punitive articles not only include every specific things, such as under article 86, a.w.o.l., article 9, disobedience of a lawful order, but under article 133 relating

to officers and article 134 conduct to the detriment of the good order and discipline of the armed services, where virtually every single item listed in the unfitness type of discharges could be prosecuted as misconduct except perhaps the first, which treats with frequent involvement—that is something which has passed already and it would seem difficult to retry a matter which has already been tried.

But the sexual perversion, even the pattern of shirking, the unsanitary habits, these could be charged under article 134, this is no question, or under another article as a dereliction of duty perhaps under article 90 or 92, I forget which it is.

So to give this right and to define misconduct as any violation of the punitive articles would open up the entire discharge board proceedings to the right to demand trial by court-material which I said it might well be the death knell of the discharge board proceedings.

Mr. EVERETT. Mr. McConnell, I would like to ask you about a situation which I believe is involved in a case now pending in the fifth circuit.

I believe it arose originally in the Air Force and it pertains to a situation where a man, a master sergeant, was alleged to have been guility of child molestation. Apparently after the initial statements, not by him but by other witnesses, other persons, it was decided that it would be impossible to secure a conviction by court-material, whereupon the case was brought before a 3917 board in the Air Force and he was processed for discharge.

I think it is now pending on a stay with respect to the discharge which has been enjoined pending the court hearing in the fifth circuit.

In that type of a situation, assuming that for reasons beyond its control, the armed service involved could not prove guilt before a court-material, would it be your opinion that they should be free to discharge the man with an undesirable discharge?

Mr. MCCONNELL. Yes, if they could prove the offense under the present or any future rules, future legislative rules, dealing with the rules of evidence before military boards. I don't think they should have the right, for example, to simply proceed on the basis of statements without witnesses when there has been no confession or admissions by the individual as to his guilt in this. However, I must say that I mentioned before, there is considerable division within our own committee as to this, and this is precisely the type of activity by the military that sort of rebels against concepts of due process. Where you cannot prove the man guilty, you board him, anway. And perhaps a way of overcoming this, would be to insert into the administrative discharge regulations a prohibition against doing, taking such activity for a single act. Most of them are concerned with a pattern, with frequent involvement.

Mr. EVERETT. Now, moving on to the pattern, in the event of a pattern of misconduct, isn't it true, in the first place, that under the table of maximum punishments which is prescribed as an Executive order as part of the manual for courts-martial, that this pattern can result in trial by court-martial, bad conduct, or dishonorable discharge and punishment, and that, therefore, if an individual who was accused of a pattern of misconduct chose to go before a court-martial he would be running a substantial risk not only of a discharge other

than honorable conditions but also of confinement and wouldn't that deter, let us say, the frivolous requests for court-martial?

Mr. McConnell. I don't think so. Because to give an individual the right to demand court-martial when he is being proposed for discharge administratively for a pattern of frequent involvement of a discreditable nature with military or civilian authority, as the regulation reads, this could all have been in the past. He could have accumulated a number of article 15's, for example, a number of summary courts which never did have, which would not have had the authority to adjudicate a bad conduct or dishonorable discharge, traffic offenses in the civilian communities, perhaps a disorderly conduct charge, a series of things, none of which in and of themselves would have allowed the military to adjudicate a bad conduct discharge.

So I don't think that there would be any deterrence as you pointed out.

Mr. Everett. Wouldn't it be an adequate solution in those instances where there had been a nonjudicial punishment where he had waived in effect his right to court-martial by not utilizing option available to him, or where he had been convicted by a summary court or a special court or a civilian court, just to say these cannot be reopened, not to give the man 2 days in court, but to allow him to dispute any alleged misconduct which had not theretofore been resolved by conviction by some court of competent jurisdiction?

Mr. McConnell. Well, of course, in the board proceeding he would have the opportunity to dispute an alleged misconduct which had not resulted in a conviction. But, of course, I am sure that your concern is that this proceeding is not surrounded by all the safeguards that a court-martial would have.

But I think General Hodson pointed out, and pointed out quite well, that the last offense, the straw that perhaps is breaking the camel's back, might be a very minor offense, and the military then would be faced with the problem of having a court-martial for the minor offense, minor a.w.o.l., failure to repair, and attempt to give a bad conduct discharge for something that in itself is minor but when seen in the light of the past conduct is more appropriate for administrative board proceedings than court-martial.

Mr. Everett. Even in that situation of a series of past acts which had been overlooked, wouldn't the alternative be available, having a charge sheet which covered all of these acts? Isn't it true that any and all offenses can be grouped together for a single trial by court-martial?

Mr. McConnell. Well, you cannot relitigate past acts, certainly not if they were military acts, which resulted in military convictions. There might be problems also in the availability of witnesses to the charge at a point in time where the witnesses have long since left the service or what-have-you. It might be very difficult for civilian offenses in different communities than the place where the serviceman is now situated. It would be very difficult to attempt to try at a later date all these offenses in one or more proceedings.

Mr. Everett. Let me ask you one final question pursuing this same general problem.

The subcommittee has had called to its attention a recent decision involving, I believe, an Air Force major or lieutenant colonel who was being separated and again it was an action brought in the, here in the district court, I believe in the District of Columbia, in a decision by Judge Holtzoff under the title of *Gamage* v. *Zuckert*. It was our understanding that in that decision Judge Holtzoff had ruled that since this, one of the allegations against this particular individual, was that he had falsified his weather report, he was a weather officer, that he was required to be given the constitutional safeguards of confrontation specifically and apparently any other safeguards that would be required in a criminal trial since misconduct was being alleged.

Now, if that decision is a correct interpretation of the law, wouldn't that as a practical matter signify the death knell for the administrative discharge proceeding?

Mr. McCONNELL. Yes, it would. And it may well be that when these questions do come up to the final court, the last arbiter, the Supreme Court, it might hold that all the, virtually all, the procedural remedies such as the right of confrontation are necessary in the military before a man is administratively discharged.

But, of course, there is an alternative, and it is precisely because of this alternative that the problem arises. It is the stigma of an undesirable discharge, again, that we continually get back to. And there is the reason why the courts, not only the Federal district courts, but the Court of Claims, are continually harping on this and adding to the serviceman's rights, and possibly to the extent that discharge proceedings, administrative discharge procedings will no longer be available to the Government, and will, in effect, be turned into court-martial proceedings.

Mr. EVERETT. So, then, one solution, a partial solution may be by obviating the problem of the stigma of the undesirable discharge by using a discharge under honorable conditions, either general or honorable discharge in circumstances which involve this particular type of problem?

Mr. McCONNELL. Perhaps so; that would be certainly one solution. It may go against the grain of the military, and I am sure it will, as to a person whose conduct is obviously not honorable.

The other solution, which we have posed in the form of a question, is the question of the need to label his type of service as undesirable.

Mr. EVERETT. Would you envisage, if I may interrupt just to see if we understand your suggestion, would you envisage that all discharges except punitive discharges would be unlabeled or that there would be still some 90 percent honorable discharges and that there would be 5 or 10 percent without any label; simply a reference to the regulation or the authority under which the discharge took place?

Mr. McCONNELL. The comments made in our statement dealt only with administrative discharges, but your question is apropo. Either could be envisaged, either an entire system of unlabeled discharges including bad conduct and dishonorable where the rights flowing from conviction by special and general courts would be determined as regards veterans benefits, and these people would receive precisely the same or lack thereof that they receive now or on the other simply punitive discharges by bad-conduct or dishonorable-discharge certifi-

cates, and all the rest an unlabeled form of discharge which would encompass all those who are separated or discharged from the service by administrative proceedings or regulations. And then it would be left to the employer or anyone else concerned to inquire into the circumstances of his service. It might even serve a desirable effect. In the case of a person such as this child molester, the sexual pervert, where there is no evidence and the Government is forced to either really misuse an administrative board regulation or give him an honorable, general discharge, the later employer might look at his discharge certificate, find it honorable and assume that everything he has done in the military has been perfectly honorable and go on and be misled. Whereas if there were a need in each case to inquire, to the extent that they wished to, into the character of the service there would be no such problem.

Mr. EVERETT. Thank you.

Mr. CREECH. I believe, Mr. McConnell, Mr. Woodard has a question for you.

Mr. WOODARD. Mr. McConnell, did all the members of your committee support the legislation relating to administrative board proceedings of only single-act offenses?

Mr. MCCONNELL. No, I spoke of that only as personal thought following the colloquy between the Defense Department personnel and Senator Ervin. That is my own personal comment on that. Mainly because Senator Ervin was troubled not so much with the use of board proceedings for the frequency involvement cases but for the single act cases, and that as perhaps a way of bridging this problem.

Mr. WOODARD. Based on your understanding of the objections of those members of your committee who oppose S. 758, do you think they would have any objection to the sort of bill that Senator Ervin and Admiral Hearn and General Hodson seemed to be in agreement on this afternoon, that is, one restricted more or less to prohibiting board proceedings only for single-act offenses?

Mr. MCCONNELL. I think there would be general agreement on our committee on that position, yes.

Mr. WOODARD. In another area of administrative board proceedings, you mentioned this new directive which becomes effective in a couple of months.

Mr. MCCONNELL. Yes.

Mr. WOODARD. And the fact that a recent amendment to it would prohibit administrative board proceedings after a court-martial resulted in an acquittal. This amendment specifically states that it doesn't apply in cases where the acquittal was based on a legal technicality or other matter not going to the merits of the case. Has your committee discussed this problem at all?

Mr. MCCONNELL. We haven't taken it up mainly because we were advised quite recently of this exception. In fact, I understand from the Defense Department that the words "legal technicality" was not the original form of the language. It spoke of—based upon certain, I forget the exact phrase, legal reasons not going to the merits of the case. They were attempting to distinguish a case where, apparently, jeopardy, if you would call it, did not apply, and there was no trial on the merits, but for one reason or another, possible motion before

trial for suppression of the evidence, what-have-you, there was no actual board proceeding, or trial, I should say, and they wouldn't want to be barred from using the same basis at a later time. But we did not, to answer specifically the question, go into the discussion of this "legal technicality" phrase.

Mr. WOODARD. The directive, as I understand it didn't have that exception in it. The reason this has troubled us is that a number of cases have come ot our attention where the court-martial acquittal was based on something roughly equivalent to failure of evidence. We asked for reports and the reports we got were that it was not a decision on the merits, but rather a legal technicality. We were, therefore, disappointed to see this exception specifically written into the revision. I wondered if situations like that have come to your attention, or the attention of the committee, or what would be your feeling on whether this might need further language.

Mr. MCCONNELL. I certainly think it needs further language, and my own personal feeling is that when there has been a disposition based upon failure of the evidence that should end it. If you could continually retry the case, in effect, by new evidence, there would be no end to it.

It would be only something where a motion prior to trial, possibly an insanity plea that was upheld although that is very questionable as to whether that goes to the merits, certainly a finding by the law officer of a general court that the man was not competent to stand trial at that time, reasons such as this would be valid reasons why the services would seek to use the evidence that was never really submitted to the original court, to a board.

Mr. RAPSON. May I make a remark on that point? I haven't studied this particular area of discussion, but there is a direct analogy in criminal law which I had occasion to research several years ago. That is, the right of a State to appeal an acquittal. This right is given in some of the States, and basically the distinction is they have the right to appeal an acquittal where the acquittal was based on a legal ground as distinguished from a finding of insufficiency of the evidence. It is the same exact problem that you are raising, and I think it is the old Supreme Court case of *Palko* v. *Connecticut* which says it is all right to have the State have this right to appeal on legal grounds as distinguished from factual grounds.

Mr. EVERETT. Isn't there a slight difference? Isn't there in that the appeal is on the record? In those States where the appeal from inadmissibility of confession, the appeal is in that case while here there is nothing in the criminal sphere?

Mr. RAPSON. If you are talking about a finding of insufficiency of the evidence in an inferior court-martial, I couldn't agree more.

Mr. CREECH. Mr. Baskir?

Mr. BASKIR. I have one question on S. 749 which has to do with command influence and which would extend the existing prohibition to apply also to administrative hearings. This is a matter of some concern. As the regulations in the various services now are set up, the convening authority will forward the file after it has come up to him for the appointment of a board and the members will be selected from his command. Under these circumstances, do you think it is realistic

to expect that you could legislate out of existence the subtle kinds of command influence that might come not from an overt directive but perhaps from the feelings of the members? For instance, the impression on the part of the board members that the convening authority expects the man to be eliminated merely because he has seen fit to submit the case for a board hearing.

Mr. McConnell. I think you cannot hope to legislate out of existence something that might come up, knowing, as Mr. Rapson has suggested, in the area of courts-martial where in a case the special court-martial would have the power to adjudicate a bad conduct discharge and you detail a law officer that the court will immediately realize that the convening authority must have assigned a law officer for some reason, or any more than would happen when a general court is convened rather than when a special court to try an offense that could be tried by either court at the direction of the convening authority. This is something you will simply have to appreciate the maturity of the members to realize that it was his function to decide the appropriate court, but it is our function to determine the findings and appropriate sentence, the possibility of command influence, if you might call it, really isn't, can never be entirely alleviated.

Mr. Read. At the risk of seeming to be facetious, though, that is not my intention, I think something of this sort may be an attempt to legislate human nature or an attempt to legislate out undesirable characteristics of human nature.

Mr. Baskir. Yes. In an effort to save the integrity of that bill, perhaps its basis lies in the assumption that there would be some advantage in expressing congressional opinion and congressional feelings that board hearings are serious and that command influence is not in the spirit of those hearings, just as it is not in the spirit of courts-martial. A statute to that effect would have a psychological effect even though it couldn't be enforced as a practical matter. Would you agree with that?

Mr. Rapson. Yes.

Mr. McConnell. Yes, I would. We certainly are in favor of the statute regardless of the fact that it could not entirely eradicate something which is possibly part of human nature, despite the continuing admonitions of the respective judge advocates and the continued indoctrination of the court-martial and boad personnel.

Mr. Baskir. Thank you.

Mr. Read. Gentlemen, may I say one thing? We have endeavored here in our presentation here before you to be constructive insofar as we can do so. We like not to be negative, but I would like to make this one observation on behalf of the committee which does not appear in Mr. McConnell's subcommittee's report, and if it hadn't been for the fact that we had heard some reports that this may be advocated before you we wouldn't even bring it up at this point. But we would like to note that so far as our committee is concerned that we would be opposed to having administrative discharges placed under the jurisdiction of the Federal Administrative Procedure Act. We feel for the reasons stated by Mr. McConnell that just as we shouldn't have a parallel judiciary system for administrative discharges, so some of the same argument would apply against putting it under the Administrative Procedure Act.

That act, as we have reviewed it, is designed to cover civilian types of activities completely unrelated to the type of situation that we encounter in the military in respect to administrative discharges. We have, as you know the provision in that statute for civil service examiners. While the evidentiary rules prescribed there might not be inapplicable here, the whole design of that statute is to prepare a record so that on a quasi-adversary basis, so that appeal to the courts might be taken if desired. We would like to note for the record our position on any suggestion along those lines.

Mr. CREECH. Thank you, Mr. Read.

I wonder if you would care—either you or Mr. Rapson or Mr. McConnell would care to address yourselves to any of the questions posed to others of your committee here this evening, or, for that matter, if there is any additional information you would care to give to this subcommittee.

Mr. MCCONNELL. Just one here. The question was posed to Mr. Rapson under S. 749 whether we had any comments about proposed amendment to article 98, which would make a crime noncompliance not only with the old article 37 prohibition command influence on courts-martial but the new revised article 37 as envisaged by your committee which would prohibit such command influence over boards.

And, again going back to our recommendations which are that it should be enacted but it should be enacted as separate legislation, there would be no objection to—as far as my personal opinion is concerned—to providing in article 98 which is a punitive article in the code that command influence could be prosecuted under the Uniform Code, whether it is command influence over courts-martial or over boards. And, secondly, as Mr. Rapson pointed out, it is probably unnecessary. Noncompliance with an article of the code or even a Federal statute would be grounds for action under the code, under either the 133 or the 134 sections, the general sections. I think a court member or a board member could well be prosecuted either for dereliction of duty which is under article 90 or 92, in that he failed to comply with either article 37 or the new article which would apply to boards or under article 133, conduct unbecoming an officer.

Mr. CREECH. I believe Mr. Everett would like to ask a question.

Mr. EVERETT. I want to see, Mr. McConnell, if I have detected a slight difference of position between you and Mr. Rapson.

I gather from your statement that you consider that it is already a violation of the Uniform Code if someone exercises command influence on a court-martial, and that, in addition, it should be a violation of the code if he exercised command influence on an administrative proceeding. I gather Mr. Rapson's position was that it is questionable today that it is a violation of the code and that in his opinion it should not be a violation of the code either as to command influence in courts-martial or administrative boards.

Mr. RAPSON. To clarify my own position, I don't say it should not be an offense. I just don't think that is the most effective way of reaching the problem.

Mr. CREECH. Gentlemen, is there anything further that you would care to add?

Mr. READ. I might just add this, if I may. We want to thank the committee and its personnel for the graciousness of listening to our

views here. If we have made some small contribution to the problem that you have at hand, we are grateful. We hope and would request that as the members of the respective subcommittees and their staff go on to the study of this particular matter if it should be felt there are some aspects of the question not raised here today on which you would like to get the expression of opinion of the members of our committee or some later report on some aspects which are peculiar within our province we will be only too glad to cooperate with you upon receiving your request.

Mr. CREECH. Thank you, Mr. Read.

The chairman has asked me to say to you, Mr. Rapson, and Mr. McConnell, that the subcommittees are grateful to you today for coming here today. The facility with which you have presented your views, and the information which you have brought to us not only today but in the past has caused this subcommittee to rely very heavily upon your representations and that the subcommittee feels that it will be benefited immeasurably in the consideration of these bills because of the thoughtful consideration you have given in your presentations.

Mr. READ. I would like to feel we shall continue to be at your service.

Mr. CREECH. In accordance with the instructions of the chairman, the subcommittees will recess now and reconvene on Tuesday at 10:30, in this room.

(Whereupon, at 6:30 p.m., the subcommittees recessed, to reconvene at 10:30 a.m., January 25, 1966.)

MILITARY JUSTICE

TUESDAY, JANUARY 25, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND SPECIAL
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2228, New Senate Office Building, Senator Strom Thurmond, presiding.

Present: Senator Thurmond.

Senator THURMOND. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this morning is Seymour W. Wurfel, professor, Law School, the University of North Carolina, Chapel Hill, N. C. Professor Wurfel.

STATEMENT OF SEYMOUR W. WURFEL, PROFESSOR, LAW SCHOOL, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, N.C.

Senator THURMOND. Professor Wurfel, we are glad to have you with us. If there is no objection we will put your statement into the record.

Mr. WURFEL. I would appreciate that, sir.

Senator THURMOND. As it is written, and if you wish to comment on the statement, feel free to do that, say anything in addition to what you want to.

(Discussion off the record.)

Senator THURMOND. Back on the record.

Mr. WURFEL. Does counsel wish to have the entire statement summarized, to interrogate me, or shall I simply proceed with the statement?

Mr. CREECH. Professor Wurfel, will you proceed in any manner that you like? If you care to summarize your statement, or if you care to read it, whichever you prefer.

Mr. WURFEL. Thank you very much.

(The statement referred to is as follows:)

STATEMENT OF SEYMOUR W. WURFEL, PROFESSOR, LAW SCHOOL, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, N.C.

The following is submitted at the invitation of Senator Ervin.

S. 745. The change of name from "law officer" to "military judge" is appropriate. The mandatory employment by all services of the field judiciary system which divorces military judges from command influence of convening authorities is commendable and long overdue. Interservice exchange of field judiciary members by mutual agreement of the respective Judge Advocates General should

promote flexibility, efficient use of such personnel and insure their full-time employment in judicial duties.

No reason is perceived why civilian attorneys should serve in the field judiciary. This is not necessary to insure the constitutional rights of service personnel. The concept that a military force in the field should be self-contained, medically, spiritually, and legally has won general acceptance. Civil service employees work only a 40 hour week. Field conditions often require a more sustained performance from military judges when their work on instructions and other out-of-court preparation is taken into consideration.

S. 746. The establishment of a separate Judge Advocate General's Corps in the Navy is imperative to improve the quality of naval legal service and to give true uniformity of application to the Uniform Code. This will substantially decrease the burden of cases reaching the Court of Military Appeals.

S. 747. This proposal is perhaps too elaborate. Would not all the objectives be served if in every case where review is sought of any court-martial proceeding not previously reviewed by a board of review it be given a review as provided for in article 66? Then in all court-martial cases submitted to it the Board for the Correction of Military Records be given power to recommend to the Secretary concerned whether his powers under articles 74 and 75 should be exercised. On this basis a three-member board should suffice for all services including the Coast Guard. Its work load would surely not be so large as that of the Court of Military Appeals.

The statute of limitations proposed seems unrealistic. Three years after discovery affords ample liberality. It would be better to have no limitation at all than to impose on the board in each case a determination of whether it is in the interest of justice to apply the statute.

S. 748. A qualified lawyer in uniform is, in my opinion, as competent and trustworthy in the impartial discharge of a judicial duty as is a qualified civil-service lawyer in mufti. Each, as an officer of the Court of Military Appeals, is bound to enforce the constitutional rights of litigants. I would leave the composition of courts of military review to the discretion of the respective Judge Advocates General as it is at present. The qualifications and tenure of assignment for judges as proposed in the bill are appropriate, as is the direction that they be designated as judge. These steps, plus that to be implemented by S. 755 should assure an optimum judicial climate.

S. 749. Most desirable. However, two modifications seem appropriate. In article 37(d)(2) after "as defense counsel" insert "or trial counsel"; delete "any accused" and insert "his client"; and after "any respondent" add, "or the Government." Constitutional protection should embrace not only the rights of the individual but of the Government as well. Under the common law adversary system, counsel for both parties, restricted only by the dictates of professional legal ethics, are entitled to protection for zeal in the performance of their adversary professional duties.

Based on personal experience in the trial of criminal cases both for the prosecution and the defense in both civil and military courts, my firm belief is that uninstructed jurors or members of courts-martial, not infrequently, hamper the proper administration of justice. The specific instructions in a given case really are designed to withstand the scrutiny of appellate review more than to enlighten the triers of fact and consequently are highly technical and often more confusing than helpful. Routinely they do not include all that a lay trier of fact should know to discharge his duties properly and intelligently.

In civil life, presiding judges usually hold initial sessions with new grand and petit jury panels in which they discuss in general the duties of jurors and the law pertaining thereto in all cases, without reference to any pending cases. Assuming the judge advocate of a command is not to be trusted to discharge this function fairly, there are several alternatives open short of making mandatory an uninformed state of mind of triers of fact. These are: (1) that the general instructions given by a command judge advocate to a new general court membership be reduced to writing and a copy thereof attached to each record of trial resulting from the activities of the court membership so instructed; (2) that the Judge Advocates General of the respective services prepare general informational instructions to be given to each new general courts-martial membership and that these be furnished to the Court of Military Appeals; (3) that suitable general instructions to court members be embedded in the new Manual for Courts Martial in the same manner as the instruction in regard to the doctrine of reason-

able doubt. Such general instruction of the triers of fact is fully as important to the accused as it is to the Government.

S. 750. Fine as far as it goes. If personnel appearing before discharge boards are to be represented by counsel, the Government should have similar representation to insure adequate presentation of the facts and the preparation of a complete record thereof for appellate purposes.

Under no circumstances should a special court have power to impose a bad-conduct discharge. I would go further than this bill and entirely eliminate special courts-martial. In the light of the grant of habeas corpus in application of Stapley 246 F. Supp. 316 (1965), it seems probable that defense counsel of special courts must hereafter be lawyers. Justice is just as devastated by a lawyer appearing only for the defense as it is by such a unilateral appearance for the prosecution. The adversary system will work only where both sides are represented by lawyers. The concept of the present code that a lay president of a special court can adequately instruct in law his fellow court members is fallacious. The increased personnel requirements between a special court minimum of three and a general court minimum, including the law officer, of six, is warranted in order to eliminate the evils of a special court.

The proposal in S. 752 to permit the accused to elect to be tried by the law officer alone is wholly consistent with this recommendation. This would be in addition to the elimination of summary courts as provided in S. 759.

The enlarged powers now available under nonjudicial punishment make it practicable to eliminate both summary and special court-martial. If the proceeding is in fact nonjudicial, fine; if it is judicial at all, it should be fully judicial in all respects in justice to both sides. A general court has of course always had jurisdiction to impose the lesser punishments normally associated with special courts.

Such a single military trial-court system would tend to keep out of military courts those cases which are essentially noncriminal in nature. If the problem is simply aggravated ineptness or unsuitability, board proceedings are appropriate. A beneficial classification of thinking as to the three categories of "correction," "eliminating unsuitables," and "dealing with criminal offenses" would result from this clear cut three-way division. If adopted, all adjectives before the term "court-martial" would be deleted from the Uniform Code.

S. 751. Concur.

S. 752. The abolition of both summary and special courts-martial recommended above in the discussion of S. 750 would accomplish all the purposes of S. 752 except permitting an accused to waive trial by court members and elect to be tried by the law officer. Making available this election is highly desirable. It is recommended that the waiver provisions contained in proposed article 55 be adopted, deleting the reference to special courts-martial, and that the other provisions be changed to reflect the elimination of special courts-martial.

S. 753. Concur.

S. 754. Concur.

S. 755. Concur.

S. 756. Concur.

S. 757. Concur.

S. 758. It is assumed this proposed article would apply only in event board action were based on facts which would constitute an offense under the punitive articles of the Uniform Code. This should be clarified by adding to the end of article 141(c) the sentence: "If the board action is instituted on any other ground, this article shall be inapplicable."

S. 759. Concur. However, I would delete also all references to special courts and throughout refer only to a court-martial. Article 43 (b) and (c) could be amended by deleting the words "by an officer exercising summary court-martial jurisdiction over the command" and substituting "by a duly appointed article 32 investigating officer."

S. 760. Concur.

S. 761. Concur. Very important. However, the act should be applicable to offenses punishable by confinement of 1 year or more and not limited to 5 years or more. Why give immunity to offenders for an area of felonious offenses?

S. 762. Concur, so far as it goes. Does not section 951(b) as now framed exclude Uniform Code Articles 118–132 which denounce murder, manslaughter, rape, larceny, robbery, forgery, maiming, sodomy, arson, extortion, assault, burglary, housebreaking, perjury, and frauds against the Government? From

the sentence in the accompanying memorandum which commences, "Articles 107–132 of the Uniform Code of Military Justice prohibit certain acts which might be committed by a civilian employee or dependent and perhaps with disastrous consequences * * *," it seems clear the legislative intent is to provide for punishment of these offenses. Should not section 951(b) contain a subparagraph stating "sections 918 through 932 of this title (arts. 118–132)"?

It would be hazardous to assume that the article 134 blanket reference to "crimes and offenses not capital" would embrace offenses specifically denounced in the Uniform Code, particularly in view of the opening phrase of article 134, "Though not specifically mentioned in this code * * *." Moreover the words "not capital" would eliminate even the possibility of imposing the death penalty under article 134 for the aggravated offenses specified in articles 118–132.

Civilians may commit sedition under article 94, and can commit the essentially wartime offenses denounced in articles 100 to 106 inclusive. If the thought as to these is that the Supreme Court has not actually struck down military jurisdiction over civilians in time of war this is a slender reed on which to predicate this omission. The wartime situation was not before the Supreme Court in Singleton, Grisham or Guagliardo. Also what legally constitutes "time of war" leads into a briar thicket, perhaps not always to be resolved by executive order. True, it has been the practice to prosecute civilians for treason (aiding the enemy) or spying in the civil courts, and possibly a military commission might have jurisdiction of other law of war violations. However, why, by omission from this bill, raise obscure questions of construction as to the jurisdiction of Federal district courts in these serious matters?

Since criminal jurisdiction of Federal courts rests exclusively in statutory grants and is subject to rigorous scrutiny where applied extraterritorily the language vesting that jurisdiction should be crystal clear. No punitive article (arts. 82–134) should be excluded from this bill unless it is the express legislative intent to exempt civilians from punishment for the conduct therein denounced.

Further observations.

1. It is recommended serious consideration be given to requiring that the article 32 investigating officer, for every case in which the charge(s) may result in a dishonorable or bad conduct discharge, must be certified and qualified as required by article 27(b) (in effect, a judge advocate officer). This step would insure, so far as is humanly possible: (a) Pretrial due process to the accused, (b) dismissal without trial of cases where there is insufficient evidence, (c) complete, impartial, legally oriented investigations which will conserve all the rights of both the accused and the Government. As presently conduced article 32 investigations consume officer time. Practically all errors made at that critical stage of the proceedings result from lay ignorance and not from any intent to overreach the accused. It would be no more costly and much more effective if article 32 time is expended by lawyer offcers. Injustices would be minimized at the source, and investigating officers removed from command influence of unit commanders. This proposal would fully equate article 32 investigations to "bind-over" or preliminary hearing proceedings before magistrates in civil life and would give much greater protection to the military accused than is afforded to civilian accused by grand jury indictment.

2. The Constitutional Rights Subcommittee is to be commended for its serious efforts to make more effective the administration of military justice. It should be encouraged to continue its labors until the product insures the constitutional rights of both the accused and the Government.

Respectfully submitted.

SEYMOUR W. WURFEL,
Professor of Law, University of North Carolina.

Seymour W. Wurfel has been a member of the California bar since 1930 and is a member of the bar of the Supreme Court of the United States and of the Court of Military Appeals. He is a graduate of the Harvard Law School, has engaged in the general private practice of law, served as a trial deputy district attorney, and is a retired colonel of the Army Judge Advocate General's Corps. His military assignments included director of instruction at the School of Military Government, chairman of a board of review, defense counsel, law officer, staff judge advocate of the Philippines-Ryukyus Command and of V Corps in Germany and chief of international law at USAREUR Headquarters.

His military law writings include the book, "Military Law Under the Uniform Code of Military Justice" (with Aycock) (1955); and the following law review articles: *Military Habeas Corpus*, 49 Michigan Law Review 493–528, 699–722 (1951); *Quartering of Troops, The Unlitigated Third Amendment*, 21 Tennessee Law Review 723–737 (1951; *Military Due Process-What Is It?*, 6 Vanderbilt Law Review 251–287 (1953); *Court-Martial Jurisdiction Under the Uniform Code*, 32 North Carolina Law Review 1–81 (1954); *Space Law—Is There Any?* 37 North Carolina Law Review 269–289 (1959); *Military Government—The Supreme Court Speaks*, 40 North Carolina Law Review 717–787 (1962).

Since 1960 he has been a professor of law at the University of North Carolina.

SUPPLEMENTAL STATEMENT BY SEYMOUR W. WURFEL, ESQ. (RE S. 762)

For nearly 9 years Congress has not provided a legislative remedy for the large void created in the criminal jurisdiction of the United States by the Supreme Court in *Kinsella* v. *Krueger*, 354 U.S. 1, and the three satellite cases reported in 361 U.S. commencing at 234. A solution is urgently required. The opinion in *Kinsella* v. *Krueger* states that in the 6 years preceding June 30, 1955, 2,280 civilians were tried by courts-martial. The dissenting opinion of Justices Whittaker and Stewart in *Gresham* v. *Hagan*, 361 U.S. 278, stated that in 1963 there were 25,000 civilian employees of the Department of Defense stationed in overseas areas. January 1966 newspaper articles state that there are approximately 1 million civilian employees of the Department of Defense and that this number is to be increased immediately by 93,000.

Congress has not yet produced a remedy. The proposal contained in S. 762, or the approach of expanding 18 U.S.C. 7 to include civilians serving with or accompanying the armed forces outside of the United States are each appropriate so far as they go. They do not and cannot overcome the fact that the writ of the United States does not run abroad to compel the attendance of foreign witnesses before courts in the United States nor the utter impracticability of convening U.S. Federal courts, complete with jury panels, in foreign countries even assuming that treaties or administrative agreements permitting this action could be obtained. All of these practical obstructions were foreseen in the dissenting opinion on rehearing by Justices Clark and Burton. The adverse impact on international relations was envisioned by the dissenting opinion of Justices Harlan and Frankfurter in *Kinsella* v. *Singleton*, 361 U.S. 234 at 259, where they said, "Today's decisions are the more regrettable because they are bound to disturb delicate arrangements with many foreign countries. * * *"

It must be remembered that since the original decision of *Kinsella* v. *Krueger* (351 U.S. 470), in which Justice Clark, speaking for a majority of the Court, lucidly upheld the constitutionality of courts-martial jurisdiction in these circumstances, no five members of the Court have ever freely joined in a single opinion striking down this jurisdiction. Furthermore, Justice Black in his opinion in 354 U.S. 1 made it clear he was not considering courts-martial jurisdiction under 10 U.S.C. 802(10) but only under 10 U.S.C. 802(11).

In view of this setting it is suggested that Congress amend 10 U.S.C. 802(10) by adding thereto the following sentence:

"Whenever and wherever any person serving with, employed by or accompanying the armed forces of the United States is, with initial official permission, in any place outside the United States, the Canal Zone, Puerto Rico, Guam, or the Virgin Islands and beyond the maritime jurisdiction of the United States, these facts alone shall constitute time of war and service in the field for the purpose of the exercise of courts-martial jurisdiction over such persons."

The Founding Fathers, if they could have conceived of the stationing in foreign countries of U.S. Armed Forces, Federal civilian employees whose sole function is to further the purposes of the Armed Forces, and the camp followers of both these elements, would certainly have said cases involving any of these people were "cases arising in the land and naval forces" for fifth amendment purposes. They would also have said that the involvement of U.S. forces in Korea, the Dominican Republican, Vietnam and other foreign countries constitutes war in the constitutional sense for domestic purposes. The express power of Congress to declare war surely includes the power to declare a "time of war" for limited purposes short of total war. The Founding Fathers would not have stood impotent in a cynical world in which formal declarations of war are no longer made.

This enactment would in no way derogate from existing or future international commitments under Status of Forces or Jurisdictional Agreements. In fact it would greatly strengthen the United States in its effective discharge of its obligations under such agreements.

The composition of the Supreme Court has again changed, even as it did bewteen the first and second *Kreuger* decisions. A majority of the present Court might affirm this exercise of Congressional power. The intervening improvements in the courts-martial system, in themselves, warrant a judicial reappraisal of the whole problem.

(At this point of the proceedings, Senator Thurmond left the committee room.)

Mr. WURFEL. I think I should say initially that although I am a retired colonel of the Judge Advocate General Corps, I am not here in my official capacity whatever, but at the invitation of Senator Ervin and any views I express are purely my own.

Most of my views are stated rather fully in the statement that has been submitted to the committee which I have here and which I understand will appear in extenso in the proceedings of the committee hearing.

I think that throughout the efforts of the committee to make more in conformity with the Federal court system, the military justice system, is entirely to the good and that the change of nomenclature in this regard is certainly unexceptional.

I would like to add my view that it seems to me imperative that the bill 746 be adopted, giving to the Navy a Judge Advocate General's Corps as such. This springs not from interservice rivalry, but from a considerable experience with the difficulty in the military service of obtaining the service of competent lawyers in uniform unless they have the status of professional men fully, in the discharge of their duites and the additional detachment from command influence which comes with the separation of the legal corps from the line of any of the given military establishments.

On S. 747, it does seem to me that the necessary review could be accomplished within the framework of the present Uniform Code, that is, article 66, and that this would reduce the work of the proposed board in regard to these administrative discharges.

Furthermore, that it is better, either to not have a statute of limitations at all or to have it under the concept that we normally do, that if the statute has run, the statute has run. It seems to me that the proposed legislation which leaves to the board in every case to determine whether the interests of justice would be further served by applying the statute is unrealistic. If the legislative intent is not to have an effective statute it would be better not to have any at all. Three years after discovery of the alleged irregularity would seem to me to give ample protection to the petitioner in any given case.

S. 748—as a matter of personal opinion, I am sure, it does seem to me that the military is to be self-contained to the greatest possible extent, that where you have separate Judge Advocate Corps, it is possible to recruit and retain competent, qualified, dedicated lawyers in uniform and it just isn't necessary to draw on civilian attorneys for the purpose, either, of sitting as trial judges in the military judiciary in the field or as proposed here, on the boards of review or under the new nomenclature, the intermediate courts of military review.

As the law now stands, the Judge Advocate General in any given service has the complete option of utilizing civilians on his board of review if he finds this desirable or necessary. This discretion should be vested in the respective Judge Advocate Generals and should not be compelled as this bill proposes, to utilize certain numbers of civilians in this particular capacity.

In S. 749, the thought occurred to me that in all of these proceedings we are recognizing, certainly, from the accused or defendant or respondent's point of view, that they are adversary proceedings. Once we recognize that they are adversary proceedings and that the respondent is entitled to qualified counsel, it seems to me in our whole Anglo-Saxon approach to third-party adjudication, that it is absolutely indispensable for both sides to be represented by counsel. That is, it is just as erroneous for the Government to be without legal representation in a matter of this kind as it is for the individual to be without counsel. The committee certainly moves in the right direction, but we must be careful in the legislation to preserve the adversary system, to have counsel for the Government, counsel for the defendant as well as a legal representative, certainly on these boards, thus bringing legal adjudication to legally presented adversary representation. Diligence in the pursuit of this representation by counsel on either side must be protected, equally that of Government counsel as that of the defense. For this reason they should be as far disassociated from command influences as can possibly be achieved.

I thoroughly concur in the elimination of summary courts proposed by S. 759. I have made a proposal which may be considered rather radical, of the elimination of special courts as well. With the expanded jurisdiction under article 15 and the exercise of non-judicial punishment as pointed out by the memorandum of the committee, this certainly, in effect, substantially replaces the jurisdiction of a summary court. In view of the proposed legislation under S. 750, I believe, of requiring a law officer for special courts and legally qualified counsel for special courts where a bad-conduct discharge is to be imposed, it is consistent with this thinking to eliminate the special court entirely. Where there is a criminal offense to be dealt with, have it go to a single court-martial, that is, the general court-martial as we now understand that term. This will automatically give the protection of counsel for the Government, counsel for the defense, that is, legally qualified counsel in each case, and the presence of a law officer. There will be required three more individuals to accomplish this, that is a minimum general court of five and a law officer, over the present special court procedure. Then the adversary proceeding will in fact be adversary with complete regard to due process and legal representation throughout the entire proceeding. This, of course, would require some additional personnel. I am sure the committee has in mind that in all of this legislation it will be necessary to implement it by providing adequately trained and in adequate numbers, lawyers for the military establishment.

I do seriously urge considering this approach to the problem. It would eliminate all, I believe, of the problems of the special court. It can be done consonant with reasonable economy and efficiency on the part of the Government.

Jumping now to S. 761 which purports to accomplish remedial legislation by giving jurisdiction of some kind to replace article 3 of the Uniform Code which was struck down in the *Toth* case. It seems to me that this is rather difficult to accomplish. The bill proposed perhaps goes about as far as can be done by vesting in the civil Federal courts jurisdiction in these cases.

I would suggest that there be a clause added to S. 761 which would definitely refer it to title 18 of the United States Code and part of section 7. Also that a clause be put in article 18 vesting this jurisdiction under title 18 as provided in the bill proposed by the committee.

Now, this is good as far as it goes. Of course, this does not cure the defects with which everyone has been grappling for a number of years that the process of the Federal district court does not run to oversea areas certainly as to non-American citizens. We cannot compel attendance of foreign witnesses before the U.S. court—the expense and these problems are not met. I don't know that they can be met in this particular context. I believe under this bill there is no consideration of the possibility of sending U.S. district courts into foreign countries. This, of course, raises a very touchy problem of sovereignty. Even if, conceivably under administrative agreements or status-of-forces agreements or even under treaty approval, a foreign country would consent, there are the additional problems of the expense of sending a Federal district court, and if we are to follow Justice Black's decision entirely in the *Krueger* case—Federal jury panels to foreign countries. This raises a problem whether this could be done under the present jury provisions or would it be necessary to try to scrape up, so to speak, jury panels of American citizens in, for example, Japan.

These problems remain unsolved. As a practical matter of course, all that can be done is to screen very carefully people coming out of the service to try and make sure that they don't carry a serious offense along with them. But in the context "get the boys home by Christmas," which we had in the Philippines at the close of the war, the cry is to get them home by the next national holiday. It is not realistic, I am afraid, to expect that extensive screening is going to be conducted to see they don't fall through the very large net that was created by the Toth case.

Now, turning to S. 762, I believe this stands on a little different footing than S. 761. S. 762, of course, comes to grips with the Krueger case situation and the exercise of jurisdiction over civilians, that is either civilian employees of the Department of Defense or dependents of military and civilian personnel accompanying the military in oversea areas, presumably in times of peace. I think it is important in approaching this problem to realize that the second decision in Krueger reversing the first decision in Krueger, and which did struck down the jurisdiction under subparagraph 11 of the Uniform Code, dealt expressly with article 2, paragraph 11, only, and was so stated by Justice Black writing the opinion of the court. It leaves open the approach of article 2, subparagraph 10. In the context of the world that we live in today, where nations do not declare war in the formal sense that was the custom of international practice at the time of the Founding Fathers, I think that the definition of the words "in time

of war" in the field are subject certainly to reassessment or to assessment, if you will, in the light of what the Founding Fathers would have intended. The Founding Fathers, if they had ever conceived of the situation in which numbers of military forces—American military forces, large numbers of civilian employees of the Department of Defense whose sole purpose is to support the military effort, and the camp followers of both of these components were to be stationed indefinitely in oversea areas, the Founding Fathers concept would have been, "This is a state of war." The Founding Fathers, if they were confronted with the present situation—there is no formal declaration of war in Vietnam today—would have in fact said, "This is war." With that in mind and in view of the fact that no five members of the Supreme Court of the United States have ever freely, without being found bound by stare decisis, concurred in any single opinion which denied jurisdiction over civilians accompanying the military forces in foreign countries, it is time to reevaluate this in the light of what is meant by "state of war" for these purposes. Before alluding to my specific proposal, I would joint out that this is not a brandnew approach, by any means. The table of maximum punishments in the manual, which is authorized by the Uniform Code, has always been at the discretion of the President, and he can declare a state of emergency or a state of war for the purpose of invoking or withdrawing the table of maximum punishments in determination of the factual situation at a given time.

I submit that the Congress with its power to declare war certainly has within that power limited power to declare war short of total war for purposes of domestic requirements. With that in view, I would submit as a possible solution to this jurisdictional void, that there be added to the exsiting article 2, paragraph 10, the following sentence, "whenever and wherever any person serving with, employed by, or accompanying the Armed Forces of the United States, is with initial official permission, in any place outside the United States, the Canal Zone, Puerto Rico, Guam, or the Virgin Islands and beyond the maritime jurisdiction of the United States, these facts alone shall constitute time of war and service in the field for the purpose of the exercise of courts-martial jurisdiction over such persons."

In submitting this proposal I invite the attention of the committee to the fact that since the second Krueger, the last 8½ years plus, there have been substantial improvements, if you will, in the system of military justice in the area of due process and that the whole matter is ripe for revision. The Congress in its wisdom would have the power to enact what is proposed or an equivalent therefor and this would make possible a solution to the S. 762 situation which would obviate the almost insuperable difficulties of either convening Federal courts on foreign territory or of adequately trying serious cases in the United States with the impediment of not being able to compel the attendance of material witnesses where they are foreign nationals.

I would say on S. 761, carrying over perhaps the language from article 3(a), that the jurisdiction is to be extended only in cases where the penalty shall be for 5 years or more. I would suggest that this read "for more than one year". Why continue a hiatus of this 4-year gap in cases, all of which would obviously be felonies? If we are going to plug the gap, let's plug it realistically and completely.

I think that this is a restatement or a resummary of the views that are contained in greater length in my submission.

I will be very happy to endeavor to answer any questions that might occur.

Thank you.

Mr. CREECH. Professor Wurfel, you mentioned in your statement command influence. The subcommittee has been told by the Defense Department witnesses here earlier that command influence is virtually unknown—nonexistent today and though the subcommittee has found in its research there have been several cases in recent years—as a matter of fact, I think there have been two or three cases since the Kitchens case which was handed down in 1961 or early 1962, and with one that received a great deal of publicity at the time of the initial hearing on the subject—what has your study revealed with regard to command influence today in the armed services?

Mr. WURFEL. In the administration of military justice—let me preface by saying I retired from the regular establishment in 1960 so that I have had no personal experience in the last 5 years in this regard. The only aggravated incident of command influence that I have encountered in my service was in 1947 in the Philippines, even before the Uniform Code. A brigadier general who was G–3 summarily ordered me to see that convictions were obtained in theft and pilferage cases in the supply buildup in the Philippines at that time. In this context the convictions were to be obtained without regard to the facts.

I advised this particular G–3 that this was impossible. He said he would take it to the commanding general. I never heard one further word on it. General Moore, who was commander at that time, absolutely refused to intervene in the administration of the judge advocate's section. I know personally of only one instance which is not in my command, that came to my attention of direct command influence and this was in the European theater about 10 years ago. I realize that where this occurs, it occurs in a command and that it is rather difficult to assess the overall incidence of this sort of thing.

I will say, that from some 12 years of judge advocate service, that the line officer, the officer in a position to exercise command influence learned that the Uniform Code meant what it says. Certainly my own experience and my own impression is that command influence has been essentially eradicated and in my statement I have indicated that I am certainly 100 percent in favor of making compulsory the field judiciary system with complete divorcement from command so far as efficiency reports are concerned. The same thing should pertain for the members of boards of review in the Judge Advocate General's office. At one time I was chairman of a board of review and although this was before the Uniform Code, there was never any direct influence brought to bear. There was a climate in which a junior officer could certainly feel that to some extent his efficiency report would depend upon how he decided cases on a board of review. As I understand, that has been eliminated in one or more of the services and is the purpose of one of the bills at the present time.

I happen to know very well one of the officers who pioneered the field judiciary system and served as a field judiciary officer in the Army.

His feeling was that the system was highly successful, that it worked in practice as well as in theory. So then I must say my opinion, and this is all I can give, is that the problem has been practically licked and that the proposals pending before this committee, I think, go a long way, if they don't completely solve this problem.

Mr. CREECH. Sir, in connection with this last statement of yours, the subcommittee has also been told that command influence is a subject that cannot be appropriately handled by legislation. I infer from what you are saying that you would disagree with that, that you would feel that by legislating in this area, the desire or the intent of Congress would have a salutary effect upon the administration of military justice.

Mr. WURFEL. Definitely yes. Having served as a command judge advocate at various times under perhaps seven or eight commanding generals, I must say that I never found one who was not earnest in his desire to carry out the law. He wanted education. I think certainly the generals with whom I served were very anxious to obtain proper legal advice and to carry it out—to carry out the desire of Congress. I say that with complete sincerity and absolutely no tongue-in-check. In the early days, this took a change in thinking, but the generals at the present time have lived under, now, nearly 15 years of the Uniform Code and that the way of thinking has changed. The old derisive term of "brass hat" is pretty well in the discard, at least in this context.

Mr. CREECH. Well, sir, with regard to the bills pertaining to extra territorial jurisdiction, your statement has two comments, that the references of the bill seem to exclude some important defenses and that there is an element of impracticality in it because of the difficulty in obtaining witnesses.

Do you feel, sir, that this latter problem in effect would make the bill merely an academic exercise?

Mr. WURFEL. I would say that it would reduce its utility, and this is mere opinion, at least 50 percent. In those rare cases where all of the key witnesses happen to be American personnel, it would not be at all infeasible to return them to the United States as witnesses. Usually in my experience, having served in the Philippines and in Germany in oversea settings, the serious cases which would be involved here, homicide or aggravated assault, normally occur in nonduty situations and in the presence of or involve foreign nationals.

Now, there would be cases where foreign witnesses would be willing to appear voluntarily, perhaps, but not too often. Witnesses to homicides and aggravated assaults, particularly, just won't do it unless there is judicial compulsion to require their attendance. So, as I have indicated, I think the bill is fine as it goes and as far as it can go in that context, but it is not a solution to the problem.

I suggest further, that S. 672 should be dovetailed in with title 18 of the United States Code to make sure that the jurisdiction granted by the bill is taken up in title 18 as well.

I did indicate that it seemed to me that perhaps through inadvertence in the bill as proposed, S. 762 omitted most of the serious offenses under the Uniform Code and I understand that the committee had this omission in mind. There were historic reasons in connection with

it and the proposed bill—they proposed to do something about it. It seems to me the realistic approach would be, by specific reference, to include in the scope of this bill jurisdiction over all of the punitive articles except articles 85, 86, 91, 99, and 133. These articles are all prefaced by any person in the Armed Forces, and by their nature are not susceptible of commission by civilians. The other punitive articles, with one or two possible exceptions, are all things which a civilian can commit just as well as a military person.

I would recommend that there be an express inclusion by enumeration of the punitive articles in this legislation as to what the scope of the jurisdiction is. I am sure the committee has in mind this very thing, but it is important to stress this, in view of the posture of the proposed legislation as it now stands in the reprint of the Congressional Record.

Mr. CREECH. With regard to what you said of title 18, do you have in mind the maritime jurisdiction to cover all citizens, and to use the offenses set forth in that title rather than those in the Uniform Code?

Mr. WURFEL. This of course is a possible solution. I would think this is perhaps less desirable than the current approach of the committee, by a separate act under title 10, to establish the jurisdiction as proposed and then in title 18, by a separate action, to incorporate expressly, this jurisdiction prescribed by title 10 of the United States Code.

In other words, I think these should be an interlocking of this in the United States Code so there could be no possibility of it getting lost between the two titles.

To answer your question, in my view, the present approach of the committee I think is preferable, rather than simply to throw it, as a catchall, into title 18, paragraph 7.

Mr. CREECH. Well, sir, it has been suggested that to handle misdemeanors occurring overseas, that some extension of the U.S. commissioner system might be useful.

It has also been proposed that perhaps a roving district court judge might be able to deal with some of these cases.

I wonder, sir, what problems, practical or legal, you foresee in such an approach and if you care to comment in any detail upon these suggestions.

Mr. WURFEL. That of course is a matter of personal opinion and judgment, and is really, I suppose, for the political branch as a matter of international relations. But speaking purely personally, I suppose this would pose no problem at all in Korea, Formosa, or Vietnam. In practically all other areas it might. The administrative agreement in Japan is very harmonious. It is entirely conceivable that Japan might extend the agreement to include the sitting of this type of U.S. court or U.S. commissioner in Japan. But of course this is to some extent conjectural.

I would hazard a guess that perhaps in the more recent countries, there might be greater resistance in obtaining administrative agreements or treaties which would make possible these extraterritorial sittings of the U.S. Federal court. I think there is a very serious question and that certainly the effectiveness of such legislation would be left dependent on the success with which the State Department

pursued these provisions for implementation. It might be some governments would recognize a distinction between U.S. commissioners as distinguished from U.S. judges. It seems to me that perhaps it is a distinction without a difference as far as the exercise of sovereignty is concerned. But this would be a conceivable approach. I am sure the committee is aware that in the past the military, of necessity, of course, and I think also out of a sense of compassion, if you will, in misdemeanor cases, as to civilians, usually, has exercised the prerogative of sending such people home rather than pursuing any criminal action against them whatever. But this is not to say that this is not an important area. There are thousands of civilian employees overseas and petty larceny and this sort of thing is a fairly common occurrence, unfortunately. The fact that we are concerned with offenses with a punishment of 1 year or more simply doesn't cover a considerable area. The commissioner approach, I think, certainly should be considered.

Mr. CREECH. Professor, Mr. Everett has some questions.

Mr. EVERETT. Professor Wurfel, you served as a judge advocate under the Uniform Code and you have had occasion to write a book about the Uniform Code.

Could you give us your opinion as to whether the enactment of the code and the operation of the code has adversely affected the discipline in the armed services since 1951?

Mr. WURFEL. I would have to give a qualified answer to that, pointing out that I have not been on active duty for the last 5 years, or have I maintained any close connection with the Military Establishment—not through choice, but through geographical location at some distance from any military installation and that the last 3 years of my active service I served as a professor of military science and hence was somewhat detached from an observation of the area in which your question is directed.

I think there is some tendency in the military today for what is known as the "sea lawyer" or "guardhouse lawyer" to be a little more in the ascendancy with a manual for courts-martial in every company dayroom. I think the accused are fully aware of their rights and I think this is a good thing. I think there is a much better understanding of military justice, its limitations and the controls that are necessary by company commanders and other immediate unit commanders and this is truer than it has been in the past.

I personally don't think that there has been any substantial deterioration in the overall discipline of the Military Establishment because of the Uniform Code. I would say that its consequences on the whole have been quite beneficial and my personal evaluation would be that the code has not impeded the essential elements of discipline.

Now, I repeat, I have no personal knowledge of what the consequences are at the present time in Vietnam or in the Dominican Republic or other combat situations.

Mr. EVERETT. Professor Wurfel, in that connection, as you recall, various divisions of the code, speaking in time of war and some of the proposed legislation has special exceptions for time of war. Would it be your opinion that a more precise definition of time of war should be provided in the code to encompass the Vietnam situation or Korea hostilities and so forth?

Mr. WURFEL. I think this would be entirely appropriate. In a sense that is the essence of the proposal I made in my supplemental statement. It does occur to me that a rethinking of this language is appropriate. The language has always been used to describe a factual situation. The content or language changes. I submit without being legalistic at all about this thing that "time of war" today means something quite different than it meant at the time that the Consitution was adopted and the Congress certainly has the power realistically to look at this and to define specifically, if they so choose, what "time of war" shall mean for the purpose of the exercise of military jurisdiction—certainly within reason. There are limits beyond which it couldn't go, but this proposal is well within the discretionary reason of the Congress.

Mr. EVERETT. The subcommittee has understood that the recent cases have involved allegations of command influence exercised on defense counsel—military defense counsel in courts-martial. In your opinion would it be desirable to have some type of system of insulating the defense counsel from command influence along the same lines as we used in creating the field judiciary, that is separation of efficiency reports?

Mr. WURFEL. I have given no particular thought to this, but I certainly see no objection to it. Once you establish a field judiciary as an administrative procedure, I see no reason why trial and defense counsel could not be assigned in this manner and hence not be under the command of the Judge Advocate in a given command.

Now, this would present administrative difficulties. Of course, it would be possible to separate defense counsel and to leave the trial counsel under the jurisdiction of each command for the reason that the command is charged with the responsibility of enforcing the Uniform Code.

There are certain difficulties if you set up the defense counsel wholly apart and lock them in the position. I found in my judge advocate experience that defense counsel ultimately tire of the job and that you get a much better rounded experience for your company grade officers and majors who are normal trial-defense counsel if they rotate. You avoid a fixation which is very desirable in maintaining a detached legal point of view of both trial and defense counsel and consideration should certainly be given for periodic and perhaps even required rotation. This would be particularly so if there is to be any separation of defense counsel from the other components in the Judge Advocate Establishment.

I must say that in fairly extensive judge advocate experience I never had any difficulty with defense counsel feeling that command influence was being exercised on them. This may be a unique experience. Certainly there would be no objection to the proposal, if this flexibility that I speak of could be maintained. I think it would be unfortunate to establish a permanent corps of defense counsel.

Mr. EVERETT. Thank you.

Mr. CREECH. Professor Wurfel, Senator Ervin has asked me to say to you that the subcommittee is very grateful to you for the assistance which you have given the subcommittee in consideration of this legislation and that he regrets very much that it was necessary for him

to be elsewhere. He is unfortunately going to be tied up on the floor all day today. He will not be able to be with us. But he would like to ask if you would be agreeable to answering further questions which would be posed to you in correspondence which would be made a part of the subcommittee record.

Mr. WURFEL. I should be very happy to respond to any further questions by the committee.

Mr. CREECH. Thank you very much on behalf of the subcommittee. The chairman has asked me to say he is very grateful to you. Thank you very much.

The next witness will be D. George Paston, chairman, Committee on Military Justice, New York County Lawyers Association, New York, N.Y.

Mr. Paston, will you identify yourself for the record?

Mr. PASTON. D. George Paston, chairman of the Committee on Military Justice, New York County Lawyers Association, the largest local bar association in the country.

Mr. CREECH. Mr. Paston, do you care to summarize your statement or would you prefer to have us comment and go on with the questioning?

Mr. PASTON. I bow to your wishes. It is immaterial to me.

Mr. CREECH. The chairman has instructed me to say that your statement will be printed in its entirety in the record of the hearings. So if you care to say anything further to supplement it in any way, you may do so, or if you care to summarize it in any way and make any additional statements concerning it and then, at the conclusion of whatever you choose we shall pose questions.

STATEMENT OF D. GEORGE PASTON, CHAIRMAN, COMMITTEE ON MILITARY JUSTICE, NEW YORK LAWYERS ASSOCIATION, NEW YORK, N.Y.

STATEMENT OF COL. D. GEORGE PASTON

1. INTRODUCTION

We deeply appreciate your invitation that we submit our views on S. 745 to S. 762, inclusive.

The bills seek to amend the Uniform Code of Military Justice re the conduct of courts-martial, and administrative procedures, in lieu thereof, which result in the release of members of the armed services under other than honorable conditions.

It is well settled that in a criminal case the prosecution is required to prove the accused's guilt beyond a reasonable doubt in the minds of the jury. The following definition of "reasonable doubt" contained in a jury charge has been approved by the Supreme Court: "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit. *Holt* v. *United States*, 218 U.S. 245, 54 L. Ed. 1021. 31 Sup. Ct. Rep. 2. See, also, *People* v. *Barker*, 153 N.Y. 111, 47 N.E. 31. The evidence of facts and circumstances, in order to justify a conviction, must all be consistent with and point not only to the guilt of defendant, but they must be inconsistent with his innocence." *People* v. *Trimarchi*, 231 N.Y. 263, 131 N.E. 910.

In a civil action, the plaintiff may prevail simply by a fair preponderance of the evidence, not the number of witnesses but the quality of the evidence, since the testimony of one witness may make a greater appeal to the minds of the jurors than that of ten witnesses for the defendant. The "preponderance" or "weight" of the evidence is, therefore, governed by the credibility of the witnesses. *Schargel* v. *United Electric Light & Power Co.*, 127 Misc 24, 215 NYS 217; *Peltier* v. *Chicago, etc.*, 88 Wisc 521, 60 NW 250; *Kurz* v. *Doerr*, 180 N.Y. 88, 72 NE 926, 105 Am. St Rep. 716.

The only questions relating to an administrative board's findings is whether they were supported by substantial evidence and whether the findings were proper when made. *State Labor Relations Board* v. *Loram etc.*, 113 NYS 2d 211.

It has been said that a trial is had when the issues are presented to a court and the merits are judicially determined.

Due process of law requires that the proceedings shall be fair, but fairness is a relevant, not an absolute, concept. What is fair in one set of circumstances may be an act of tyranny in others. *Snyder* v. *Massachusetts*, 291 U.S. 97, 116, 117. Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, the court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. *Lisenba* v. *California*, 314 U.S. 219, 236. And on another occasion, the court remarked that "the due process clause," as applied in criminal trials requires that the Government's action "must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which, not infrequently, are designated as 'the law of the land'." *Buchalter* v. *New York*, 319 U.S. 427, 429.

Basic to the very idea of free government and among the immutable principles of justice which may not be disregarded is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." *Powell* v. *Alabama*, 287 U.S. 45, 68; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105.

Since the administrative boards in the armed services do release their members under conditions other than honorable, which is equivalent to criminal punishment, by a far lesser degree of proof required in courts-martial criminal trials, it is crucially important to make sure that a person brought before an administrative board is accorded due process and a fair trial.

2. PURPOSE OF THE PROPOSED LEGISLATION

We all agree that the sponsors of the bills are motivated by a desire (*a*) to improve the administration of military justice by increasing the efficiency of courts-martial and those "administrative" proceedings which are used to release members of the military services under conditions other than honorable, (*b*) at the same time safeguarding the constitutional rights of the members of the military services.

3. THE SENATE BILLS

To accomplish the foregoing objective, Senator Ervin introduced 18 bills, numbered S. 745 to S. 762 inclusive.

4. THE HOUSE BILLS

The Department of Defense and the U.S. Court of Military Appeals have formulated a G bill and an H bill, introduced by Mr. Bennett as H.R. 273 and H.R. 277, as substitutes for 5 of the 18 Ervin bills (S. 747, S. 750, S. 751, S. 752, and S. 757) in their belief that the 2 House bills achieve the objectives of the said 5 Senate bills, provide a better grouping of related matter, and eliminate "undesirable" features of the Senate bills.

5. S. 750 AND H.R. 273

S. 750 provides that no member of the armed services shall be administratively discharged without being afforded an opportunity to appear and be represented by qualified counsel before a board or court-martial.

H.R. 273 omits such provision in the belief of its sponsors that administrative procedures are unrelated to courts-martial and, therefore, have no place in the UCMJ.

Our views

(*a*) Since a discharge under other than honorable conditions is severe punishment, equivalent to criminal punishment, and administrative boards are free to disregard rules of evidence required in courts-martial, there is a greater need to safeguard the constitutional rights of members of the armed services before administrative boards than before courts-martial.

(*b*) The UCMJ even now concerns itself with administrative procedures unrelated to courts-martial. It provides against administrative dismissals under enumerated circumstances (title 10, sec. 804, art. 4), for administrative action re complaints of wrongs (title 10, sec. 938, art. 138), and administrative action for redress of injuries to property (title 10, sec. 939, art. 139).

(*c*) S. 750 should contain a provision to the effect that "when a board is convened, the notice of the proceedings served on such member shall have attached thereto a copy of the regulations pursuant to which he may be discharged or separated from the service." Such provision may be inserted between the two sentences of subdivision (a) of S. 750. Too often, a request for a copy of such regulation is refused because it is "unavailable."

6. S. 752, S. 757, AND H.R. 273

Both the Senate and the House bills authorize pretrial proceedings in GCM cases. The House bill sponsors believe that its language is clearer than those in the Senate bills.

Our views

We anticipate no difficulty in the adoption of clear language to accomplish the objective sought, particularly since Senator Ervin said: "It may be necessary to revise the wording of some of these measures; I am wedded to no particular language. However, the substance of each (the Senate bills) is, I feel, important if we are to grant the full measure of justice and security to those to whom this Nation has entrusted its defense." (Congressional Record, vol. III, No. 17, Jan. 26, 1965.)

7. S. 752 AND H.R. 273

Under the Senate bill, an accused is given the unqualified right to be tried by a one-officer court. Under the House bill, a trial by a one-officer court requires the consent of both the Government and the accused.

Our views

The law officer is chosen by the Government (the convening authority), and we must assume that he was so chosen because he is an officer of demonstrated qualifications, acceptable to the Government, which should be deemed satisfied if the accused elects to be tried by such individual.

8. S. 747 AND H.R. 277

The Senate bill provides for a civilian board in the D/D authorized to modify, set aside, or expunge the findings, sentence, or both, of courts-martial not reviewed by a board of review.

The House bill provides authority for relief in cases which are not reviewed by a board of review and which have become final under article 76, UCMJ, to apply principally to special and summary courts-martial now finally reviewed in the field and for which there is no specific statute for such relief. Its sponsors believe that it is uneconomical and unnecessary to provide a new authority to grant new trials in minor cases. The House bill would give the Judge Advocate General statutory authority to vacate or modify convictions or sentences in the cases specified, upon newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused, in no way interfering with the powers of the existing civilian boards to correct errors and remove injustices under section 1552 of title 10.

Our views

A new board would be expensive. Since the JAGS can handle this business, a new board is unnecessary. We should give the necessary authority to the JAGS.

9. CONCLUSIONS

(*a*) The bills we have not discussed, which are approved by the USCMA and the D/D, and are designed to effect desirable improvements in the administration of military justice, are approved by us.

(*b*) Administrative boards are used in the services to rid themselves of undesired individuals in the absence of probative evidence to convict by courts-martial. In many of these cases, discharges, under other than honorable conditions are meted out. The board members are not lawyers. A provision should be made requiring that whenever a board decides that a member should be discharged or released under other than honorable conditions, the board's action shall be reivewed by the JAG.

(*c*) When a man is called before a board under AR 635–89, AR 635–208, or AR 635–209, and requests a copy of the regulation to permit him or his counsel to prepare against an undesirable discharge, he is, not infrequently, informed that the regulation is not available. Telling a man, often a boy, that he is being called before a board which may discharge him pursuant to the provisions of a numbered regulation, he is helpless to defend unless he is provided with a copy of the regulation. Our proposed legislative remedy is set forth in paragraph 5(c), page 4 above. We repeat that basic to the very idea of free Government and among the immutable principles of justice which may not be disregarded is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." *Powell* v. *Alabama*, 287 U.S. 45, 68; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105. He does not have such opportunity unless he is furnished a copy of the pertinent regulation.

(*d*) Administrative boards should be composed of at least one lawyer to avoid undue weight being given to hearsay and other nonprobative evidence received by the board.

(*e*) Article 67(g), UCMJ, 10 U.S.C. 867(g), requires the judges of the USCMA, the JAGS 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 committee on armed services of the Senate and the House, to the Secretary of Defense, the Secretary of the Treasury, and to the Secretaries of the armed services, with regard to the status of military justice and the manner and means by which it can be improved by legislative action.

Since the enactment of the code about 15 years ago, the code committee has met annually and submitted an annual report recommending the manner and means by which military justice can be improved by legislative enactment.

Congress has not utilized such reports for legislative enactment, except for the bad check provision (sec. 923a, art. 123a) adopted in 1961 and the enlargement of a commanding officer's powers of nonjudicial punishment (sec. 815, art. 15) adopted in 1962.

(*f*) Now that Senator Ervin and his committee and staff have made a thorough study of military justice, and the code committee agrees with his objectives, it is hoped that the 2d session of the 89th Congress, cognizant of the needs of the military services and the fundamental constitutional rights of those to whom this Nation has entrusted its defense, will favorably consider and adopt the proposed legislation.

Respectfully submitted.

D. GEORGE PASTON.

Mr. PASTON. You will note from my written statement that I have endeavored to stress the point that the objectives of this committee, Senator Ervin, seem to be the same as those of the armed services and the U.S. Court of Military Appeals in most respects, and that the exact language to be chosen to carry out their mutual object should not be too difficult. Where there is any apparent disagreement as to thought and so on, my statement also shows there is no actual disagreement.

You will recall in the statement where the statement was made that administrative boards don't belong in the Uniform Code of Military Justice because they are not criminal in nature, and we showed that the present code does contain phases to be handled by

an administrative board and other matters not strictly criminal in nature. So there would be nothing wrong in including within the code matters that are handled by administrative boards which, under present operations, have been shown to deprive an individual of certain fundamental rights. So, to secure those rights to the individual it would be better to legislate, to have it included in the Uniform Code of Military Justice. That I think is the main point that we desired to stress in that connection.

I have pointed out in the statement other views that we entertained. I would be happy to endeavor to answer any questions that you might have.

Mr. CREECH. Thank you, Mr. Paston.

Sir, in your statement you outline a case for considering at law the essential criminal nature of administrative proceedings based upon misconduct. In addition to the essentials of due process which the bills would apply to these discharges, would it also in your view be necessary to incorporate rules of evidence and the strict standards of proof as well?

Mr. PASTON. In the civilian setup where administrative boards are only required to base their findings on substantial evidence to support their conclusions, we don't impose upon administrative boards to find facts "beyond a reasonable doubt" as we do in criminal cases in court-martial. Upon review of actions by administrative boards if we find that they adhere to the principle of fundamental rights to the person before it, there would be no need to impose additional evidentiary requirements as we do in criminal cases. But if, after such reviews, we find too many cases where the boards brush aside the rights of individuals requiring the reversals of their action, we may then determine that it would be advisable to impose the same requirements that we do in criminal cases.

Mr. CREECH. Well, sir, you suggest on page four of your statement, that S. 750 should also contain a requirement that respondent be given a copy of the regulations under which he is being processed. Would you also include a requirement that civilian counsel and, for members, say, under 21 years of age, that their parents and guardians also be given notice?

Mr. PASTON. I would say yes, and I would go further. I would say that before they have the boy—I call him a boy—answer in the affirmative that he will accept an administrative discharge without honor, that the offer should be transmitted to this parents and a reasonable time allowed to elapse so that the boy may be properly advised by his parents or by civilian counsel whether to accept the offer. Because as you know, from past experience, we have had too many cases of the boy gladly grabbing that opportunity, getting a discharge without honor and in later years coming to his Congressman and saying "I can't get a job" or "I am barred from many other things because I was discharged without honor at the time."

At the time he was a boy he didn't realize its later importance.

Mr. CREECH. The argument raised against S. 752 upon which 73 is based is that there are other considerations besides the qualifications of the military judge which might make the Government desire a full court. If Federal civil trials—in these things—in Federal civil trials

both side must consent to a nonjury trial. In your view should it be different in a court-martial?

Mr. PASTON. I think it should be different, yes.

In the Federal courts where an individual states that he is willing to be tried by the judge alone without a jury, the Federal district attorney must concur and of course the court must also approve. But in military justice, where the convening authority has set up the court and named the law officer, and we must assume that the law officer was so selected because of his qualifications, and the convening authority knew that the accused may elect to be tried by that named law officer, then, if the accused says, "I am willing to be tried by that law officer alone without the balance of the court," it should be final, and the convening authority should not be given another opportunity to change the court or to insist upon a trial by the entire court after having afforded the accused an opportunity to be tried by the law officer who was approved, selected, and named by the convening authority.

Mr. CREECH. Well, sir, you have stated in your opening remarks the necessity for due process in administrative hearings leading to discharge—do you think by giving an election of a court-martial in these cases as provided in S. 758 this problem would be corrected? Do we assume certain changes will nonetheless be made in the hearing itself along the lines of the bills or do you see problems in providing for an election of a court-martial as in S. 758?

Mr. PASTON. I think that the purpose of giving the accused the right to elect a court-martial instead of an administrative board is because we believe that he will be surrounded by the proper safeguards of his rights at a court-martial. But if he says, "I am willing to be tried by an administrative board," and if that administrative board is not surrounded by the proper safeguards, I think what we ought to do, if we already assume that the court-martial is safeguarding his rights, is also safeguarding his rights before the administrative board as well.

Mr. CREECH. Sir, we have had discussion here earlier this morning on S. 761 and S. 762, bills pertaining to extra territorial jurisdiction and it has been suggested to the subcommittee that it would be preferable to amend title 18 rather than the Uniform Code to achieve the results which these bills are designed to meet. In some instances the subcommittee has had it suggested that title 18(a), section 7, the maritime jurisdiction section, would be the appropriate section to amend in order to cover all citizens rather than the ones in the uniform code.

I wonder if you care to address yourself to this suggestion.

Mr. PASTON. My own views would be simply these: That if we have a proper provision it doesn't matter too much whether it appears under one title or under the other. It would be a question of mechanics. It should be set out in such clear language and tied up between the two and in any other titles that it may affect, so that he who runs may read and won't overlook it. Now, it is true that some people involved in criminal acts overseas are other than those who accompany the Army, Navy, Marines, so that we should have a law subject of course to the status of forces agreements whereby we could take care of all our accused overseas. If it is under the maritime

act, it should be cross referenced to the Military Justice Code or vice versa.

Mr. CREECH. Sir, in connection with those bills, it has been suggested that in order to handle misdemeanors which occur overseas there should be some extension of the U.S. commissioner system and by the same token it has been suggested that a roving district court judge might be able to deal with noncapital felonies. I wonder if you could see any practical or legal problems in connection with these suggestions and if you care to comment on them.

Mr. PASTON. I think we have got to start with this basic idea, that when an American is tried by a foreign court, American citizens believe that the accused American is being railroaded, that justice is not being meted out. We know that in many foreign countries, American defendants have fared better at the hands of the foreign courts than they would have in our own courts. Nevertheless, too many Americans are afraid that the opposite would obtain. Therefore, by agreement with these foreign countries, it would be wise, I think, if we set up a court or commission to handle cases involving Americans, again, if those countries would agree, which some maye not.

Mr. CREECH. Sir, the subcommittee has received representations concerning the desirability of a Navy JAG Corps. Among the suggestions which the subcommitee has received is that the subcommittee should await action over on the House side on the Bolte bill of which this is one of the provisions.

Now, as you know, this legislation has been under consideration by the House and has been proposed over there at least 5 or 6 years ago and notwithstanding the fact that there have been numerous representations as to the desirability of this legislation, there has been no action taken on it.

I wonder, sir, if your committee has gone into the background, development of this proposal and if you feel the necessity for it or the necessity for it is such that the Senate should go ahead and act on this legislation without awaiting any action elsewhere?

Mr. PASTON. I am frank and blunt.

Since we believe that it is desirable to have, we can't see why the Senate should wait for the House to adopt this proposed bill. What goes on behind the scenes, whether our allies wanted to get into Paris before we do—things of that kind—I don't know it is going on between the House and Senate. But since we think that it is a desirable thing we believe that the Senate should adopt it and then let the House close the bolt.

Mr. CREECH. Sir, the subcommittee has also been told with regard to this proposal, creating a Navy JAG, that the Navy has been informed as a result of the questionnaire which it has asked former naval lawyers to answer—lawyers who are leaving the naval service to answer—that the two reasons most frequently cited by officers leaving the naval service for doing so are salaries and the fact that there is no professional status given a naval lawyer.

I wonder if your committee has any information on this situation or if your study has revealed whether this is a morale factor with the naval lawyer and whether this legislation would in fact enhance the situation in the Navy regard to retaining inservice naval lawyers?

Mr. PASTON. I think there can hardly be any doubt about it. Any individual who is a lawyer and serves in the Armed Forces under such duties as is required of a lawyer, when he comes out he would like to be stamped with that title of having been a lawyer in the armed services. Status is an important thing in today's economy and in today's civilization. It is also true while he is still in the service.

Mr. CREECH. Mr. Everett has some questions.

Mr. EVERETT. Colonel Paston, on page 7 of your statement you indicate that the administrative boards should be composed of at least one lawyer to avoid undue weight being given to hearsay and other nonprobative evidence received by the board. Was it the view of your committee that this lawyer should be more or less like a judge for that administrative board providing legal direction to it and how far did you have in mind that this concept would be carried?

Mr. PASTON. Frankly, we didn't want to go into that. Our thought was that we permit administrative boards to receive hearsay evidence, which is not proper evidence, and other informal matters. Then the administrative board, in weighing what it has received, gives undue weight to the matters that should receive very little, if any weight. They should therefore have on the board a lawyer, a qualified lawyer, who would be in a position to evaluate the evidence for his comembers of the board so that they can arrive at a proper conclusion.

You raise another matter which sounds very good. If we think the idea is a good one and we adopt it, must we go a step further and see whether or not we should clothe that lawyer with a little more authority than that of an ordinary member of the board? I agree with you.

Mr. EVERETT. In an earlier comment a minute ago you indicated that you thought, as to extraterritorial jurisdiction, it was less material than it would be in title 18 or title 10, that it be very clear, and I gather similarly from your statement that you do not find any fatal objection to having uniform code provisions which deal with administrative discharges and administrative proceedings.

Could you elaborate on that, Colonel Paston?

Mr. PASTON. It has been said by too many people that the matters to be handled by administrative boards should not be in the Code of Military Justice, which is strictly for court-martial criminal matters only.

I gave the reasons before for the desirability of including these administrative board proceedings in the code.

I also pointed out that too many people overlook the fact that the present Code of Military Justice does contain matters which are not strictly criminal in nature. For instance, under title 10, section 804, article 4, there is a provision against administrative dismissal under enumerated cirumstances. Then there is another provision, under section 938, for administrative action, re complaints of wrongs, and under section 939, administrative action for redress of injuries to property. They are hidden away in the code and I can't blame too many people for overlooking the fact that they are in the code. But, so long as we do have administrative matters in the code now, and we find that it is so important to safeguard the rights of individuals who come before administrative boards, they certainly belong in the code—equally as important as these matters, if not more so.

Mr. EVERETT. Colonel Paston, last week the subcommittee heard testimony which took different views as to whether command influence is now subject to punishment by the Uniform Code and whether it should be subject to punishment by the Uniform Code. I believe on the other hand, a position has been taken in one of the statements that command influence should be subject to punishment in a civil court proceeding; that is, in a Federal district court.

Could you give the subcommittee the benefit of your views as to what penalties, if any, should be available for command influence exercized on court-martial members, on members of administrative boards and how these penalties should be imposed, if you think there should be any penalties?

Mr. PASTON. Frankly, I haven't thought of that at all nor has my committee. But I don't know whether we should fix any definite penalty to be meted out to a commanding officer who exercises undue influence. I imagine that if any such cases are found, the Secretary of the service concerned or the Secretary of Defense has enough power to handle the situation in the proper way. If enough of those cases should show up and the Secretaries concerned do not take the proper action and stop the practice, why then, I suppose, we could devise suitable legislation to take care of it. You might, for instance, reverse the conviction in any case where command influence was found. This drastic step would deter such attempts.

Mr. EVERETT. Colonel Paston, the Army and Navy currently employ the field judiciary system and the Air Force, for personnel reasons and other reasons are apparently not using—apparently have not adapted such a system at the present time. One of the legislative proposals before the subcommittee concerns statutory requirements for field judiciary systems which would be applicable to all the armed services. To what extent do you feel that it would be desirable to make rigid a requirement of a field judiciary system and to apply it to all the armed services by statute?

Mr. PASTON. We were concerned a long time ago with the fact that certain regulations applied to some services and didn't apply to others, so that an individual in one service that didn't get the benefit that others got in another service.

I think that as long as we start out with a Uniform Code of Military Justice, that we want to apply to all the services, then I think the machinery we are setting up should apply to all the services. We shouldn't let the Air Force nor the Navy, as they have attempted in the past, stand aside and say that they don't belong to our family. We should make the field judiciary applicable to all services.

Mr. EVERETT. Thank you, Colonel Paston.

Mr. CREECH. Colonel Paston——

Mr. PASTON. You asked me the question about whether a boy who was being offered an opportunity to receive a discharge under other than honorable circumstances—I pointed out, and I think it is important that when they serve him with the notice to appear before a board under a certain regulation, AR 635–89, 208, or 209, that they should supply him with a copy of that regulation. The reason I say that is because I know from personal experience that such individuals, No. 1, are furnished with a copy of the regulation; No. 2, their attorney, when he requests that regulation receives an

answer that they are not available. Then, when we go to the depot, which I think is in Baltimore, where the attorney is told to answer for it, he doesn't get an answer for about 4 months, long after the matter comes on, which is within about 2 months.

I think we ought to have that included. Then, if we look a little deeper we find that in some of these administrative proceedings, and I am talking now from personal knowledge, where the reporter present is so unqualified that when testimony is introduced or summations are made, he sits there, looks up at the ceiling, and is obviously not taking down what is being said. Then the recorder says, "Don't worry about it, I will doctor it up," and he will tell you that you will get a copy of the record. I refer to a particular matter which was disposed of last October, and to date no such record has been furnished.

So, those are some things we ought to look into. Make sure that the accused and his attorney are served at the same time the notice is served, with a copy of the regulation concerned, and then make sure that you have a qualified reporter taking down the record.

Mr. CREECH. Colonel Paston, the situation that you describe reflects your experience was a specific case?

Mr. PASTON. One specific case. I personally have no quarrel because it turned out favorable to my people. But I point that out that it could have turned out the other way.

Mr. CREECH. Colonel, Senator Ervin has asked me to say that the subcommittee is deeply grateful to you and the Committee on Military Justice of the New York County Lawyers Association for the exceedingly fine statement that you have made here today and the assistance which you have given the subcommittee throughout its study on the rights of military personnel.

He has also asked me to say that he deeply regrets not being able to be here today and he has asked me that I inquire whether you would be agreeable to answering additional questions should there be some which he would like to pose to you in correspondence?

Mr. PASTON. I would be very happy to. Thank you very much.

Mr. CREECH. Thank you very much for coming here.

The next witness will be John J. Finn, chairman, Special Subcommittee on the Uniform Code of Military Justice, American Legion. Mr. Finn will be accompanied by Herald E. Stringer, director, National Legislative Commission, the American Legion.

The Chair will recognize at this time Mr. Stringer.

Mr. STRINGER. Thank you very much Mr. Creech. Our witness today is, as you have stated, Mr. John J. Finn. I believe that you and the members of the subcommittee are acquainted with him. For the record may I say that Mr. Finn since 1929 has been an attorney. He is a member of the bars of Massachusetts, Virginia, the District of Columbia, the U.S. Court of Military Appeals, and the Supreme Court of the United States.

For the past 6 years he has been chairman of a Special Subcommittee on the Uniform Code of Military Justice and Court of Military Appeals of the American Legion.

In our judgment he is knowledgeable on this subject. He is here with me today and is prepared to testify.

Mr. CREECH. Thank you very much, Mr. Stringer.

Mr. Finn, would you care to proceed.

STATEMENT OF JOHN J. FINN, CHAIRMAN, SPECIAL SUBCOMMITTEE ON UNIFORM CODE OF MILITARY JUSTICE AND COURT OF MILITARY APPEALS, THE AMERICAN LEGION; ACCOMPANIED BY HERALD E. STRINGER, DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION

Mr. FINN. The American Legion and I personally are very happy to appear here and we thank the committee for the extension of the opportunity to appear and to present the views of the American Legion with respect to the bills S. 745 through S. 762, with most of which we are in agreement.

I have a prepared statement which I desire to submit, and knowing the volume of business that you have here, I would state only that the first 7 pages of that statement give the general philosophy and basis upon which the views that are expressed by the American Legion are set out in respect to the various bills. I think I can save the committee time if I just take the first bill and run through each bill, and enlarge upon that which is in the statement in the event that such is necessary.

(The statement referred to is as follows:)

STATEMENT OF JOHN J. FINN, CHAIRMAN, SPECIAL SUBCOMMITTEE ON UNIFORM CODE OF MILITARY JUSTICE AND COURT OF APPEALS, THE AMERICAN LEGION, ON S. 745 THROUGH S. 762 AND RELATED LEGISLATION

Mr. Chairman and members of the committee, on behalf of the American Legion and personally, I thank you for affording me the opportunity to testify here concerning S. 745 through S. 762 which the American Legion generally favors.

In preparing this statement, I was assisted by past and present members of the Special Committee of the American Legion of which I am chairman, including: Brig. Gen. Franklin Riter, retired, of Salt Lake City Utah, who was in charge of military justice matters in the European theater during World War II stationed in England, Carl Matheny, a distinguished lawyer from Detroit, Mich., who served in the U.S. Navy during World War I, Benedict Ciaravino, of Freeport, N.Y., who has had wide experience in U.S. Navy legal matters, and Max Hansen, of Boise, Idaho, who had considerable experience with military justice in World War II in his service with the U.S. Army.

The testimony I offer is based upon various mandates of national conventions of the American Legion dating as far back as 1946, testimony which has previously been offered, in areas relating to the subject matter of this proposed legislation, to congressional committees in years past, and a report of the Special Committee on the Uniform Code of Military Justice and on the U.S. Court of Military Appeals, submitted to and adopted by the 38th Annual National Convention of the American Legion held at Los Angeles, Calif., September 3–6, 1956, a copy of which is attached to the testimony which I offered on March 6, 1962, before the Subcommittee on Constitutional Rights of the Committee of the Judiciary of the U.S. Senate, and which is incorporated in the report of that committee had on Senate Resolution 260, 87th Congress, 2d session, at page 405 et seq. This report was based upon an intensive investigation conducted by the American Legion's special committee which I represent today.

The fundamental concepts and principles which have underlain and guided the recommendations we have consistently made to Congress over the years are set out in said report beginning at page 7 (p. 409 of Senate committee report on S. Res. 260, 87th Cong.) and which for conveniences' sake I quote here:

"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 nonconflict 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. * * *

"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 puni-

tive 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 Constitution 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 pretentions and idle gestures.

"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 hierarchy 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 * * *".

In addition to the foregoing, the comments made with respect to the proposed legislation herein are advanced with the additional following considerations in mind.

It is a contention of the American Legion that today, since the majority of persons in the military service are serving because they are drafted (or fear they will be) by draft boards of civilians in their own community, civilians should determine the type of discharge given from the military services if they receive a discharge other than an honorable discharge.

Furthermore, if it becomes necessary to try a person for an offense, particularly those not strictly military in nature, the trial should be had in as close an approximation to a trial which the serviceman would have in a State or Federal court if he were a civilian as is possible.

The Army, the Navy, the Air Force, and the Coast Guard, each conduct courts-martial of various kinds and in addition, each service has one or more boards for the review of discharges and dismissals and one or more boards for the correction of military records, all of which have some effect upon the administration of justice in the military service. There is wide disparity in procedures and disposition of matters which come before the various courts and boards and correspondingly, wide disparity in the relief, or lack of relief afforded. For the same offense in different services a different type of trial, punishment, review, and disposition is had. This is not fair or conducive to high morale.

The American Legion has always contended that competent counsel should always be available to an accused in a court-martial. It has always opposed the practice, not yet defunct, of the competent lawyer becoming "unavailable" to the defense or being made available for prosecution when he has successfully defended an accused or two. No objection is had to assigning competent lawyers as prosecutors but their peers as lawyers should not be denied to accuseds.

The objection has been made in the past, and will be made again, by the Defense Department that the expense of suggestions of the American Legion (and perhaps of implementation of these proposed bills) would be too great for the services to sustain. Further objection has been made that, in the services, it would be impracticable to set up and conduct courts-martial at times and places which would be necessary if the American Legion recommendations were to be followed. Lastly it has been said that the present system could, or would not work in time of war. There is no reason to believe the same objection will not be advanced as to this proposed legislation.

The question of expense in this area for the richest country in the world is the last that should be raised. In any event we conceive it to be so ridiculous as to not warrant comment.

With reference to impracticality it should be borne in mind that general, special, and even summary courts-martial are not held in an army tank traveling over contested terrain, in a navy longboat at sea, and in an airplane on a mission. When a person is tried it usually is at a headquarters, base, or fixed area and at a time considerably after the offense. A short answer to this objection and to that of unworkability in wartime is that despite such fears as to the present code expressed by military people the code worked without difficulty during the Korean conflict—and this on the authority of Admiral Radford who was in charge.

I now present a very brief statement of the position of the American Legion in respect of each of the bills under consideration by this committee. I should be very happy to enlarge upon any of these remarks at any time, either with the committee or your staff.

S. 745

This bill makes the law officer a military judge and sets out the qualifications of such a person. It appears to us that this bill, if enacted, sets up what might be called a forced circuit judiciary system. The Department of the Army has set up a circuit judiciary system, but administratively. The American Legion has been opposed to handling military justice matters administratively, mainly for the reason that a practice set up administratively (generally to forestall then current criticism) can always be abandoned when the furor has subsided or it is, in the opinion of the service, expeditious to do so. The provisions of this bill, if enacted, will carry out, in part, recommendations which have been made by the American Legion for many years in making military courts more like other courts of this land and such action should be accomplished by legislation of this nature rather than leaving such a useful and progressive system to depend on administrative action.

S. 746

This bill provides for the setting up of a Judge Advocate General's Corps in the Department of the Navy. We are entirely in favor of this bill, its provisions having been the subject of constant recommendations by the American Legion. However, we believe that if such a corps is provided for the Navy that a similar

corps should be provided for the Air Force. In fact, under date of January 16, 1961, Mr. F. A. Bantz, Acting Secretary of the Navy forwarded a draft of proposed legislation "to establish a Judge Advocate General's Corps" in the Navy. The lawyers of the U.S. Navy have been attempting to have a corps established since during World War II, but the line officers of the Navy have been constantly opposed. They fear that loss of control of the legal department and over courts-martial which they have always exercised. It sometimes appears that they distrust the loyalty of a lawyer to his client and apparently doubt that a Navy lawyer, in a corps, would be as patriotic an American and as devoted to the Navy as they are. The American Legion has never been able to understand why, if a legal corps is practicable and useful for the Army, it cannot be and is not equally so far the other services. In this connection I refer you to the report of the American Legion special committee, page 19, et seq. (committee hearings on S. Res. 260, 87th Cong., p. 421, et seq.).

We question the wisdom of the maximum age limit of 35 years set out in section 5578a. If this provision had been in effect during World War II, a great many competent lawyers would never have served in the Navy and it is doubtful in time of emergency enough good lawyers to satisfy the Navy's need would be obtainable in the 21 to 35 years age bracket.

S. 747

This bill seeks to effect a reform which the American Legion has recommended for many years and we favor the aim sought to be accomplished thereby. We invite the committee's attention to the fact that a bill to accomplish relatively the same purpose was filed in the 89th Congress, 1st session by the American Legion. H.R. 9949. We suggest that the term of 3 years for members of the board as provided in S. 747 does not appear to the American Legion to be a sufficiently lengthy term to attract the qualified and highly competent type of person we conceive to be necessary to properly administer matters which would come before such a board. We feel that the 15-year term suggested in H.R. 9949 would be a more satisfactory method of obtaining people who would be qualified to act in a way acceptable to the Congress and the people.

It is noted that in certain cases involving courts-martial, it is anticipated that the board can make changes on its own authority, but in other cases it recommends changes to the secretary of the service involved. This provision necessarily must be read with proposed S. 753 which gives the Court of Military Appeals the authority to review cases from this board by way of petition or certificate. In this respect the two sections are not clear as to the extent of authority of the Court of Military Appeals in the type of case where the board can only recommend relief. It might be that the judges of the Court of Military Appeals would not want to be in the position of passing upon a mere recommendation or to decide a matter on such recommendation where another authority is to make the final decision. In any event the Court of Miiltary Appeals should not be placed in the position where another authority, namely, the Secretary of the service involved, would make the final decision.

Candidly, we are of the view that H.R. 9949, as written, would accomplish the end sought by S. 747, is more specific in many respects and is not subject to some of the determinations which must be made administratively before the board under S. 747 could become operative. Furthermore, a board established in the Executive Office of the President is in the nature of things bound to arrive at far more independent conclusions vis-a-vis the military services than is a board established in the Department of Defense for the same purposes. We respectfully suggest that H.R. 9949 should receive committee approval and be substituted for S. 747.

S. 748

This bill, if enacted, would carry out recommendations made by the American Legion over a period of years. Raising the present boards of review to courts of military review adds dignity to each of the courts and is a salutary change. The provisions for allowing civilians to serve on such courts and the clarification of the powers of the court are most desirable.

We have felt, and still are of the view, that such boards or courts of military review should be placed in the Department of Defense and removed from each service which would tend to eliminate disparity in procedures and dispositions which is presently the case and about which complaints are constantly heard.

S. 749

The American Legion is now and always has been in favor of the end sought to be obtained by legislation of the kind proposed in this bill. However, as we read this bill, it is purely hortatory in character and the American Legion has been of the view that offenses of the type delineated should be punishable under provisions defined in the U.S. Criminal Code.

S. 750

The American Legion approves of this bill as far as it goes. However, it does not feel the bill goes far enough to be consonant with generally acceptable practices in the United States today. We are certain the committee is aware of recent Supreme Court decisions which indicate a trend toward the requirement that accused persons have a right to representation by qualified counsel at all stages of apprehension and confinement. We do not feel that persons in the military service should have any fewer rights in this area than civilians as we have set out above. In any event, we believe that counsel should be mandatory in one man special courts-martial.

S. 751

The American Legion concurs in this bill and recommends its adoption except that it feels that any such legislation should include all cases and not be restricted to a period of 1 year before enactment.

S. 752

This bill generally follows suggestions previously made by the American Legion in the area discussed and the American Legion approves of the bill as written. However, it is noted that summary courts-martial are retained and the American Legion has consistently been asserting that these courts should be abolished since they serve no useful purpose. In fact, approximately 2 years ago representatives of the American Legion in meetings with representatives of the Court of Military Appeals, the Department of Defense and staff members of the House of Representatives Armed Forces Committee agreed not to oppose proposals to increase certain nonjudicial or company punishments which could be meted out in the military services. This was agreed to because it was asserted that if these additional punishments could be assessed there would be no longer any need for summary courts-martial. It was the understanding of the American Legion representatives that should the increase in command punishments allowable prove successful, the services would themselves abolish summary courts-martial. The legislation was subsequently passed.

It is our understanding that the granted increases have been highly successful in assisting promotion of discipline and accomplishing their intended purposes. It is time to eliminate summary courts-martial now.

There has been a question raised as to the provision asserting that the law officers' rulings are final on all matters except mental responsibility. This provision as well as the present law is ambiguous to some extent in that there is some question as to whether this proviso means mental responsibility for the crime, that is, as a defense, or whether it also includes the capacity to stand trial for the offense. It is believed that this aspect of the bill should be clarified before enactment.

S. 753

We have previously discussed a portion of this bill in conjunction with S. 747 above.

There is further the possible objection to this bill that it violates a premise upon which the American Legion has been proceeding in that there should be a "civil review" outside of any Department of Defense influence.

There is also some danger that reconsideration of administrative action, which would be beneficial perhaps to an accused serviceman or one severed from the service, would be foreclosed, to which practice the American Legion strongly objects. It is believed that reconsideration of action could be refused under the proposed legislation and that the legislation should be confined to military offenses only. We have no objection to continuation of section 1552 boards (correction of military records). They can be helpful in retirement and like matters.

It has been the position of the American Legion that the section 1553 boards (review of discharges and dismissals) should be abolished in any event.

It was the original conclusion of the special committee of the American Legion that these boards were of little, if any, value. We believe that as a result, however, of H.R. 9949, predecessor bills, and representations made by the American Legion to congressional committees, these boards have gradually become of some value in changing certain types of discharges. However, such changes have been accomplished administratively and we believe that a statute of the type of H.R. 9949, or that which is under discussion here, should be enacted, which board will take the place of section 1553 boards.

It is noted furthermore that under present article 67 the law provides that action "need be taken only" with respect to issues certified or raised in a petition. As now suggested to be revised, it will read the Court of Military Appeals "shall take action only with respect" to the issues certified or raised in the petition. If this change is read strictly according to the language and from past performance the Defense Department will so insist it would abolish the de novo review given by the Court of Military Appeals, which includes the power of the court to notice plain error (a power in every other Federal court). About one-third of the present granted appeals involve issues caught at this level, many times in items not even urged by counsel. This de novo review (as intended in the Code) does more than anything else to keep the military on its toes.

The American Legion opposes any legislation which in any way narrows the present power of the Court of Military Appeals.

S. 754

In the opinion of the American Legion this bill is a "must" and is now and has been for a long time necessary to prevent injustices which have been perpetuated on servicemen by issuance of administrative separations and discharges, in many cases where such action was resorted to when it was known that a conviction by a court would be impossible. In previous testimony and in the report of the special committee of the American Legion, page 37, et seq. (committee report S. Res. 260, 87th Cong., p. 439, et seq.), this subject is discussed at length.

S. 755

This bill is satisfactory, follows mandates of conventions of the American Legion to seek enactment of this type of bill and, in our opinion, should be enacted.

S. 756

This bill is satisfactory, follows mandates of conventions of the American Legion to seek enactment of this type of bill and, in our opinion, should be enacted.

S. 757

The American Legion questions the value of pretrial hearings in criminal cases generally because it questions the caliber of defense counsel generally available to military personnel; it doubts such counsel's ability to property protect an accused in stipulations or agreements reached in a criminal action.

It is known, however, that the Defense Department desires to inaugurate such a practice and the American Legion appreciates that in certain areas the trial and disposition of courts-martial would or could be expedited if motions to suppress evidence, regarding confessions, and motions which are presented in a U.S. Federal court could be heard in advance of an actual trial.

S. 758

This bill, in part at least, coincides with the views of the American Legion and is generally satisfactory. We raise the question, however, as to whether, if enacted, such a bill might not be used as an instrument of oppression, i.e., there exists the possibility of double jeopardy. Further, the waiver provisions do not seem to be consistent with the general philosophy of the American Legion which is doubtful of allowing the use of waivers in military courts. Past experience has shown abuses.

Furthermore, we have doubt as to whether the deprivation, provided in the bill, or certain defenses should be condoned or is acceptable. Candidly, we doubt the necessity for such provision.

S. 759

This bill which would abolish summary courts-martial accomplishes what this committee has been pressing for over many years as we have stated above and we strongly recommend its adoption.

S. 760

The American Legion believes that this bill expresses a desirable policy; however, it believes that the bill should be strengthened so as to leave no doubt that depositions may not be used in a court-martial as evidence which may be the basis of a conviction. The majority of the special committee of the American Legion is doubtful that depositions should be used in courts-martial in any event, but a substantial segment of the committee believes that a defendant should be allowed to avail himself of depositions in his defense.

S. 761

The American Legion is somewhat doubtful that enactment of this bill would be constitutional and we would rather leave to the Department of Justice the question of whether or not it should be enacted.

S. 762

Your witness makes the same comments with reference to this bill as are made hereinabove with reference to S. 761.

SUPPLEMENTAL STATEMENT OF JOHN J. FINN, CHAIRMAN, SPECIAL SUBCOMMITTEE ON UNIFORM CODE OF MILITARY JUSTICE AND COURT OF MILITARY APPEALS, THE AMERICAN LEGION, ON S. 753, FEBRUARY 25, 1966

Mr. Chairman and members of the subcommittee, it has been called to my attention that S. 753 would remove from the U.S. Court of Claims and the U.S. district court jurisdiction over certain decisions rendered by the discharge review and correction boards.

The American Legion bill, H.R. 9949, calls for a civilian separation review board. We do not intend for that bill to limit in any way the jurisdiction of the Court of Claims and the district court over decisions of the proposed board which would be conferred by existing law. It would be a great loss if that happened.

The American Legion, therefore, objects to that portion of S. 753 which would divest the U.S. Court of Claims and the U.S. district court of the jurisdiction they now have to review certain decisions of the discharge review and correction boards.

Mr. FINN. Now, S. 745 makes the law officer a military judge and sets out the qualifications of such a person. It appears to us that this bill, if enacted, sets out what might be called a "forced" circuit judiciary system. The Department of the Army has set up a circuit judiciary system, but administratively. The American Legion has been opposed to handling military justice matters administratively, mainly for the reason that a practice set up administratively, generally to forestall then current criticism, can always be abandoned when the furor has subsided or it is, in the opinion of the service, expeditious to do so. The provisions of this bill, if enacted will carry out, in fact, recommendations which have been made by the American Legion for many years in making military courts more like other courts of this land, and such action should be accomplished by legislation of this nature rather than leaving such a useful and progressive system to depend on administrative action.

S. 746. This bill provides for the setting up of a Judge Advocate General's Corps in the Department of the Navy. We are entirely in favor of this bill, its provisions having been the subject of constant recommendations by the American Legion. However, we believe that if such a corps is provided for the Navy that a similar corps should be provided for the Air Force.

In fact as you are, I know, aware, in 1961, the then Acting Secretary of the Navy forwarded a draft of proposed legislation and from your comments just immediately preceding my appearance here, I gather there is some sort of bill still pending in that area over in the House, of which I was unaware. But the lawyers of the U.S. Navy have been attempting to have a corps established since during World War II. But, the line officers of the Navy have been constantly opposed to this. They fear, apparently, the loss of control of the legal department and over the courts-martial which they have always exercised. It sometimes appears that they distrust the loyalty of a lawyer to his client and apparently doubt that a Navy lawyer, in a corps, would be as patriotic an American and as devoted to the Navy as they are.

The American Legion has never been able to understand why, if a legal corps is practicable and useful for the Army, it cannot be, and is not equally so, for the other services. In this connection, I refer you to the report of the American Legion special committee, page 19, which is contained in the committee hearings on Senate Resolution 260 in the 87th Congress, at page 421, in which we enlarge upon this at great length.

We question, however, in the bill which we have before us the wisdom of the maximum age limit of 55 years set out in section 5578(a). If this provision had been in effect during World War II, a great many competent lawyers would never have served in the Navy and it is doubtful, in time of emergency, enough good lawyers to satisfy the Navy or other services' needs would be obtainable in the 25 to 35 year age bracket, and if I might interpolate a personal note, I wouldn't be here today if that had been in effect during World War II.

S. 747 seeks to effect a reform which the American Legion has recommended for many years and we favor the aim sought to be accomplished thereby. We invite the committee's attention to the fact that a bill to accomplish relatively the same purpose was filed in the 89th Congress, 1st session, by the American Legion. This was H.R. 9949. We suggest that the term of 3 years for members of the board, as provided in S. 747 does not appear to the American Legion to be a sufficiently lengthy term to attract the qualified and highly competent type of person we conceive to be necessary to properly administer the matters which would come before such a board. We feel that the 15-year term suggested in H.R. 9949 would be a more satisfactory method of obtaining people who would be qualified to act in a way acceptable to the Congress and the people.

It is noted that in certain cases involving courts-martial it is anticipated that the board can make changes on its own authority, but in other cases it recommends changes to the Secretary of the service involved. This provision necessarily must be read with proposed S.

753, which gives the Court of Military Appeals the authority to review cases from this board by way of petition or certificate. In this respect, the two sections are not clear as to the extent of authority of the Court of Military Appeals in the type of case where the board can only recommend relief.

It might be that the judges of the Court of Military Appeals would not want to be in the position of passing upon a mere recommendation or to decide a matter on such recommendation where another authority is to make the final decision.

In any event, the Court of Military Appeals should not be placed in the position where another authority, namely, the Secretary of the services involved, would make the final decision.

Candidly, we are of the view that H.R. 9949 as written would accomplish the end sought by S. 747, is more specific in many respects, and is not subject to some of the determinations which must be made administratively before the board, under S. 747, could become operative.

Furthermore, a board established in the Executive Office of the President is in the nature of things bound to arrive at far more independent conclusions than is a board established in the Department of Defense for the same purposes.

We respectfully suggest that H.R. 9949 should receive committee approval and be substituted for S. 747, and may I say the suggestion is not solely because we composed this bill, or advance it. We are sincere in the belief that the system of putting people on boards from the military, and having them changed every 3 years or 2 years, or 2½ years, where they spend 6 months learning the job, 3 or 4 months doing some work, and the balance of their term of office trying to find out where they are going next, trying to pull strings to get to the right place, in their view.

Next, this bill, S. 748, would carry out recommendations made by the American Legion over a period of years. Raising the present boards of review to courts of military review adds dignity to each of the courts and is a salutary change. The provisions for allowing civilians to serve in such courts, and the clarification of the powers of the court are most desirable. We have felt, and still are of the view, that such boards are courts of military review, and should be placed in the Department of Defense and removed from each service which would tend to eliminate disparity in procedures and dispositions which is presently the case and about which complaints are constantly heard.

I have commented about this administrative matter twice here and it is already in my statement. We have the same problem here—the same problem also of the "Manchu Act" of transfer of people.

S. 749—we have always been in favor of the end sought to be obtained by legislation of the kind proposed in this bill. However, as we read this bill, it is purely hortatory in character and the American Legion has been of the view that offenses of the type delineated should be punishable under the provisions defined in the U.S. Criminal Code.

S. 750—the American Legion approves this bill as far as it goes. However, it does not feel the bill goes far enough to be consonant with generally acceptable practices in the United States today. We

are certain the committee is aware of recent Supreme Court decisions which indicate a trend toward a requirement that accused persons have a right to representation by qualified counsel at all stages from apprehension and confinement through trial and appeals. We do not feel that persons in the military service should have any fewer rights in this area than civilians as we have set out above.

In any event, we believe that counsel should be mandatory in one-man special courts-martial.

S. 751—we concur in this bill and we recommend its adoption, except that the American Legion feels that any such legislation should include all cases and not be restricted to a period of 1 year before enactment.

S. 752 generally follows suggestions previously made by the American Legion in this area. We approve the bill as written. However, it is noted that summary courts-martial are retained and the American Legion has consistently been asserting that these courts should be abolished since they serve no useful purpose.

In fact, approximately 2 years ago, representatives of the American Legion in meetings with representatives of the Court of Military Appeals, the Department of Defense, and staff members of the House of Representatives Armed Forces Committee agreed not to oppose proposals to increase certain nonjudicial or company punishments which could be meted out in the military services. This was agreed to because it was asserted that if these additional punishments could be assessed there would be no longer any need for summary courts-martial.

It was the understanding of the American Legion representatives that should the increase in command punishments allowable prove successful, the services would themselves abolish summary courts-martial. The legislation was subsequently passed.

It is our understanding that the granted increases have been highly successful in assisting promotion of discipline and accomplishing their intended purposes. It is time to eliminate summary courts-martial now. There has been a question raised as to the provision asserting that the law officers' rulings are final on all matters except mental responsibility. This provision as well as the present law is ambiguous to some extent in that there is some question as to whether this proviso means mental responsibility for the crime, that is, as a defense, or whether it also includes capacity to stand trial for the offense.

It is believed that this aspect of the bill should be clarified before enactment.

I am sure that you have that in mind.

S. 753 we have previously discussed in conjunction with S. 747. There is very little possible objection to this bill but it violates a premise upon which the American Legion has been proceeding in that there should be a civil review outside of any Department of Defense influence.

There is also some danger that reconsideration of administrative action, which would be beneficial perhaps to the accused serviceman, or one severed from the service, would be foreclosed, to which practice the American Legion strongly objects. We have no objection to continuation of section 1552 boards. They can be helpful in retirement and like matters.

It has been the position of the American Legion that the section 1553 boards should be abolished in any event.

It was the original conclusion of the special committee of the American Legion that these boards were of little, if any, value. We believe that as a result, however, of H.R. 9949, predecessor bills, and representations made by the American Legion and others to congressional committees, these boards have gradually become of some value in changing certain types of discharges. However, such changes have been accomplished administratively and we believe that a statute of the type of H.R. 9949, or that which is under discussion here, should be enacted. Such boards will take the place of section 1553 boards.

I want to stress this fact. Since these hearings commenced, or at least after they were announced, and in keeping with what I am trying to suggest, that administratively things are accomplished which we think ought to be stopped—in fact, what we think is that we ought to have statutes to accomplish these things. I note that the Army Times of January 19, 1966, after your hearings were announced and perhaps after they were started, "Individual rights strengthened." "Pentagon overhauls rules on disciplinary discharges." If this was essential at this juncture, why wasn't it essential back in 1945? Why has it not been done prior to this time? If it was essential, necessary, or advisable then, it seems to me that what I said previously about when the heat is on, something is done administratively and if the heat is off, then that administrative action is withdrawn, perhaps, and something else is substituted therefor. It seems to me that this is a concession that what we have been contending for years is true, namely, we ought to have laws which will guide and govern the military in respect of these boards of discharge—that consider discharges and reviews.

We come again to what I have often said in hearings before various committees here, that when civilians today draft young men in the service and they are put in by citizens in their own communities, then somebody in their own community, or someone like that person, or who represents that type of person, should determine the type of discharge which the serviceman is awarded or is assessed against him.

I cannot stress too strongly this point that these boards must, I believe, be set up under law, and be so set up that all this administrative change back and forth, up and down, is permanently abolished.

S. 754—in the opinion of the American Legion, this bill is a "must" and is now and has been for a long time necessary to prevent injustices which have been perpetuated on servicemen by issuance of administrative separations and discharges, in many cases where such action was resorted to when it was known that a conviction by a court would be impossible. We have discussed this question at length and it appears in the committee report on Resolution 260, 87th Congress, and I won't enlarge upon it any further here, but that doesn't mean that I do not sincerely believe that we must have a bill of this type—we must have a bill of this type.

S. 755—this bill is satisfactory, follows mandates of conventions of the American Legion to seek enactment of this type of bill and, in our opinion, should be enacted.

The same thing can be said for S. 756.

S. 757—the American Legion questions the value of pretrial hearings in criminal cases generally because it questions the caliber of the defense counsel generally available to military personnel; it doubts such counsel's ability to properly protect an accused in stipulations or agreements reached in a criminal action. It is known, however, that the Defense Department desires to inaugurate such a practice and the American Legion appreciates that in certain areas the trial and disposition of courts-marital would, or could, be expedited if motions to suppress evidence, regarding confessions and motions which are presented in a U.S. Federal court could be heard in advance of an actual trial.

I should intertoplate here that we feel that the boy who is in service should be represented by qualified counsel and this, in part, is the reason for the hesitancy, shall I say, with which we have approached this proposal.

S. 758—this bill, in part at least, coincides with the views of the American Legion and is generally satisfactory. We raise the question, however, as to whether, if enacted, such a bill might not be used as an instrument of oppression. That is, there exists a possibility of double jeopardy. Further, the waiver provisions do not seem to be consistent with the general philosophy of the American Legion which is doubtful of allowing the use of waivers in military courts.

Past experience has shown abuses.

Furthermore, we have doubt as to whether the deprivation, provided in the bill, or certain defenses, should be condoned, or is acceptable. Candidly, we doubt the necessity for such provision.

S. 759—This bill which would abolish summary courts-marital accomplishes what this committee has been pressing for over many years, as we have stated above, and we strongly recommend its adoption. We have talked about it earlier. We are in favor of it. They should be abolished.

S. 760—The American Legion believes that this bill expresses a desirable policy. However, it believes that the bill should be strengthened so as to leave no doubt that depositions may not be used in a courts-martial as evidence which may be the basis of a conviction. The majority of the special committee of the American Legion is doubtful that depositions should be used in courts-martial in any event, but a substantial segment of the committee believes that a defendant should be allowed to avail himself of depositions in his defense.

I mention this to show that we don't have 100 percent agreement in our committee on this—we do have on everything else that is in here, but in this one, as I say, a substantial segment of the committee believes that a defendant should be allowed to avail himself of depositions in his defense.

As to S. 761, we feel that that is a matter that the American Legion should not get into. I am willing to answer any questions now—but before—also on S. 762, I would make the same comment as I made with reference to S. 761.

I am willing to answer any questions now or at any later time the committee desires to ask them.

Mr. CREECH. Thank you, Mr. Finn.

If you have no objection, counsel does have some questions we would like to pose at this time.

Mr. FINN. Fine.

Mr. CREECH. On page 5 of your statement and later as you were speaking extemporaneously, you felt civilians should determine the type of discharges by servicemen just as they determine their draft eligibility. In your statement you indicated that you were thinking in terms of someone to represent the draft board. I wonder, sir, if you would care to expand upon this a little.

Mr. FINN. Well, I don't think, Mr. Creech, that I specifically would have somebody represent the draft board.

Mr. CREECH. I thought you were indicating some such civilian, they should have some representative of a draft board.

Mr. FINN. That's correct.

Mr CREECH. Would you care to expand upon that?

Mr. FINN. I think in this report which has been incorporated in the hearings of that Senate resolution 2 or 3 years ago, that we went into that at great length.

I can say this without finding this in the book, but the reason we have this opinion is that during the war the Navy—I don't know what happened in the Army during the war—but some 200,000 boys were dismissed with administrative discharges from the U.S. Navy. Many of them were dismissed because they agreed to be dismissed in lieu of a court-martial. Many were thrown out on the basis of a medical discharge. Some of them were dismissed administratively because they were homosexuals, and so forth.

All these people were lumped together.

I sometimes doubt that the military people understand the stigma that attaches to bad conduct, administrative or even medical discharges, from the service. In fact, I know they don't. Because as I previously stated, I was on a board that Mr. Forrestal appointed during the war in which they had a marine colonel who was a personnel officer from the Marine Corps who stated that a bad-conduct discharge, for example, was like—if a boy worked for General Motors, he just didn't get a letter of recommendation to his next employer.

Now, nothing could be further from the truth. The fact is that when these boys get any type of discharge other than an honorable discharge, they have difficulties getting into college, into schools; they have difficulty getting any kind of decent job and I think that many times these discharges are not properly awarded, and, as we know, there was a period of time within the last 3 years or so when administrative and other types of discharges were used as a device to avoid cases being presented to the Court of Military Appeals.

I would gather that if an independent board was regulating or overseeing those discharges, that there would be a substantially different type of discharge awarded to each of the boys involved.

This is why I say we ought to have private citizens outside the Pentagon, in the White House, if necessary, or subject to Presidential aegis, acting upon these discharges because in effect that's what the draft boards are; that is, private citizens.

I can enlarge upon this, but I think I have said enough.

Mr. CREECH. Mr. Finn, you have indicated with regard to S. 745 that your organization favors the enactment of this legislation. The subcommittee has been informed that the military opposes this legisla-

tion providing for the field judiciary on the basis that they need flexibility for changing circumstances.

As you know, the Air Force does not have the field judiciary and it appears that this type of opposition comes primarily from that service.

I wonder, sir, if your extensive study in this area—from your study, if you would care to comment upon these assertions.

Mr. FINN. Well, I don't want to appear to be unduly critical of the services. The Air Force under Generals Harmon and Kuhfeld, I felt was the most enlightened of the services in respect of courts-martial. However, I have argued this question with both Generals Harmon and Kuhfeld and I must say, as we—we don't agree with their position. I don't see why, if something is advantageous and practical in the Army or the Navy, that it isn't equally practical in the Air Force.

Certainly, you don't have people flying around in airplanes trying them. You don't have people in a tank up in the front line. When you try them you bring them back to a rear area somewhere and there you try them.

Sometimes I get the view—I did some years ago—that the Navy felt that we, the Legion, was advocating a proposition that we ought to have a court-martial, a lawyer in every longboat that the Navy has. This is not true. My experience in the Navy during the war, and I am sure that the same held for the other services, is that when you have a general court-martial for somebody, you have him tried at a base. You had him tried at a large area, and very few of them were ever tried aboard ship.

This type of court, circuit court, so to speak, I think is an essential. I don't see why the United States of America can't have this when foreign countries which we, to some extent, perhaps look down upon, and about which there is a lot of criticism, and as was indicated here earlier, by the American public, of the way our soldiers are treated under the status of forces agreement, have a type of court which is far different from ours (which in many instances, Switzerland for example, consists of civilians trying military people) yet they operate very satisfactorily.

Now, we don't advocate that. But we do advocate that we ought to have competent people sitting on boards and competent people sitting on military courts.

I think that this type of—as I stated earlier—this is a progressive, salutary measure, and I think we ought to have it and we ought to have it for the Air Force because I don't think we ought to have anything different for any of the services.

There is too much disparity in the disposition of cases right at the present time.

Mr. CREECH. So, going on to S. 746, you have indicated that the American Legion believes that if such a corps is provided for the Navy, a similar corps should be provided for the Air Force.

Mr. FINN. Yes, sir.

Mr. CREECH. The bill, of course, only provides for a Navy Judge Advocate Corps. I wonder if you would care to comment upon the system which is used in the Air Force with regard to your views and why you feel it would be desirable to also include the Air Force under S. 746?

Mr. FINN. Well, I have known the three Judge Advocates of the Air Force—the three generals, since its inception—since the Air Force's inception, namely, Generals Harmon, Kuhfeld, and General Manss. I have been deeply impressed with each of them. I know, we will say, their hearts were in the right place. I know they are trying to do what is best and I think they believe that their present system is best for the lawyers. I cannot dispute the fact that they have a right to that opinion.

However, I don't quite agree with them, because there are signs already that there is an attempt among certain groups to take over these various things. For example, 2 years ago, or so, there was a bill presented as an addenda to an appropriation bill to have the services allowed to send people back to law school after they had been in the service for several years, so they could get a free legal education and then come back. But only people who went to Annapolis or West Point would be qualified to go to this school, and I assume that ultimately it will be the Air Force Academy at Colorado Springs whose graduates will be sent to school, if moneys are appropriated.

In the Navy right now, they have civilians on their boards of review and I think they are trying to phase them out because as soon as one of them retires, he is not replaced by another civilian; he is replaced by a naval officer.

I mention all this because I believe that if you don't do something by law, ultimately some strong character takes over, he runs the ship the way he wants to run it, and he ignores all that has been done previously, and I think perhaps that might happen in the Air Force. Some day they will get somebody, perhaps, who is a Judge Advocate General there who is not—shall I say—as enlightened as the past three have been.

Now, why do I think a corps is essential?

If you are in the Navy and you are a line officer and if you are in the Air Force and you are a line officer, the regular line officers, if you just are a lawyer, don't think you amount to very much at all, you don't have that type of dignity that I believe a lawyer ought to have in military service. I am a lawyer myself (and in any event I am a member of the bar) and I feel that, as such, we are entitled to just as much concern as the physician and the dentist and the engineer and all the rest who are entitled to special rating and consideration. I don't believe that if you go into a service which has not a corps, that you have the opportunity to go to the top, and I don't believe anybody should go into any service unless he has an opportunity—he shouldn't go into any job unless the top job is somewhere in his future. You may never make it—probably won't—but the fact is that it ought to be available to you and you should not be foreclosed before you start, from any chance of succeeding to it.

This is why I believe a corps is essential.

Mr. CREECH. With regard to what you said about the corps, the corps being essential and your comments regarding the dignity of a lawyer, is it your view, sir, that the establishment of a Navy Judge Advocate Corps would have a salutary effect upon the Navy's being able to retain inservice lawyers?

Mr. FINN. I do believe so.

Mr. CREECH. And encourage other lawyers to join the Navy as a career service?

Mr. FINN. Yes, I believe so. Up until the last two Judge Advocate Generals, if you went into the Navy's legal setup, you didn't have any chance of being the Judge Advocate General. I believe it is due to the American Legion that the last two Judge Advocate Generals of the Navy have not been Annapolis graduates.

I don't have anything against Annapolis graduates, or graduates of our academies. Nothing at all. But I think that in this case, if the American people spends its money and sends these people to a military school for 4 years and gives them a free education to learn how to shoot a gun or run a tank, or airplane, or run a ship, that's what he ought to do and that people who have spent their money to go to law school and have become lawyers; they ought to be service lawyers.

They shouldn't put us on ships to sail around unless we want to.

In any event, they shouldn't make a person who went to the Naval Academy to learn how to sail a ship—they shouldn't make him into a lawyer at public expense; and particularly they never send them immediately after they get out of school. They go to sea for 3 to 6 years or so. So they forget how to study and then they go back to school for 3 years, get out of law school and then go to sea again for 6 years or so.

I don't know whether they do this in the Army, but that's what they did in the Navy.

If we had a corps, they wouldn't be able to do this and I think it is absolutely essential that we have it because I think perhaps a corps of Navy lawyers and of Air Force lawyers would probably be able to do more for themselves, as lawyers, in the service than they are presently able to do, being under the thumb, perhaps, of people who are not lawyers.

Mr. CREECH. Sir, earlier today I commented upon the fact that legislation concerning a naval Judge Advocate's Corps has been pending for some time and I did not mean to give the impression that it had been introduced during this present Congress. The Bolte bill, which is included as part of that legislation has not been introduced, but the subcommittee's information is that it is being considered for revision and introduction.

I wonder, sir, in view of what you said you feel there is any reason why the subcommittee should await action on the Bolte proposal or if it is to be introduced, or any other proposal providing for naval Judge Advocate's Corps—to your knowledge is there any reason why this legislation should not be considered at this time?

Mr. FINN. I am sure, Mr. Creech, you are not trying to get me in trouble with some of my friends over in the House. But I don't see any reason why the Senate can't operate—I guess the Senate operates rather independently at times, from what I read in the newspapers, and I don't see any reason why it cannot initiate legislation of this sort.

Mr. CREECH. I wondered, sir, if there were any mitigating circumstances or any reports, studies, or if there is any reason which is being undertaken, which, to your knowledge should cause the subcommittee to defer consideration at this time?

Mr. FINN. No, sir.

Mr. CREECH. Moving on to S. 747 here, I believe your suggestion is, you suggest the substitution of H.R. 9949?

Mr. FINN. Yes, sir.

Mr. CREECH. Which would create a presidential board of review?

Mr. FINN. Presidential review board, yes, sir. Have you had an opportunity to read that bill?

Mr. CREECH. We have studied that bill, sir.

Mr. FINN. All right.

Mr. CREECH. I believe you have indicated that you prefer this over S. 747 which would create a unified board for correction of military records. Do you see the two as a conflict? Could the presidential board act as a clemency board with S. 747 remaining as a final tier in the review structure of the administrative action, and if not, what further independence would H.R. 9949 achieve that would not be present under S. 747 where the members are all civilian and so forth?

Mr. FINN. I hope I didn't convey the impression that I was opposed in any way to S. 747. Perhaps it is pride of authorship or something to that effect, but as I think I stated earlier, we have specifically stated what the salaries are to be. We have also stated that the term should be 15 years and I have indicated the reasons for that. We have made it less necessary to have administrative rulings or rules for the operation drawn up by the board itself at a later time than you have.

Let's put it this way: If 747 is thet best we can get, we would be for it. But we would prefer—and as a matter of fact, I feel that perhaps S. 747 could be amended by including the features of 9949 that I have alluded to here and thus we would have a very satisfactory bill.

Mr. CREECH. Do I gather from what you are saying, sir, that you do not envisage—that you do see perhaps a conflict—you feel they should be combined, that you would not favor both a presidential board and also a unified board for correction of military records?

Mr. FINN. I think we have enough boards now. Good Lord, we are spending an awful lot of money on them, let's eliminate some of them and let's bear down on one.

We also suggest that this should be a presidential board rather than that it be in the Defense Department. This is for the reasons that I suggested about one's entry generally into the service being by draft boards. I think this is more or less essential in such a board. The present boards that are set up for this purpose, and we have expounded at length upon that in this report which is filed here, just do not comprehend the effect of the type of discharge. And I think we have got to have civilians to do this. We have to have civilians that have guts, to use the vernacular, something on the ball. You have got to appoint them to these boards—you have got to appoint people to these boards who are intelligent and capable and people who are not going to be wondering, where am I going to go next. Am I going to go to Attu or am I going to Paris. By this statement I am not impugning the courage, integrity or ability of any person serving on any of the boards at the present time.

Mr. CREECH. Sir, I notice with regard to 748 that you have made your position quite clear, but I wonder if you care to comment upon

some of the arguments which the subcommitte has received in opposition to this bill?

The subcommittee has been told that S. 748 misconceives the nature and purpose of the appellate bodies which now exist and that preventing military lawyers from qualifying as presiding judges, that the fixed tenure for military members is too inflexible.

I wonder, sir, in view of the Legion's long-standing experience and study, that you would care to comment upon these criticisms?

Mr. FINN. I don't know why people that have a uniform on should object to a lawyer who doesn't have a uniform on. I feel that this bill is fine, and I think that the only trouble with it is, that it says there is established in each military department an appellate court. I think that ought to be in the Department of Defense. The reason for this is quite obvious. We now have how many boards? I don't know. There are two—three or four in the Army—I realize that civilian courts don't often coincide in their views with one another, but I do believe that if we have a single system we would have less disparity of decision and disposition.

Now, I believe that there is too much of an opportunity. I don't say that it exists. I don't say they do it. But there is too much of an opportunity for command influence on these boards. Who makes the people's fitness reports that are on these boards? It is not someone in the Defense Department. It is someone in the individual service that is involved. I think most people who become lawyers are people of integrity and I think that they more or less don't pay much attention to these things, but, they are human, and I have known some lawyers who, because of the fact that somebody looked in the door and wanted to know why haven't you finished such and such a case, just got rid of it without too much of a survey of it because of the fact that they were afraid that perhaps they might be marked down.

Further, I think I said earlier, that I believe the Navy is trying to phase the civilians out of this program in the Navy. And I think it might be well worth it for the committee to make a little investigation of that fact and find out what has happened to all the boards that they had in the Navy and what happened to all the civilians that were on them and whether or not they intend to keep civilians. I think that if this type of board was in the Defense Department, they would act more like a group—more like an appellate court, let us say, and I know a great many people who have acted in the capacity that a board operates that are entirely in favor of this proposal, namely that they go into the Defense Department.

I don't think—if the uniformed officer is—if his morale is destroyed by the fact that he has civilians near him or around him, then I think that officer has a lot to answer for. Because I appreciate people who are in uniform. I worked with them and I don't know why they shouldn't appreciate the person who is not in uniform. I don't think this morale problem is of any importance. I think it is just something thrown up to dissuade you from proceeding on this bill.

Mr. CREECH. Moving on to S. 749, the subcommittee has been told that in view of the fact that serious command influence can be exercised by subtle, nonovert means, and in view of the fact that com-

mand influence can be exerted by these means, it would not do any good to have a punitive article in the Uniform Code in place of S. 749.

What is your view with regard to whether prosecution is or whatever occur as a matter—as a practical matter?

Mr. FINN. Nothing. Nothing would happen, because I believe that the person who is going to prosecute somebody for this type of offense, namely, exercising command influence may be afraid that the person who is to be censured or prosecuted would be his commanding officer at a later date. This is always a matter which is in the minds of some of these people who are in the service. I don't believe—I don't believe this bill or anything like it really is of much value and as I said earlier, I believe the only way you are going to get around this is to—is when somebody does commit an offense of this nature, you bring them into a Federal court and have a Federal district attorney convict him if he is guilty of the offense, under the United States Code, outside the Code of Military Justice. This is my view of this. You are right, command influence is subtly exercised. It is very difficult in my opinion in any event to trace it. I doubt that any efficacious bill could be drawn which would stop it. You just have got to educate the people and it will take a little time to do that.

I think things are infinitely better today than they were in 1941 or 1945 in this respect. And I think candidly, it is the Court of Military Appeals more than anything else that has been responsible for it. It has been keeping the military people on their toes, although I know some of them don't like some of the decisions that have come out of that court. But they have overturned a number of decisions where command influence was exercised. This is the place where it can be done and as I said earlier, I believe your bill is only hortatory in character, that the only way to really get at this is to try them in a Federal court under the Federal code.

Mr. CREECH. Sir, moving on to S. 750, together with the various administrative changes now issued, it would means that a man would have counsel at all important stages, including waivers of hearings. I notice on page 11, bottom of page 11 of your statement you say that you feel the subcommittee is aware of the recent Supreme Court decisions which indicate a trend toward the requirement that accused persons have a right to representation by qualified counsel and all stages of apprehension and confinement.

I wonder, sir, what your feeling is with regard to earlier stages, the requirements of counsel at earlier stages? At what earlier stage do you feel they would be needed?

Mr. FINN. May I refer you to page 6 of my statement which I did not read, where I said, and this is about the third paragraph on that page, "The American Legion has always contended that competent counsed should always be available to an accused in a court-martial. It has always opposed the practice, not yet defunct, of the competent lawyer becoming unavailable to the defense or being made available for the prosecution when he has successfully defended an accused or two. No objection is had to assigning competent lawyers as prosecutors but their peers as lawyers should not be denied to accuseds."

To more directly respond to your question, I think that a lawyer should be made available at all stages, that it is possible to do so. We

have had complaints before that this is expensive, we don't have enough lawyers, we can't do it, and I have tried to—I don't know what the criticism has been in that area here, but I have tried to meet it to some extent by the paragraph which immediately follows that which I just read. I think that no one would ever make any mistake in allowing or ordering by statute competent counsel to be made available to an accused at any stage after he has been apprehended.

Mr. CREECH. Moving on, then, to S. 754, and ask if you are satisfied with the new directive of the Defense Department which incorporates many of the provisions of this—of the bills under consideration and if you feel there still exists a need for legislation in view of DOD's directive?

Mr. FINN. Obviously, I have expounded on that subject two or three times. Administrative actions have no value whatsoever, I think we would get—we have got to have a statute and I think that a statute of this kind that you propose is essential.

As I suggested earlier, this to me is a confession that what we have been contending for is essential, although they haven't had the good grace to admit it. But doesn't it seem peculiar to you that just before you start hearings on something like this they change the rules? I don't need to say anything else, I don't believe. I am speaking for the American Legion—I can't speak for myself alone here. I have personal views about this. Let what I have said suffice.

Mr. CREECH. I am certain, however, that the committee would be interested in your personal views in view of your vast experience in this area of law, if you would care to speak.

Mr. FINN. This article which appeared in the January 19, 1966, Army Times—and I am speaking for myself alone at this juncture—this really incensed me because this is just exactly what I have been fighting for about—I have been fighting this for many years and everybody poo-poos the idea.

Mr. CREECH. Would you identify that article for the record, sir.

Mr. FINN. You may have it, a copy of it.

Mr. CREECH. Would you care to insert it?

Mr. FINN. This reads at the top, "Individual Rights Strengthened. Pentagon Overhauls Rules and Disciplinary Discharges." I sometimes wonder if they know what is going on over there in the Pentagon in relation to this type of thing. If I were there and I felt that this was essential, I wouldn't do it until after you got through with these hearings. Here is the whole paper. You will find it in there.

(The article referred to is as follows:)

INDIVIDUAL RIGHTS STRENGTHENED—PENTAGON OVERHAULS RULES ON DISCIPLINARY DISCHARGES

(By a Times Staff Writer)

WASHINGTON.—The Pentagon has just completed a major overhaul of administrative discharge rules which greatly strengthens the rights of men facing such disciplinary action, plugs some loopholes, and puts more restrictions on the discharge authority. The new directive, which will go into effect sometime in March, lists for the first time the rights of the man threatened with an undesirable or a general discharge. Among these are a kind of military fifth amendment by which a man may refuse to submit to examination by an administration discharge board.

He may now also challenge the right of any voting member of the board to hear his case, and he may question any witness who appears before the board. The directive insists, that if he wishes, he may be represented by a lawyer, military or civilian, unless one is not available.

Here are some of the main points in the new directive:

No man can be discharged under conditions other than honorable unless he is given the right to present his case before an administrative discharge board. He may waive the right.

The discharge authority, usually the man's commander, under the new rules may issue either the discharge recommended by the board, or a more favorable one, but he cannot direct issuance of a discharge less favorable than that recommended.

If, even after a board recommends retention of the man, the commander wants to discharge him, he must give him an honorable discharge.

A man won't necessarily be denied an honorable discharge solely because he had a specific number of convictions by courts-martial or actions under article 15 during his current enlistment.

The man threatened with board action can request the appearance of any witness whose testimony he believes is pertinent to his case. The board will invite the witness to attend, but witnesses not on active duty must appear voluntarily, and at no expense to the Government.

Mr. FINN. This is an insult to this committee, I believe. It is an insult to lawyers that after all these years of operation, where people have been complaining about the results, the last minute, when something is about to happen, bingo, we have a change announced.

Now, we are going to take care of everything, Mr. Chairman. They are saying that they are going to take care of everything—don't worry about it, now. We are going to do it administratively—ridiculous.

Mr. CREECH. Mr. Finn, if I may, I would like to move on then to S. 758.

The subcommittee has been told at least of four different types of cases, court-martials—that administrative discharge is the only procedure that is effective and that therefore administrative discharge is necessary in these four types of cases. I wonder if you would comment on each category to the exception of the general rule as pronounced under S. 758 and these four types of cases are identified as those in which there is a pattern of petty misconduct, those involving extended a.w.o.l., those involving sexual perversion, homosexuality, and fourthly, those where there is an impossibility of trial for technical reasons.

Mr. FINN. Impossibility of trial for technical reasons?

Mr. CREECH. Yes.

Mr. FINN. How can there be in the last——

Mr. CREECH. One instance in which they don't have the corpus delicti, they don't have physical control of the individual, presumably where someone has disappeared.

Mr. FINN. A.w.o.l. or desertion?

Mr. CREECH. Not only the individual, but absence of witnesses, perhaps witnesses who are essential are not available—something of that sort.

Mr. FINN. May I answer that question insofar as the desertion and impossibility of trial by furnishing an illustration?

There is a case that I know of where a young man was in the Navy and was assigned to the Sixth Fleet and was in the Mediterranean and he disappeared. He hasn't been located for a number of years. All of a sudden his family is notified of the fact that he is given an undesir-

able discharge. I don't think this is right. If we countenance an allegation of impracticality, pretty soon everything will be impractical. I don't see how, with the exception, perhaps of the cases involving perversion, and in which most cases the active participant has always been willing to get out, quit himself, and if he does, if he is advised by counsel, qualified, to get out under certain circumstances, then it would be all right. But I don't know why an American citizen can't have a trial, no matter what the circumstances are.

Mr. CREECH. I hope to have the transcript so that I would not misrepresent the representations made. Unfortunately they don't seem to be here. I wonder if there is an additional question pertaining to this so that I will not have misrepresented to you representations made to you and answer it for the record in correspondence?

Mr. FINN. I will be glad to come up here or answer in writing.

Mr. CREECH. Would you care to comment upon the other four types of cases—petty misconduct, a.w.o.l., sexual perversion, homosexuality?

Mr. FINN. I recall when I was in the Navy, we tried people for desertion who had disappeared from the Navy before the law started, and had gone away for 4 years or so. I don't believe that anybody should be tried, let us say, in absentia and in essence, when you by a board action assess some penalty against a person, that is what you are doing, and I don't—I would never countenance it. I don't like it and it is the position of the American Legion that everybody should have his day before a competent court and be competently represented by counsel and the type of offense of which the person is guilty shouldn't color the type of trial that is had. It is as simple as that in my book.

Mr. CREECH. On the misconduct, petty misconduct, the representation was made that it isn't the last offense, but a combination of all over a period of time and that this is a pattern of petty misconduct. I wonder if you would care to comment.

Mr. FINN. I realize that this is a problem. I still feel that we have —I understand from reading the papers we have a lot of juvenile delinquency today—we have a lot of juvenile delinquents that do a lot of things that are rather nasty. But, if they are to be tried for any of them, any one of them, or all of them, they go into a juvenile court, at least, where they have an opportunity for a hearing. Well, it used to be the system, if you had so many summary courts-martial, you were automatically susceptible to being discharged from the service. This was wrong, I thought, and as far as the pattern is concerned, it might be failure to have your shoes shined or have your shoe laces laced up, and a good deal of this might result or develop from a personal idiosyncrasy of a commanding officer. We might not agree with the commanding officer that all of these petty offenses of which the man is charged are exactly such that his efficiency in the military is of no value. When you get down to the question of having certain individuals in charge of others, then, if they make a determination, it should not be their determination which ultimately controls what happens to the individual complained about. He should have an opportunity to stand up and be confronted by his accusers and have a lawyer with him and answer those charges and if they can't make them stick,

if they can't prove that the man should be out of the service, that he is a nuisance, then they should not be allowed to let him go. This impracticality—it is too expensive and all that—this leaves me cold. The greatest country in the world—and the richest—and we have these objections. Perhaps it is because the people in the service are too lazy to proceed against these people. We never had problems of this type insofar as a.w.o.l. is concerned when I was in the service. You tried them when I was in the service. I trust that that is an answer to your question.

Mr. CREECH. Yes, sir.

I see that you have commented on three of the four types. The other type is sexual perversion and homosexuality.

Mr. FINN. Well, this is an area—I served on a board in the Navy which dealt with this problem as a result of which we issued an ALNAV—the Secretary did, I should say, which gave the person who was guilty and was the active participant the right to resign in lieu of a general court-martial. I don't know what they do today in that connection, but to answer your question specifically, I can't see that a man who is a pervert, if he is accused of being such, shouldn't have a right to stand up in front of a court and be charged and have a lawyer and be convicted.

Let me recall the reason I say this. I was on a board of review in the Navy—in fact I was called upon to review a case where a young man who was a marine was on an island in the South Pacific and he was accused of having committed oral coition with a couple of sailors. He denied it, up and down, sideways. And anything to do with these people he denied. They decided that they would prefer charges against him and they charged him with this offense. The boy said. "You mean I can get out of this 'profane' outfit if I sign this paper?" They said, "Yes." So he signed the paper and it said, "I, so-and-so, on such and such a day, did these acts with so-and-so-and-so." They continued their investigation and they found out he was right, he did not do it. So what did they do? They turned around and charged him for libeling the two people that were named in the specifications.

Don't you think that somebody like that ought to have had a chance to have his day in court? He was convicted of this libel. He went to Portsmouth and due to the good offices of two Senators from his home State, he was immediately released when the word of their intercession became known to the Navy Department.

This is the type of thing that I think we should be concerned about when we talk about waiving anything in regard to the trial of a case. That includes perverts, although I have no sympathy with them whatsoever, and in the Navy they are pretty bad.

Mr. CREECH. Sir, under S. 758, an individual may elect a trial by court-martial whatever the service proposes to give, unless for general alleged misconduct. The representations that have been made in these types of cases, and in the case of the homosexual and some of the other types of cases involving minors, for instance, child molestation and cases of that sort, then it is very difficult in some instances, impossible, to bring forth witnesses and that this is one of the reasons these cases sohuld be handled administratively.

I wonder if you would care to comment on this presentation.

Mr. FINN. All I have to say is, that if he was a civilian, the person charged, he would have a right to a trial. Why should he be any different if he is in the military service? If they have got the goods on him, they can convict him. If they haven't got the goods on him, they shouldn't convict him.

Mr. CREECH. Of course, even under the terms of this bill, if he is going to receive a discharge under honorable conditions, then, of course, they would be permitted to proceed.

Mr. FINN. I would hope that the bill would have safeguards sufficient to be sure of the fact that the boy who does this agreeing has a lawyer by his side who knows what he is doing and advises him because I am sure you are aware of the—I don't want to say evil, but unfortunate experiences we have had in years past with waivers. Allowing 17- or 18-year-old boys to waive rights which destroy their whole career—and discharge under honorable conditions, may I suggest is not exactly one which doesn't raise some eyebrows or questions once in a while. Why isn't this an honorable discharge?

Now, I appreciate that there are certain veterans' rights that are available to a person, even those who get a bad conduct discharge, which are available to one who gets an honorable discharge. But that is in the governmental area, and it is a question of what he is entitled to from his Government. What he can do in respect of the community at large with a discharge that is not an honorable discharge is, I think, as I have said before, unappreciated at times by the people who have made the suggestions to you that apparently have been made.

Mr. CREECH. Other representations concerning this bill had been made under the present administrative system, it affords adequate protection to the serviceman and that this bill would prevent the military from eliminating undesirables and technical problems preclude a court-martial. The bill would require that attention or at least force a general discharge when it was not warranted.

Would you care to comment upon these representations?

Mr. FINN. All I can say, Mr. Creech, is that, what are the technical reasons? They can be anything. They can be anything that a legal officer or a JAG or somebody like that dreams up. He can say, well, for technical reasons I don't want to do this. If you phrase a law in that fashion you are leaving a loophole which I don't think should exist. We are getting away from the judicial. We are getting into the administrative, and I think I have said enough to convey to you the idea that I don't like administrative action. And this committee upon which I serve is heartily opposed to any administrative actions in this area of military justice.

Mr. CREECH. Mr. Everett has some questions.

Mr. EVERETT. Going back, Mr. Finn, to this problem of the technical objection. General Kuhfeld in his testimony before this subcommittee 4 years ago pointed to the example of a child molester where the child was unwilling to testify and where the defendant had made—where the serviceman had made a complete confession so that there was no doubt that he was guilty, and yet, because of the corpus delecti rules that apply to courts he cannot be convicted and in effect he asked whether or not the Air Force, his service, should be compelled

to give such a person an honorable discharge or even a general discharge in order to get rid of them when they felt sure from his own confession that he was guilty.

I believe there is a similar type case now pending involving that very point in the courts.

Is it your opinion, then, that the service should have to pay the premium of discharging that man under honorable conditions in order to get rid of him, even though he has confessed, even though there is really no doubt as to his guilt?

Mr. FINN. Well, since I have an honorable discharge myself I hate to see it sullied in any degree. I am sure the membership of the American Legion feels that we ought to, as discharged veterans, that are honorably discharged, should do everything we can to prevent someone who is not entitled to that type of discharge to obtain it.

On the other hand, I realize that this is an area, as I think I indicated in the area of perversion—it is very difficult, but what do the public authorities do in a situation of this kind? If they can't try the man he goes free and he walks along the street just like you and I. I would hate to see such a person get an honorable discharge.

On the other hand, I think at least they ought to try to try him and I don't think they tried to try him. That is my view of the thing. Since I am committed unequivocally to the fact that we feel that people charged with offenses ought to have their day in court, and I don't think that military personnel should be any different from our civilians.

Mr. EVERETT. Considering another type of separation that has raised some questions, to what extent is the American Legion approving of procedures for separation of officers by requiring them to show cause for retention before administrative boards? It has been suggested that this changing of the burden of proof might possibly be unconstitutional and in any event was objectionable. Does the American Legion have any views on this point?

Mr. FINN. No, sir. We have not had any opportunity to consider this point. I was unaware that they do this, personally.

Mr. EVERETT. Going back to S. 746 and the Judge Advocate General Corps for the Navy, and your suggestion that the same thing might be done for the Air Force, isn't it true that there is a significant difference between the Air Force and the Navy or the Army in terms of the Air Force's not using a corps structure as the other services do, and isn't it also true that there has been no demand or request from the Air Force lawyers in uniform or in reserve for creation of a JAG Corps in the Air Force as apparently there has been for the Navy?

Mr. FINN. Well, I think you have about four questions in there, Mr. Everett.

If I understood you, you said that the Navy is different from the Air Force.

Mr. EVERETT. I am trying to inquire, is the personnel structure of the Air Force so different from the other services that the corps system would have less relevance to it than it might to the Army? Or Navy?

Mr. FINN. I think the success—I may be not specifically answering your question—but this is the only way I can answer it. I think that

the success the Air Force has had has been due to the fact that as you know, they have had lawyers who practiced law outside the service before they became Judge Advocate Generals. They therefore were bred, let us say, in the community of law and therefore, when they got into the Air Force they treated their personnel like lawyers ought to be treated. This is not true in the Navy. Because in the Navy, the line, the Bureau of Navy personnel and the Chief of Staff has controlled the Office of the Judge Advocate General. And therefore the lawyers serving there were not treated like lawyers should be treated. There is that difference, there is no question about that.

All I am saying is that I think it inconsistent for anybody to suggest that the Army has a corps which is a workable instrument. I can't see any difference between the Army and the Air Force in that respect. They are all supposed to be serving the country and if we recommend a corps for one service, namely the Navy, if we have it in the Army, I just for the life of me, and in our committee we cannot understand why we should not have it for every service. Because, who knows who the Judge Advocate General may be in the Air Force 10 years or 20 years from now? He may be a Captain Bligh or a Captain Queeg or somebody like that. Who knows? Then they may want it in the Air Force, the lawyers. Why not do this thing up the right and easy way—in a nice package and let's have it uniform?

Mr. EVERETT. On page 11 of your statement, in dealing with S. 749, you comment that the American Legion has been of the view that offenses of the type delineated should be punishable under provisions defined in the United States Criminal Code. Would this mean that jurisdiction to punish a man to influence violations would then be transferred to the district courts?

Mr. FINN. I think that if a person is charged with having done this, he ought to be transferred—his case ought to be transferred immediately to the Federal court and he ought to be tried there. None of this trying in the military first, because I think if you did that you would be running into questions of double jeopardy and things of that nature. No, no, no. I think if you are going to try somebody for command influence and that is what we are discussing here, then we ought to get it out of the military altogether and have him tried under a criminal statute in the United States Code, divorced from the Code of Military Justice, or else just forget about it. Because you are just putting a lot of words on paper, as I suggested, of a hortatory character which don't accomplish anything.

Mr. EVERETT. Wouldn't there be some interferences with military operations if a commander were called in under an indictment of a civilian grand jury to defend himself before this petit jury on this charge?

Mr. FINN. Certainly he would. But if he is quilty, what of it?

Mr. EVERETT. On page 13 of your statement, dealing with S. 752, you suggest that it be clarified as to whether or not mental capacity, capacity to stand trial for the offense is to be ruled on finally by the law officer or the judge. Would it be your suggestion that he should rule on it finally or should it on the other hand be ruled on by the members of the court-martial, the jurors, let's say?

Mr. FINN. I think the jurors ought to hear the evidence and they ought to make the decision as to whether the man was: (1) competent to stand trial; or (2) was competent to understand the nature of the offense with which he is charged; and (3) whether or not he is competent to help his lawyer to defend him.

In other words, if he is adjudicated insane, either at the time of the commission of the crime or at the time that he comes to trial, this is a matter that I think the jury should decide. In our case, the court. I merely mention that, Mr. Everett, because I feel the present law is a little confused in this area, for that it is difficult to say that what the authority is and whether he can use that as a defense to the crime or whether he should be tried at all. I think perhaps now you have an opportunity to clarify it and perhaps it should be done.

Mr. EVERETT. With respect to S. 758, you raise the question whether such a bill might not be used as an instrument of oppression. There exists a possibility of double jeopardy. Could you spell out for the subcommittee, for the record, what you envisage as a possibility of double jeopardy under S. 758?

Mr. FINN. May I have a minute, Mr. Everett? I want to refresh my recollection.

I think what we were driving at here is that—is making written applications, the waivers—waiving the right to plead any statute of limitations, and then to waive any right to a plea of immunity or prohibition against trial by court-martial and these things all are waivers which we would prefer not to have in any law for the reasons previously stated. I did say here double jeopardy. It is on the basis that the man perhaps is tried by the civilian authority and then is brought in either for that offense or because he was away and is tried by the military authority and this waiver is getting into this area—I am not convinced that it would be double jeopardy. I am just afraid that there is that peril that might exist here and we would like a little clarification of the language.

Mr. EVERETT. Thank you

Mr. BASKIR. I would like to return to the matter of the proper line to be drawn between administrative discharge proceedings and the military justice system in the code. You have indicated very forcefully that you believe all matters of misconduct should come under the code and should be decided at a trial. Perhaps you would agree that in that case the administrative system should be left for other kinds of problems—such as physical disability—not involving patterns of miscondut?

Mr. FINN. Pension matters and things of that sort.

Mr. BASKIR. And also when a man is just physically or mentally or psychologically unable to perform military duties and he is given a discharge not for any misconduct, but because of his inherent inability?

Mr. FINN. I don't think a person that is military—militarily unfit for duty due to injury or disease should have a court-martial by any means. I didn't mean to convey that impression. If I did I regret it. But because, as a matter of fact, I did suggest that the section 1552 boards would be available for that purpose if a man got an improper discharge and we feel, the Legion feels, that we ought to retain

1552 boards for surveys—various administrative actions which are taken outside the realm of justice, military justice.

In other words, what I mean to convey to you is that when a man is tried for a military offense of any kind, whether it is purely military or it is an offense which is one that the civilian public recognizes, and by that I mean to differentiate between absences, spitting in an officer's face, and things of that sort on the one hand and rape, murder, arson, robbery, burglary, on the other. When a person is tried for an offense of that nature, then I believe that he should have that type of trial—he should not be administratively severed from the service—which the ordinary civilian person in the United States has when he has a trial in the military service. That is my position.

Now, I believe that a much greater effort can be made by the services to carry out a type of trial and conduct that type of trial which is more closely analogous to that which we have in private life, civilian life, than has been the case in the past. And the fact that they have instituted this circuit judge system indicates to me that they themselves are aware that there is an area where improvement can be had and they are doing so, and I understand that they are very satisfied with this system. So that is what I am trying to say.

If you are going to try somebody for a crime, whether it is a military crime or a crime which is recognized at large, and you are going to try him, let him have a trial which is as closely analogous to that which every citizen of the United States gets, and that means the same safeguards being available and a decent lawyer being made available. By decent, I mean competent—and all the rest of the situation.

Now, it is claimed, and I am sure that it is true to some extent, and I don't want to be accused of not being aware of this, that there are safeguards for the person in the military service which are far greater than those available to a civilian charged with a crime—in other words, there is more of a paternal relationship in the service. Well, maybe there is. I think there is, candidly. This process that is had in the services is far better from the accused's standpoint than anything that is available in civilian life. However, my complaint is, once you say try him—from that point on—let's have a decent trial—let's have one that is like everyone else gets in America. That is all.

Mr. BASKIR. There has been testimony from representatives of the Department of Defense which indicated that they feel, especially with reference to S. 758, that there are some areas in which, because of the circumstances of the military environment, it is not practical to have a trial.

You have indicated what you think is the ideal solution.

Assume that on the basis of the representations by the Defense Department, it is decided not to make the clear division which you have suggested. What alternatives then would you suggest? In the bills there are apparently two different lines of thought, one to give a man an election and the other to increase the safeguards in the administrative hearing.

Would you address yourself to the alternative solution if administrative procedures continue to be used for some of these cases of misconduct?

Mr. FINN. I have no objection to the election aspect of these things provided, and this is a big provided, that he is represented by a competent counsel at the time that any elections are made. The committee on which I serve has consistently held—we don't like elections, we don't like waivers. However, we realize that in the military organization there are times when you must operate, and in order to operate you've got to dispose of matters when they arise. You can't wait forever. Therefore, we feel that perhaps under some circumstances these elections, surrounded properly by safeguards, could be condoned. We would like to eliminate them, if possible.

Mr. BASKIR. I gather from your reply that you believe that these two approaches are completely complementary, that there should be both an election and, in addition, certain due process safeguards to the administrative proceeding itself?

Mr. FINN. Let's say it this way. If you put in this election business, then I think you ought to have safeguards—you ought to safeguard it very rigidly.

Mr. BASKIR. And if a man with the necessary safeguards decides to choose the administrative proceeding, that proceeding itself should also have the kind of safeguard which are in the bills.

Mr. FINN. Exactly.

Mr. BASKIR. In effect, do you see it perfectly compatible to have two parallel systems, you might say, one called a board and another called a court-martial, which in effect are brothers, or very close cousins, because they have essentially much the same procedural rules?

Mr. FINN. Let's put it this way. I would prefer to see—if you are going to sever someone from the service because of something he has done which is not proper, and you are going to give him a discharge which is other than an honorable discharge, he should be tried by a court. That is our primary contention, and that court trial should be like that in civil life as far as possible.

We don't think we ought to have election, or waivers, or things of that nature. I realize that we are perhaps a voice crying in the wilderness in this area. We are not any the less sincere. But if you are going to do that, and I assume—I know that the people in the Pentagon feel that they are going to be lost without this type of power—I don't agree with them—but if you do agree with them, then I think that rigid safeguards should be set up. I think I said earlier—we have enough boards now in this country and we could get rid of a few of them without too much harm being done. I wonder whether we should set up more boards to do something which can be accomplished in another way. We've got a court-martial system that—I think we should use it.

Mr. CREECH. Mr. Finn, the subcommittee has been informed that the morning hour has just expired, that we have not heard the bells and we no longer have permission to sit.

On behalf of the chairman I have been asked to thank you for your testimony for coming here today in behalf of the American Legion and giving the subcommittee the benefit of your thinking and research in the areas in which this legislation is concerned.

The chairman has asked me to inquire if you would be agreeable to answering additional questions if they were posed in correspondence in view of the time limitations placed upon the subcommittee?

Mr. FINN. Yes, I would.

Mr. CREECH. Thank you.

The subcommittee appreciates very much your coming here today.

Mr. FINN. May I say, the views that I have expounded here are those of the entire committee of which I happen to be chairman. I have set out the qualifiactions of those persons and each of them is a far better lawyer than I. I am merely being their mouthpiece today and I thank you very much for the courtesy you have extended to me and to Mr. Stringer.

Mr. CREECH. The subcommittee will reconvene at 2:30 p.m.

Thank you.

(Whereupon, at 1:13 p.m., the subcommittee was in recess, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION (2:55 P.M.)

Senator LONG of Missouri. The comittee will be in order.

Mr. Counsel, will you call your first witness, please.

Mr. CREECH. Thank you, Mr. Chairman.

Mr. Chairman, the first witness this afternoon is Mr. John S. Stillman, chairman of the American Veterans Committee, Washington, D.C.

Mr. Stillman.

Senator LONG of Missouri. Mr. Stillman, will you proceed with your statement?

STATEMENT OF JOHN S. STILLMAN, CHAIRMAN, AMERICAN VETERANS COMMITTEE; ACCOMPANIED BY HARRY LERNER

Mr. STILLMAN. Thank you, Mr. Chairman.

Mr. Chairman and members of the staff, my name is John S. Stillman. I am the national chairman of the American Veterans Committee, on whose behalf I am appearing today.

These recommendations have been prepared by our special committee on military justice who I wish to thank for their hard work on this matter.

First of all, I would like to express my appreciation and that of AVC for the oportunity to present our views on the all-important subject of the 18 bills before you. AVC would also like to commend the Subcommittee on Constitutional Rights; its distinguished chairman, the senior Senator from North Carolina, Sam Ervin; his colleagues on the subcommittee, and the competent staff. This subcommittee has done more to assure justice to our military men than any other group or organization in our history.

The American Veterans Committee is an organization of veterans of World War I, World War II, and the Korean conflict. Its program is built around its credo that ex-servicemen are "Citizens First, Veterans Second."

AVC has long been interested in the problems of military justice. We believe that members of the Armed Forces are entitled to their constitutional rights no less so than are civilian citizens of the United States. We believe that except in the case of a critical national emer-

gency military justice can be administered with full respect and observance for the rights of the individual without impeding the military mission of the Armed Forces. We believe also that in the administration of justice there should be substantial uniformity, organizational and procedural, among the various military departments.

Blackstone at one time referred to the English soldier as being "in a state of servitude in the midst of a nation of free men." We have no such stark contrast today, thanks largely to the adoption in 1950 of the Uniform Code of Military Justice.

The impetus for the adoption of the code was provided by public demand for reforms in the administration of military justice because of the experiences of our Armed Forces in World War II, then comprised largely of civilians. Again today we find that our Armed Forces contain many thousands who were drafted, or who volunteered for service when faced with the draft, and are not career military personnel. Many of those now serving are not only young, but also immature, and their first experience of life away from home and from school is in the military service.

The basic changes wrought by the code in order to civilianize military justice have been sound, and the improvement in the speed and quality of military justice has been commendable. Experience has shown, however that there is room and need for further improvement.

The 18 bills now before this subcommittee can be categorized by their principle objectives as follows: (1) those which strengthen the independence, prestige, and expertise of military justice personnel in the exercise of their duties; (2) those which further implement the constitutional guarantee that no person shall be deprived of life, liberty, or property without due process of law; (3) those which simplify and improve military justice procedures; and (4) those which close jurisdictional gaps. The AVC is in full accord with all these basic objectives. We would however, like in particular to discuss the first two of them.

A prerequisite to the effective administration of military justice is the existence of a judiciary in a position to act impartially on the merits of any case.

Our Constitution clearly and carefully provides for the separation of powers between independent legislative, executive, and judicial branches of government. An independent judicial system is just as essential to the proper, impartial administration of military justice as it is to civilian justice.

The independence of the military judicial system continues to be prejudiced by the threat of command influence, notwithstanding article 37 of the code. The Court of Military Appeals has reversed convictions in several cases where commanders have attempted to influence the court by giving instructions to the members. A commander who orders a case to trial, moreover, may name the members of the court, including its president, and also (in the case of a general court-martial), its law officer. Further, the efficiency of the members of the court may be rated for promotion and retention purposes by persons in the chain of command. On some boards of review, moreover, the chairman rates the efficiency of the other members. These conditions militate against the independence and impartiality of this judicial system.

The proper administration of military justice requires also a qualified judiciary. A judgeship is a highly specialized position. The law officer of a general court-martial has responsibilities equivalent to that of a civilian judge in a criminal proceeding. Unlike the civilian judge, however, the law officer might serve for only one case, or only now and then. We believe that the quality and speed of military justice would be advanced if the law officer has more tenure, in which he could acquire skill, knowledge, experience, and prestige. We like the field judiciary system which has developed in the Army, and has now been adopted by the Navy. We favor the proposal to make the system mandatory by statute in all the military departments. In this system, the law officer serves as such in a particular geographical area for his tour of duty, and he may then serve as a law officer elsewhere. This system not only helps develop a qualified judiciary, it also tends to reduce command influence, since the law officers are designated by the Judge Advocate General.

The group of bills that would further implement the constitutional guarantee of due process relates not only to courts-martial and punitive discharges, but also to administrative proceedings and administrative discharges. Court-martial exercise their functions under the watchfull eyes of the Court of Military Appeals. In one case, Chief Judge Quinn of that court said:

> No reason in law, logic, or military necessity justifies depriving the men and woman 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 (1955).

The Court of Military Appeals, composed entirely of civilians, was an innovation introduced by the code. It is now a fixture in the administration of military justice. We have no quarrel in general with the present practices of the military departments in the application of due process in court-martial proceedings under the scrutiny of the civilian court. Moreover, uniformity of interpretation of the code has been largely attained.

Of course there are differences in the way the punishment is administered.

With regard to administrative proceedings which result in discharges, we note that the Court of Military Appeals in its annual report for 1960, page 12, called attention to the "unusual increase in the use of the administrative discharge" which "led to the suspicion that the services were resorting to that means of circumventing the requirements of the code." It seems clear to us that the discharge "other than honorably" of a member of the Armed Forces without a proper hearing and without his consent (except on the ground of fraudulent enlistment, or enforced absence due to incarceration under sentence by civil authorities) has deprived him of due process of law. No doubt many, and perhaps most, of those so discharged are young and inexperienced, and military service is their first full-time job.

We believe that no member of the Armed Forces, officer or enlisted, should be given an administrative discharge other than honorable unless certain safeguards are provided. We believe that these safeguards should include provision for a hearing before a board convened for the purpose of considering issue of such a discharge.

We believe the board should be presided over by a law officer or a military judge. We believe there should be notice to the respondent sufficiently in advance for him to be able to prepare his case. We believe the respondent should have the right to be present at the hearing, to be represented by counsel, to confront the witnesses against him, wherever practical, and to cross-examine them, to introduce evidence, and to present witnesses in his own behalf. We believe a discharge other than honorable should not be allowed unless the hearing is conducted impartially, on the merits, and the board recommends the discharge on the basis of evidence adduced at the hearing. We believe an adequate record should be kept, so that any finding or recommendation adverse to the respondent may be adequately reviewed.

Bills before this subcommittee would require observance of those safeguards only where an undesirable discharge is issued. In our opinion, the constitutional guarantee of due process requires that the safeguards be made mandatory where either the undesirable or the general discharge is involved. Both of these forms of discharge carry some stigma.

We are pleased that the Department of Defense, in a directive issued December 20, 1965, which becomes effective in March this year, would provide some of the safeguards we favor. It provides that before an enlisted member of the Armed Forces may be administratively discharged under conditions other than honorable, there must be a hearing before a board appointed to hear the case; that the respondent receive notice of the hearing, that he have the right to appear, to have counsel, to present evidence, and to cross-examine witnesses; and that the discharge cannot be issued unless recommended by such a board.

AVC welcomes this move by the Department of Defense. However, it does not go far enough. It applied to the undesirable discharge, but would continue to allow the issue of a general discharge without observance of the safeguards set up by the new directive. The safeguards provided, moreover, do not apply to officers. Also, boards set up under the new directive could not require the testimony or attendance of civilian witnesses, since statutory subpena authority is lacking. In addition, there is no provision for a law officer to preside at the board hearing. We therefore recommend legislation that would embrace all the safeguards mentioned above.

The above comments merely touch on some of the most important proposals in the 18 bills before you. We recognize that all of them are important, and the views of the AVC on each of the bills is attached. You will note that we oppose the proposal to abolish the summary court-martial. If, however, legislation is passed changing the character of special courts-martial such as would be the case if S. 752 became law, we might take a different view, perhaps along the lines of the able testimony of the Association of the Bar of the City of New York on S. 759.

Mr. Chairman, on behalf of the American Veterans' Committee I thank you for the opportunity to be heard and for your consideration of our views. I would be glad to answer any questions, and if we can be of any further help to the work of your committee, please call on us.

(The "Comments by the American Veterans' Committee" follow:)

COMMENTS BY THE AMERICAN VETERANS' COMMITTEE ON S. 745 TO S. 762

(Attachment to the testimony of John S. Stillman, national chairman, American Veterans' Committee, Jan. 25, 1966, before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, on the bills pertaining to military justice)

S. 745

AVC supports S. 745 to give a statutory basis to the field judiciary system now in use in the Army and Navy, and extend the system to the Air Force; to change the title of the "law officer" to "military judge"; to facilitate the interservice use of the members of the field judiciary; and to allow the use of civilians with appropriate qualifications.

The bill would help bring uniformity between the military departments, since only the Air Force does not have the field judiciary system. A qualified judiciary is essential to the proper administration of justice. The field judiciary system encourages development of a qualified judiciary, enhances its prestige, and reduces command influence.

S. 746

AVC supports S. 746, the effect of which would be to establish a Judge Advocate General's Corps in the Navy, and thereby make the military departments more uniform. Existence of such a corps would do much to strengthen the practice of military justice in the Navy and to assure the rights of its personnel. Such a corps, moreover, would tend to attract and retain, for the advancement of military justice, young and ambitious officers who otherwise might make no effort to use their legal training and skill.

S. 747

AVC supports in principle S. 747 to establish a Department of Defense Board for the Correction of Military Records, with appropriate provision for the Department of the Treasury relative to the Coast Guard, in lieu of the present separate boards for each service. Common problems are currently being handled differently. AVC believes that a single Department of Defense Board would help attain uniformity in the treatment of similar problems.

AVC notes that the present, separate boards are backlogged to varying degrees. To help avoid backlogging, AVC recommends that the bill be amended to provide for "at least nine members," rather than "nine members," and for the authorization of adequate staff.

S. 748

AVC supports in principle S. 748 which will reconstitute the boards of review of each service as courts of military review. Such a measure will enhance their independence and status, and introduce a civilian element into the membership of the courts.

AVC recommends the deletion from the proposed article 66(b) of the words "only civilian judges of each court shall be eligible to act as chief judge." While AVC believes the provisions which call for the mandatory inclusion of a civilian on each panel are salutary, we see no need for the further proposal that such civilian shall preside.

S. 749

AVC supports in principle S. 749 to lessen command influence on members of courts-martial and boards in the military departments. Impartial justice is jeopardized, and perhaps rendered impossible, if a person's judgment is influenced, even subconsciously, by the knowledge that his decision could result in reprimand, or an adverse efficiency rating. AVC urges the following amendments:

(*a*) In proposed article 37 (a) and (b) add "direct" to the actions that would be prohibited by persons in command channels.

(*b*) Add the following language to proposed article 37(c):

"(3) to statements or instructions given by a law officer or legal officer to an administrative board provided such statements are given in open hearing and made a part of the record."

S. 750

AVC supports the purposes of S. 750 which would strengthen the protection given to an accused where a bad conduct discharge is being considered. It would also provide that before any person may be discharged under conditions other than honorable (except pursuant to a trial by court martial), he shall have a right to an administrative hearing before a board convened for the purpose, at which he is afforded an opportunity to appear and present evidence on his own behalf. AVC is of the opinion that the provisions relating to administrative discharge are good, but prefers the more inclusive provisions contained in S. 754.

AVC urges that the provision regarding waiver of counsel, whether in trial by court martial where a bad conduct discharge is being considered, or in administrative discharge proceedings, be strengthened as follows:

(*a*) The accused or respondent should have at least 48 hours from the time charges are served, or notice of the administrative discharge hearing is given, before waiver of counsel may be considered effective by the court or the board, as the case may be;

(*b*) The period set in (*a*) should not reduce the time available to the accused or respondent to prepare his case; and

(*c*) The decision of the accused or respondent to waive counsel should be in writing, the waiver document to bear a notation by a counsel who meets the qualifications prescribed in article 27(b) of the code that he has been consulted in the matter and has fully advised the accused or respondent.

S. 751

AVC supports in principle S. 751 which would increase from 1 to 2 years (after approval of sentence by the convening authority) the period within which an accused may petition the Judge Advocate General for a new trial on the grounds of new evidence or fraud.

AVC urges that S. 751 be so amended as to permit the petition to be filed if less than 2 years has elapsed since approval of the sentence by the convening authority regardless of the date of enactment of this Act.

S. 752

AVC supports the purpose of S. 752 which would permit an accused, after learning the identity of the law officer, to elect to be tried by such law officer. AVC notes that the Department of Defense has submitted a substitute bill for the same purpose. Such a provision would probably expedite justice. We recommend that a reasonable time—at least 48 hours—be set before the election is regarded as final. We recommend further that the decision of the accused to be tried by the law officer be required to be in writing, and that the document be required to bear a notation by counsel, whose qualifications are those prescribed in article 27(b), that he has been consulted and has fully advised the accused.

S. 753

AVC supports S. 753 which would provide for review by the court of military appeals, in certain circumstances, of the decisions of boards for correction of records or discharge review boards, constituted under 10 U.S.C. 1552 and 1553 respectively. Uniformity among the military departments, as well as better administration of justice would be advanced.

S. 754

AVC supports in principle S. 754 which would provide that before any person may be administratively discharged "under conditions other than honorable" he shall have a right to an impartial hearing before a board convened for the purpose, at which he is entitled to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence in his own behalf. A law officer would preside. AVC is of the opinion that any lesser safeguards would violate the constitutional guarantee that a person shall not be deprived of life, liberty, or property without due process of law.

The bill would continue to allow issuance of a "general discharge under honorable conditions," which carries some stigma. We recommend that the bill be amended to bar such a discharge as well, unless the safeguards proposed in the bill are provided.

There could be an exception to the need for the safeguards contained in the bill where the record, standing alone, is sufficient proof of misconduct, as in the

case of fraudulent enlistment for concealment of a criminal record, or of absence from duty due to incarceration by sentence of civil authorities. We recommend that the bill be amended to allow for this exception.

We recommend also that the member concerned be granted the right to elect to be heard by a board consisting solely of the law officer, after advice of his counsel.

S. 755

AVC supports S. 755 which prohibits one member of a board of review from rating the performance of other members of the board. Such a proposal tends to reduce command influence and promote independence of judgment.

S. 756

AVC supports in principle S. 756 which would prohibit the administrative discharge of a member of the armed services under conditions other than honorable if the discharge is based wholly or partially on a ground on which (1) the member was previously acquitted by court-martial; or (2) an administrative board decided in his favor. No person who has won a test regarding the correctness or proficiency of his actions should be required to defend again those actions against the same adversary under the guise that one proceeding is judicial and the other administrative.

S. 757

AVC supports S. 757 which would give the law officer of a court-martial authority to dispose, before trial, of motions relating to matters of law, such as the admissibility of evidence. He would also be authorized to accept a plea of guilty. These proposals would expedite the course of justice. There is no need for a court to be convened, as at present, in order to dispose of such matters or accept a plea of guilty.

S. 758

AVC supports the purpose of S. 758 which will grant to individuals for whom an administrative discharge for misconduct is proposed the right to elect a trial by court-martial. However, if S. 754 and S. 760 are enacted, we see no need for this bill.

S. 759

AVC opposes S. 759, which would abolish the summary court-martial. Under article 15 of the code as amended by Public Law 87-648, a member of the armed services may elect to be tried by court-martial instead of accepting nonjudicial punishment from his commander. Such punishment, unlike a court-martial sentence, is not a matter of permanent record, and the member has no black mark against him when he ultimately is discharged and enters or reenters civilian life. We think that the success of the system of nonjudicial punishment will be threatened if the summary court is abolished. Where a member has not committed the offense for which the nonjudicial punishment is proposed, his election to trial by court-martial frequently results in a summary court proceeding. If that court were abolished, however, the choice of the member concerned would be between accepting the nonjudicial punishment for the alleged offense, or requesting trial by no less that a special court. That court has at least three officers plus a trial counsel and a defense counsel. It was not established to hear minor offenses. It has far greater punitive powers than a summary court. Its members might resent, subconsciously at least, the need for them to dispose of the case, involving the allegation of a minor offense, on the initiative of the accused.

S. 760

AVC supports in principle S. 760 to confer subpena powers on boards considering an administrative discharge, records correction boards, discharge review boards, and investigating officers under article 32 of the code. Such subpena powers, judiciously exercised could make the course of justice more speedy and true in cases subject to possible courts martial where at present the court has subpena powers but the pretrial investigating officer does not. The proposal, moreover, would help bring to members of the armed forces the protection of due process of law in board proceedings considering a discharge other than honorable. The board, through use of its subpena powers, could compel at-

tendance of witnesses whom the member involved could then confront and cross-examine.

S. 761

AVC supports in principle S. 761 which would close the gap left by the Supreme Court decision in U.S. ex rel. *Toth* v. *Quarles*, 350 U.S. 11 (1965). The bill provides for a trial in a Federal district court for serious crimes committed by former members of the Armed Forces while on active duty. AVC's platforms, as adopted by several successive national conventions have contained language favoring such a measure. There is no justification for persons accused of crime to go free without trial, simply because no court has jurisdiction to hear the case.

S. 762

AVC supports in principle S. 762 which is intended to close the gap left by a series of Supreme Court decisions (*Reid* v. *Covert*, 354 U.S. 1 (1957); *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)), which concluded that civilians accompanying the Armed Forces abroad, including dependents, who may have committed an offense, could not constitutionally be tried by court-martial. The bill would confer jurisdiction for trial of some offenses on a Federal district court. Such offenses as murder, manslaughter, and larceny are omitted. AVC recommends that the range of offenses triable in Federal district court, be broadened to include all those encompassed in articles 77 through 134 of the code, except offenses of a purely military nature.

Mr. CREECH. Mr. Stillman, the chairman has asked me to say if you have no objecton counsel will proceed with questions at this time, if that is acceptable to you.

Mr. STILLMAN. It is acceptable.

I would like at this time to introduce Mr. Harry Lerner, a member of our special committee.

Mr. CREECH. Does Mr. Lerner have a statement to make at this time?

Mr. LERNER. No statement, thank you, sir.

Mr. CREECH. With respect to S. 759, which would eliminate the summary court-martial, the subcommittee has been told that although there has been a great increase in the number of these courts-martial, summary courts-martial, in absolute terms it is still widely used.

Witnesses from the Department of Defense have suggested that further time is needed for experience under this new nonjudicial punishment under article 15, which came into force about 2 years ago, and a new court or special court before eliminating a summary court. I wonder, sir, if you would care to comment upon this representation to the subcommittee.

Mr. STILLMAN. I would like Mr. Lerner to answer that.

Mr. LERNER. This is with regard to elimination of the summary courts?

Mr. CREECH. Yes.

Mr. LERNER. I am not sure I got the full purport of that question.

Mr. CREECH. The subcommittee has been informed by the Department of Defense that the number of summary courts-martial has been diminished appreciably.

Mr. LERNER. Yes.

Mr. CREECH. With the advent of nonjudicial punishment under article 15. I believe that the subcommittee was told by the Army that the number of summary courts-martial has dropped by approximately one-third with the use of nonjudicial punishment under article 15.

However, because the summary court is still widely used, the Department representatives have suggested that the summary court-

martial should not be abolished until there has been a greater experience with the new nonjudicial punishment provided for under the revised article 15, and also the new law officer or special court. That experience is needed in both of these to a greater extent before the summary court should be abolished.

Mr. LERNER. Sir, that was the thinking also of our subcommittee of the American Veterans Committee. We felt that in the course of a few years, the amendment to article 15 with regard to nonjudicial punishment had not provided enough experience to show whether further change in the code relating to the functions of the summary court was warranted.

We did feel that its abolition at this time might tend to weaken the effectiveness of nonjudicial punishment under article 15, and in view of the high regard which our people had as to the way article 15 was functioning at this time, our thought was that it was best to leave the status quo.

There was also some thought, however, to the possibility of changing the special court, and if the law officer provision contained in one of these bills were to become law, so that there could perhaps be a one-officer special court, that might be a factor which would make a difference in any conclusion we might ultimately reach with regard to the retention of the summary court.

Mr. EVERETT. Mr. Stillman, in your statement concerning the field judiciary, on page 3, you mentioned that under this system the law officer serves as such in a particular geographical area.

It has been suggested that there might be greater interservice use of law officers. What would you think of the proposal that has come to the subcommittee's attention, that there be an interservice field judiciary with interchangeable members of that field judiciary, and with each member of the field judiciary assigned to a geographical area, much like a district or circuit judge in the Federal court system? Would you favor that arrangement, or would you feel that that might present problems?

Mr. STILLMAN. I think if you are going to start to unify the legal systems of the armed services, perhaps you should start at a higher level than that.

It has been interesting to me that the present Secretary of Defense has moved so fast and so far in supply matters and intelligence matters, but nobody seems to dare touch unifying the judge advocate and the legal systems in the armed services. I think rather than starting at the lower level of the field, perhaps an overall central Defense Department judicial system should be looked at.

Mr. EVERETT. Would you favor a separation of defense counsel from commanding officers, very much along the lines of the field judiciary?

Mr. STILLMAN. Of course, the judicial officer under this system as I understand it is designated by the Judge Advocate General and it is supposed to free him from command control.

I think if you go much further than that, you probably complicate the military personnel system. On the cruiser on which I served in World War II, I served in all three capacities, and I never hesitated to defend people to the best of my ability, even though I was under command control of the commanding officer of the ship, not actually of

the senior man in the court but of the ship. I wouldn't be worried about that.

Mr. EVERETT. In some of the previous testimony, as you will recall, strong objection was raised particularly by the Department of Defense representatives to inclusion in the Uniform Code of provisions which dealt with the administrative discharges and administrative matters, on the theory that a strict dichotomy should be maintained between punitive matters in the Uniform Code, and administrative matters which I suppose should be treated under this theory somewhere else in title 10.

In the view of your committee is it important to maintain this distinction, or do you have any views on that?

Mr. STILLMAN. I believe that administrative matters probably should come under some other section of the law, but we believe the same safeguards should be put in.

When the administrative procedure is used for discharges, perhaps it should not be in the UCMJ but in the administrative section of the law, provided the same safeguards are in the statutes. It wouldn't matter much so far as the substantive rights of the servicemen are concerned.

Mr. EVERETT. One objection was made to the proposal that there be an expansion of article 37 to include command influence on administrative boards, on the grounds that such a provision should be treated in some other article. Do you feel that is a major objection, or is this more or less a matter of form?

Mr. STILLMAN. I think it is sort of a housekeeping problem where you put it in the statute. You could put it in the same legislation, but have it amend a different article in the statute.

Mr. EVERETT. Now, in connection with S. 757 and in connection generally with the role of the law officer, the question came up as to the extent to which the law officer should be allowed to make determinations of mental capacity to stand trial as distinguished from mental responsibility at the time of the offense.

Does your committee have any views as to whether the law officer or the trial judge should make a final determination as to capacity and competency to stand trial, or in your opinion should the soldier be treated by the members of the court?

Mr. STILLMAN. Would that not be a medical matter?

Mr. EVERETT. Well, I am thinking now in terms of the legal evaluation of the medical testimony, whether or not the defendant is capable of standing trial and cooperating with his defense counsel.

Mr. STILLMAN. We really have no opinion on that.

Mr. EVERETT. In connection with S. 760 you pointed out that you support in principle the conferring of subpena power on certain boards as well as on investigating officers under article 32 of the code. The objection was raised in testimony last week that it would be necessary to have safeguards on the use of the subpena power to avoid abuse; that there would be possibilities of a defense counsel or a respondent in administrative procedings harassing the Government by frivolous requests for subpenas.

What type of limitations and controls on the exercise of subpena power would you envisage if S. 670 were adopted?

Mr. STILLMAN. I think you would have to rely on the good judgment of the presiding officer of the administrative board that this comes before. After all, he has the discretion, as I understand it, whether or not to grant the request for a subpena in each case, would he not?

Mr. EVERETT. In order for that discretion to be intelligentaly exercised, would it then be envisaged by you that the article 32 investigator would be a lawyer or that there would be a lawyer on each of these boards who could rule on the legal materiality of the testimony that it was designed to produce by the subpenaed witness?

Mr. STILLMAN. I believe in my direct statement we stated, at the top of page 5, that the board should be presided over by a law officer or a military judge in the case of granting discharges.

Mr. EVERETT. So that it would be envisaged that this law officer or military judge would rule on the subpena, the request for subpena very much as a Federal court?

Mr. STILLMAN. That is correct.

Mr. EVERETT. And to the extent that the article 32 investigator is a nonlawyer, I suppose this would present special difficulties, and you would have to make some special provision for that contingency.

Mr. LERNER. If I could speak to that, in the case of the article 32 investigating officer, where as yet there has been no referral to a court, there could be special problems as you have indicated, and in a case like that there would necessarily have to be some guidelines laid down either by legislation or administratively.

However, those guidelines probably would have to follow the same guidelines that the law officer of a court-martial or administrative procedure would follow, were the matter to be referred to him. In other words, the person desiring the subpena would have to show what he expected the particular witness to say, and how it would be material with respect to his case.

Mr. EVERETT. In the present Uniform Code provisions, mainly the courts-martial provisions, Mr. Lerner, I believe the authority is given to the trial counsel to issue subpenas, including those requested by the defense.

There has been some criticism of that procedure, of having the prosecuting authority rule on the requests for subpena by the defendant, by the accused.

Do you have any comemnts on the desirability of such a procedure?

Mr. LERNER. The entire system of courts-martial has been subjected to a great deal of criticism for a number of years, and in some cases this criticism is perhaps without merit. In other cases it is perhaps merited.

Where a trial counsel has the responsibility to the prosecution, then it would seem that discretion in the issue of the subpena ought not be lodged with that particular person, and in so saying it should be clear this does not mean that they abuse the power.

It is just not in accord with our general idea of fair play that a person who hs a responsibility for prosecution should also have discretionary powers which could perhaps limit the defense that the prosecutor would be faced with.

Mr. EVERETT. One witness testified, I believe it was earlier today, that it would be desirable to require that the article 32 investigator be an attorney, which I gather is practiced currently in at least one of the services.

Do you have any thoughts as to whether this should be made a statutory requirement?

Mr. LERNER. We don't have any opinion on that subject, sir.

Mr. EVERETT. Thank you very much.

Mr. STILLMAN. There is one other point on why our committee opposed the abolition of the summary at this time that Mr. Lerner would like to comment on.

Mr. LERNER. This is with respect to the question that Mr. Creech first asked regarding the nonjudicial punishment under article 15 and the possibility of abolition of the summary court.

At present where a person in the service is faced with article 15 punishment, and they didn't commit the offense for which the punishment has been laid down, they have a choice of either accepting the punishment or requesting trial by court-martial, and usually that trial by court-martial is before a summary.

If the summary were abolished, the only alternative that the innocent member of the service would face would be either to accept punishment for something he did not do, or ask for trial by court-martial which at the very minimum would be a special.

Now, a special has much broader powers than a summary. You can get a bad discharge, for example. Also, a special is composed of at least three officers, and in addition there must be a trial counsel who is an officer, and then a defense counsel who is an officer.

So the person who has been offered punishment under article 15, if he were to elect trial by court-martial would immediately involve five officers in that trial, since at the very least it would be a special.

Now, officers are human beings and they might resent subconsciously, notwithstanding the best of motives the idea of sitting on a petty offense, which is usually the type that is subject to a punishment under article 15. So for that reason we feel that at this time it would be unwise to abolish the summary court.

Mr. CREECH. With regard to what you have just said, and noting as we did in your statement that you said that you were opposed to the proposal to abolish the summary court-martial, I wonder this, sir.

Of course recognizing that the special court-martial does have wider jurisdiction, and of course can confer a more severe penalty than a summary command, recognizing also the human element which you just mentioned, would not one normally consider, though that such a court-martial would consider the severity of the alleged crime in arriving at a decision.

(Senator Ervin entered the hearing room.)

In other words, the fact that a special has the power to confer a harsh sentence, if the alleged crime were one which could have been handled by nonjudicial punishment but the serviceman elected a court-martial, if the summary were abolished and it went to a special court, would it not be reasonable to assume that they would take into consideration the severity of the alleged crime, and the punishment to conform with it?

Mr. LERNER. We are suggesting that it might not be reasonable, in view of the much broader powers of the special and the human nature element that is involved. We would feel differently, perhaps, if the special were in such a way that a law officer could preside and the trial be conducted by a single officer. However, where five busy officers are involved in the trial of a petty offense which is subject to disposition under article 15 and a person has insisted in the eyes of these people to be tried by the five, with all this tax upon their time, they subconsciously or unwittingly might show their resentment by imposing a penalty far beyond what the person otherwise might have received.

It tends to impose a very unfair choice upon an individual who has been called upon for punishment under article 15, and feels that he just has not committed the offense.

Mr. CREECH. You say on page 2 of your statement that by allowing the commander who convenes the court to name its members, its president, its law officer, that this creates a possibility or a threat of command influence.

I wonder, sir, what would you suggest as an alternative means of constituting a court-martial to overcome this?

Mr. STILLMAN. It depends to a certain extent upon the nature of the base or the ship or the service you are speaking of. You can't lay down any flat rules.

Mr. Lerner will continue with the answer.

Mr. LERNER. Our view is that the enactment of legislation which would make the establishment in a field judiciary mandatory is the answer, the principal answer to that question.

We feel that since the members of the field judiciary are certified by the Judge Advocate General, and are assigned by the Judge Advocate General, this tends to insure impartiality in the same way that is found in the case of a trial for a civilian offense before a civilian judge.

Mr. CREECH. Sir, you also discussed or, rather, stated when discussing administrative board actions, that administrative boards should not be able to give an undesirable discharge without according the serviceman a board hearing with fundamental safeguards.

The subcommittee has from time to time received testimony in which it is said that any type of discharge other than an honorable one may carry a stigma for the recipient. I wonder, sir, if you would care to expand upon your statement and also if you care to comment upon this assertion that has been made in the past by other witnesses.

Mr. STILLMAN. We feel that, if anything less than an "honorable discharge" is given, that it does create some stigma. Do you wish us to expand on that?

Mr. CREECH. Yes. That would be in accord with other representations made also. You obviously arrived at this decision after a great deal of study and research. I wonder if you would care to give the subcommittee any of the background information?

Mr. STILLMAN. Our organization of course is made up entirely of veterans of all the armed services and our veterans' service, veterans' claims and VA representatives have worked with men from all parts of the country who have had some of these problems, and we are not in a position, of course, to cite you name, rank and serial at this point.

A very vivid example of the economic effect of such a stigma is when the veteran goes out to get a job. One of the first things your employer will ask, "Let's see your service record and see the nature of your discharge." If it is not an honorable discharge, the average personnel officer would look very hard.

Senator ERVIN. If counsel will pardon me, and if I may interject myself at this point, the suggestion was made by one witness last week that the Armed Forces might well adopt a system under which, in the case of persons who were in the armed services who were merely unfit to be soldiers by reason of their mental condition, or their lack of intellectual power, or because of physical considerations, or those that it was desirable to discharge not because they had committed any great or serious crime, but just a series of petty offenses: that in these cases, one might minimize the hazard which an undesirable discharge gives to a man seeking employment after severance from the service, by establishing a discharge or release from service that does not make any specification whatever as to the character of the service.

What do you think of that?

Mr. STILLMAN. Mr. Chairman, we are very glad to have you with us. As I said earlier, it is a privilege to be called upon to testify upon the important work of this committee.

I think you refer to two slightly different situations. One is where the man mentally or physically shouldn't have been there in the first place. In this case it is the fault of the people who took him in. There perhaps you should work out some way of giving him an annulment instead of a divorce.

Perhaps he shouldn't have been taken in. Under that condition there should probably be a new approach.

If it is a case of cumulative offenses, you may really be punishing a man twice for the offense, and this is the area in which I think a man should not be subject to double jeopardy and should have the same constitutional protection of his rights as in a court-martial. Say he is acquitted by a court-martial, but the people on the base remember, "He is the guy who gets in trouble." Even though he was acquitted for the specific offense, his reputation perhaps might get him a discharge that is less than honorable, without his having a fair hearing on it. That is one of the safeguards that I think this new legislation proposes.

Senator ERVIN. Let us say you had a petty offender who doesn't do anything very bad, but just keeps constantly repeating. They don't want to give him a dishonorable discharge, and they don't want to give him an undesirable discharge. At the same time one of the most prized possessions that a man brings out of the Army is an honorable discharge, and if you give that type of man an honorable discharge, they say you cheapen the value of an honorable discharge and cheapen the honorable discharge not only in the esteem of the serviceman, but also in the esteem of the civilians.

That petty offender commits the most minute military crimes and keeps repeating them. He ought not, on the one hand, get an honorable discharge. But on the other hand, there is the expense of a court-martial before you can get rid of him by dishonorable means.

Mr. STILLMAN. You may have misunderstood me, Senator. I did not say we shouldn't have these other characters of discharge, because you admit it is a slight handicap in later life not to have the honorable discharge.

They should be entitled to due process of law, if they get a discharge other than honorable. I do not think that is too much to do for the man. After all, he might get in trouble with his top sergeant in that one company, and they can transfer him or try him somewhere else in a different kind of work.

Senator ERVIN. They might have a man who might turn up on each duty assignment a couple of minutes late, and he does that chronically.

Mr. STILLMAN. I think there is something wrong with his leadership and supervision.

Senator ERVIN. Well, I had a man call me from Germany the other day that had had three trials for insignificant things right in a row.

Mr. STILLMAN. I wish he had more counseling.

Senator ERVIN. From everything I hear, I certainly do agree that a man who is given an undesirable discharge goes out into life with a stigma on him which requires super-human requirements before he can overcome it.

Mr. STILLMAN. I agree, sir.

Senator ERVIN. And certain men that are like that ought not to be released from the service until they have been given every opportunity under due process of law.

That is, they ought not to be granted a discharge without some kind of action which due process recognizes unless they are first acquainted with their rights, and in my opinion sign a waiver in a voluntary manner, after receiving competent advice, either from a civilian lawyer or from a military lawyer.

But there does seem to be something beyond maybe a mere shadow at least in the claim of the military authorities that they ought to have some ways that they can get rid of a man who is undesirable for service, and yet who does not commit any very serious crime, without having to go through any kind of a court proceeding.

In other words, they take the position that a man doesn't have a vested right to be in the military service, and that the military service ought to have some way to get rid of the man without too much red-tape, as they put it, in case he is unfit for the service, but does not commit any crime serious enough to be tried by a general court or special court.

I would be glad to have my further comments you might make on that point because it is a right interesting question, on which my mind is more or less in a confused state.

Mr. STILLMAN. We don't agree with the point of view—I know it is not your view, you are quoting other witnesses, I assume military witnesses, as having said that. We feel these kinds of mental-attitude matters can probably be taken care of within the service. We feel that you should not be able to give somebody a discharge that is less than honorable, without this due process constitutional protection.

Senator ERVIN. I believe the suggestion that I called your attention to, that there ought to be some kind of a neutral discharge, a discharge

that didn't say anything to the man's credit or anything to his discredit, I think that came from a lawyer who was a member of the military affairs committee of the New York City Bar Association.

He took the position that there ought to be some distinction drawn between the judicial field and the military and the administrative field along that line.

Mr. STILLMAN. I will ask my colleague if he would care to comment.

Mr. LERNER. Sir, I wonder if this type of neutral discharge is perhaps what the military has intended by the general. I am not sure, because the thought is rather new.

The feeling of the American Veterans Committee is that the general tends to penalize a man, although this may not be intended by the military departments. The penalty arises when he goes out in civilian life and seeks employment, and the word "honorable" is not on the discharge, or the discharge does not say "honorable discharge," so the prospective employer tends to become suspicious and begins asking questions, with the result that the man is put in an embarrassing position, and is apt not to get the employment that he is seeking.

Therefore, it is our position that before any person is given a discharge that is not an honorable discharge, that there should be a proceeding with all the safeguards that we have brought out in our statement.

Senator ERVIN. In other words, your position is not necessarily that the man should be tried before a court-martial, but that there should be at least a board proceeding in which he is given notice that the military alleges that he should be released from service, and that he should be given notice of the reasons for that charge or allegation, that he should have the right to demand a hearing, in which he would be represented by a military lawyer, if one is available, or have the authority to bring in a civilian lawyer, if he desires, of his own choice, have an opportunity to be confronted by the witnesses against him, and an opportunity to cross-examine them. That is what you are saying, in effect, isn't it?

Mr. STILLMAN. Yes, Mr. Chairman, and in fact the Defense Department agrees with a large part of that.

On December 20 they issued a new directive to put such a plan into effect this March, largely because of the legislation that you have introduced. So they have gone a long way on this.

This will prevent an officer who has a personal grudge against somebody just giving him a discharge without any protection to his rights, which could have happened in the way you described earlier.

Senator ERVIN. Of course the regulations are subject to change. Do you think it would be advisable for Congress to put the substance of that directive and regulation into law?

Mr. STILLMAN. By your leave, sir, may I repeat some of the testimony that I gave before you came?

Senator ERVIN. Yes. I am sorry that I couldn't be here.

Mr. STILLMAN. We outline the protections that we believe a man should have. Then we say that we are pleased with the Defense Department's new directive. It provides that before an enlisted member of the armed forces may be administratively discharged under conditions other than honorable, there must be a hearing before a

board appointed to hear the case, the respondent must receive notice of the hearing, have the right to appear, have counsel, present evidence and to cross-examine the witnesses. The discharge cannot be issued unless recommended by such a board.

Senator ERVIN. You have answered——

Mr. STILLMAN. But we go a little bit further in answer to your question about legislation.

AVC welcomes this move by the Department of Defense. However, it does not go far enough. It applies to the undesirable discharge. It would continue to allow the issue of a general discharge without observing the safeguards set up by the new directive. The safeguards provided, moreover, do not apply to officers.

Also, boards set up under the new directive could not require the testimony or attendance of civilian witnesses, because statutory subpoena authority is lacking. In addition, there is no provision for a law officer to preside at a hearing of such an administrative board. We therefore do recommend legislation to embrace all the safeguards mentioned above.

Senator ERVIN. I thank you. I want to apologize to both of you gentlemen and also the witness who testified this morning. This is one of those days that the members of the Senate can't be the masters of their souls as far as time is concerned. I am sorry I couldn't get here to hear the prior testimony.

Mr. STILLMAN. We appreciate the problem.

Senator EVIN. You may be sure that I will certainly read it and give it very thoughtful consideration.

Thank you.

Mr. CREECH. I would like to go back to your statement earlier, when I asked you the question about your statement that the constitutional guarantee of due process requires that the safeguards be made mandatory where either the undesirable or general discharge is involved because of the stigma which they carry.

Then you go on to cite, as you did just now in your colloquy with Senator Ervin the reasons why you feel that the DOD directive is desirable, and you state over on page 6, the first paragraph, the last sentence:

"We therefore recommend legislation to embrace all the safeguards mentioned above."

These are the safeguards that are not included in the DOD directive. You enumerate a number which are not.

Mr. STILLMAN. That is correct.

Mr. CREECH. Now, had the DOD directive included these which you enumerate, would you still recommend the legislation, if these things had been provided?

Mr. STILLMAN. I think the chairman answered that one for me by saying that directives can be changed. I think we would.

Mr. CREECH. I would like to ask you if I may about some questions pertaining to S. 762. I note from your statement that you say that you support this bill in principle.

It has been suggested to the subcommittee that to handle misdemeanors occurring overseas, some extension of the U.S. commissioner system might be useful. And also it has been suggested that a roving

district judge might be able to deal with some of the cases involving noncapital felonies.

I wonder what problems, practical or legal, do you foresee in either of these approaches, if you would care to comment upon the suggestions.

Mr. STILLMAN. I defer to Mr. Lerner.

Mr. LERNER. There might be some administrative advantage in allowing a U.S. commissioner overseas or a roving member of the U.S. district court to go overseas to hear the cases, because the witnesses more likely would be available, and the case very probably would be heard sooner.

However, the committee of the AVC, which weighted these particular bills did not go into that possibility in detail, and under the circumstances, we are not in a position to say whether we would prefer that type of approach.

Mr. STILLMAN. I think you would have to give effect to the Status of Forces treaties in the various countries as to what rights you yielded over to the host country, isn't that correct?

Mr. CREECH. Yes; this would be a problem of course, and a consideration. One of the suggestions which has been made to the subcommittee, and I appreciate having the benefit of your thinking about this, is posed thusly. Could a roving U.S. district judge or possibly a series of visiting regular U.S. district judges on an ad hoc basis sit as a court on a US. Navy ship on the high seas, and thus obviate the problems involved in obtaining the agreement of the countries involved?

Might it not be easier to persuade local witnesses to take a short sea voyage than to come to the United States for longer periods?

I wonder if you would care to comment upon this?

Mr. STILLMAN. I would see no problem with military personnel, with service personnel. I think you might raise real problems with dependents in a situation like that. I wouldn't recommend it for civilian personnel.

Mr. CREECH. There has been some comment made here earlier today, and at other times, too, before the subcommittee, that amending the Uniform Code creates serious difficulties and that it would be preferable, and I am speaking now with regard to 762, that it would be preferable to expand titles 18, section 7, the maritime jurisdiction section, to cover all citizens, and use the offenses set forth in the title rather than those in the Uniform Code. I wonder if you have given any consideration to this?

Mr. STILLMAN. I believe that also is beyond the scope of our study.

Mr. CREECH. Thank you very much. I do have one further question, to go back to the colloquy which you had with Senator Ervin, if I may.

Senator Ervin alluded to the representations made to the subcommittee that there are certain practical and administrative problems which the armed services encounter in separating indiivduals who fall into four classes of cases of four types of cases.

Now, in respect to S. 758, the subcommittee has been told by the Department of Defense that a court-martial is not a practical means of handling these types of cases, and therefore administrative discharge is necessary. These cases fall into four major categories.

One, that is where there is a pattern of petty misconduct; two, those in which there are extended a.w.o.l.'s; three, those which involve sexual perversion and homosexuality; four, the impossibly of trial for technical reasons.

Now, would you care to comment on each of these categories as an exception to the general rule of S. 758?

Mr. STILLMAN. Just off the top of my head, as I have had no time to study that very carefully, would not the third item come under a medical discharge?

Mr. CREECH. Sexual perversion?

Mr. STILLMAN. Yes; I should think that would come under a medical discharge.

Mr. CREECH. No, as a matter of fact, I suppose the subcommittee has received more complaints concerning administrative separations concerning homosexuality than any other type of case.

Mr. STILLMAN. As a layman I would have thought that would come under the category of a medical discharge.

Mr. CREECH. No.

Senator ERVIN. The opinion of homosexuality, that it represents such a deviation from the normal that he should be given——

Mr. STILLMAN. I think it is a psychological and a physical illness.

Senator ERVIN. Under a medical discharge,

Mr. STILLMAN. The repeated a.w.o.l.'s it would seem to me, like being a second offender and a third offender and a fourth offender, it would seem to me it would soon get up to the special court-martial jurisdiction.

Senator ERVIN. If I may interrupt counsel again, I think this is a field of the greatest difficulty for everybody concerned on both sides. Homosexuality is a vice which is ordinarily practiced in secret, and of course the accomplice is about as hesitant to say anything about it as the perpetrator. In fact, they sort of aid and abet each other. It is a most difficult thing to prove, because it is committed in secret.

Witnesses from the armed services have testified that they very frequently get a confession from a certain person or a serviceman that he is a homosexual, and when it comes down to trial, he always repudiates his confession and there is lack of proof of corpus delicti by anything except his confession, and therefore they can't get rid of him by court-martial.

On the other hand, he is rather notorious in the place that he is stationed among those that he is associated with. He has been guilty of homosexual acts and they have an abhorrence of serving with him. That it presents a very difficult situation, which I think is a correct summation of the matter from the standpoint of the military.

Mr. STILLMAN. I certainly wouldn't want to participate in the trial of that kind of an offense. That is why I think a medical discharge would be the way to handle it. I agree with you it wouldn't make a happy ship's company or base having a person like that.

Mr. CREECH. Mr. Stillman, if I may, I would like to relate this to 758, which as you know provides that when an individual requests a court-martial, when the service proposes to give him an administrative discharge, less than a general discharge, for alleged misconduct, and he would be entitled to it, so providing him with this election, the sub-

committee has been told that the present administrative system affords adequate protections to the serviceman and that this bill would prevent the military from eliminating undesirables when technical problems preclude a court-martial, and the bill would require their retention or force at least a general discharge when that is not warranted.

It was in this context that the subcommittee has been told that there are these four categories in which most of these cases fall. I just wondered, sir, what your experience has been, your committee's experience with these types of cases, if your experience would substantiate the representations made by the Defense Department that S. 758 would hamper the military services or be a deterrent to their administering justice. That is the reason I——

Mr. STILLMAN. We have not had observers at military bases across the country. We are in no position to judge on a broad scale what the volume of experience is.

But on the bills themselvse, our committee feels that if S. 754 and S. 760 are enacted, that there may not be any need for S. 758.

Mr. CREECH. Mr. Everett has a question he would like to ask.

Mr. EVERETT. There was a decision just reported from the fourth circuit involving a case tried in North Carolina which apparently held that it was improper to punish a habitual drunk by locking him up, that he had to be treated.

Do you feel that there would be any analogous reasoning with respect to an undesirable discharge for alcoholism or drunkenness or would there be a difference in approach?

Mr. STILLMAN. Well, you might also include narcotics, I suppose, in there. A lot of people think narcotics addicts should be treated medically rather than legally. You are certainly getting into, you are opening up quite a large Pandora's box of medico-legal problems here.

Mr. EVERETT. Thank you, Mr. Chairman.

Mr. CREECH. Mr. Baskir has a question he would like to ask.

Mr. BASKIR. The new Department of Defense directive which was talked about earlier deals specifically with enlisted personnel. The largest body of regulations that existed in the services prior to this also dealt with enlisted personnel. Is it your feeling that officers as well as enlisted personnel should have the same or equivalent body of legal protection under similar circumstances?

Mr. STILLMAN. We believe they should have the same protection but it is also my understanding that there has to be a court-martial before an officer can be discharged, is that not right?

Mr. BASKIR. Yes.

Mr. STILLMAN. I am not sure that it really matters. Isn't that true? Isn't a court-martial required?

Mr. BASKIR. Yes. However, I believe there are certain show cause proceedings, and it is possible to eliminate from the service an officer under slightly different procedures. I am wondering whether under those circumstances——

Mr. STILLMAN. He should have the same safeguards, certainly. So should the drunk and these other gentlemen we have been talking about. They should have the same safeguards.

Mr. BASKIR. I would like to go back just for a moment to this matter of the election of a court-martial, and the general matter of drawing

a line between where an administrative proceeding and discharge is proper and where a trial is proper.

There is some problem in drawing this line. I gather from your statement that you consider that adding the various legal protections to the proceeding such as the directive and such as a number of the bills would do, would be sufficient, and that it is not necessary to have an election or to have a court-martial.

Mr. STILLMAN. That is right, S. 754 puts those safeguards in, I believe.

Mr. BASKER. Yes. So, in effect, the bills are trying to add all of or as many as possible of the legal protections in a trial to administrative proceedings.

Do you feel that at some point the administrative proceeding will be encumbered to such a great extent that we merely have a judicial proceeding, a full criminal proceeding, but under a different name, and that in effect the usefulness, if there is one, of administrative proceedings will have disappeared?

Mr. STILLMAN. I would like Mr. Lerner to answer that in more detail, but just offhand we still have the advantage of their not giving somebody a criminal record as such, so there is that distinction.

Mr. LERNER. I don't think at this time anyone can say that the usefulness of the administrative proceeding has been impaired or has disappeared. It is necessary first to give it a try.

The principal concern of the American Veterans Committee is that persons are being discharged without adequate safeguards and, if the price that has to be paid for justice is a more encumbered administrative proceeding, then that price should be paid.

There perhaps could be simplicity introduced in the administrative proceedings. If legislation were enacted allowing for a law officer to preside, and to hear a case on the option of a person whose continuance in the service was in question, such a procedure could very possibly provide all the safeguards that we have in mind, and still not encumber the administrative process unduly within the military departments.

Mr. BASKIR. I had intended my question, if it was not clear, to assume a situation in which the directive or, alternatively, a number of the bills had passed and it was now required to have legal counsel, the law officer as the president of the board, and subpena for cross-examination of witnesses and that at certain levels, review approaching legal review was also in effect.

All these suggestions have been made under the theory that in order to protect a man's rights, you must have these due process elements in the administrative proceeding.

The fear has been expressed that if this is done, then you have eliminated any usefulness of the administrative discharge for activity approaching misconduct. I wonder if you have any other comments along that?

Mr. STILLMAN. We feel that that is just a delaying action to discourage your worthy efforts to put in these constitutional protections that we believe the serviceman should have.

Mr. BASKIR. I did not mean to propound that as my own theory, but just to get your opinion.

One last point. A number of witnesses have expressed the opinion that the notice of charges, which is now given to the individual subject to an administrative proceeding, is not sufficient; that for instance, a copy of the regulations is often unavailable to the man and that his attorney, if he has one, finds himself unable to get a copy of the regulations.

Also, there have been cases of civilian counsel not being informed of when the board will meet, or the actions of the board; all of this because they are not required to have the service of various papers and information on the attorney.

I wondered if you have run across this problem in your own experience, and if you would suggest a requirement that counsel and the guardian or parents be informed as fully as the man himself.

Mr. LERNER. There have been cases that have come to our attention where an undesirable discharge has been given without proper notice. One of the elements that we believe should be enacted into law is the requirement that there shall be notice and ample time for preparation of the case of the respondent in any administrative proceeding, and such notice would, of course, encompass the notice to his attorney.

I don't know whether your question is intended to bring out whether notice should be given to the attorney as well as to the man who is involved. If a man has an attorney, and the commander who has proposed his discharge with other than an honorable discharge has been informed that the man has an attorney, then it seems to me that notice to the attorney would be the same as notice to the man.

Conversely, however, notice to the man would not necessarily be notice to the attorney, since the man is not legally trained and may not fully comprehend all that is involved, and in such a case it would seem to me that the notice should be directed to the attorney. Otherwise the man might be prejudiced in some material respect.

Mr. STILLMAN. I think the point about parents and guardians is a very good one. I think there should also be more adequate publicity of the man's rights in this regard.

Recently there came to my attention the case of an airman at Stewart Air Force Base who had a bad automobile accident. He was in the hospital and couldn't be expected to explain to his parents everything that was going on, and the parents were told he was going to be discharged, and they didn't know what rights he had, and so on. So the only notice to the parents was publicity to the serviceman's family of his rights. It is important that they be fully and promptly informed of his rights.

Mr. BASKIR. The bills provide in various places for counseling and for election. The question has been posed: can you expect a young boy of 17½ or even older but still immature, even with counsel, to make a decision, unless his parent or his guardian or some other person on his side is there to make the decision for him?

Mr. STILLMAN. You can notify them quickly enough if he gets killed in Vietnam, within 8 or 12 hours. There is no reason why you can't notify them in this type of situation. The next of kin is always on their record.

Mr. BASKIR. Thank you, sir.

Senator ERVIN. Gentlemen, I thank you very much for your appearance, for the study you have given to this problem, for your interest

in the problem, and for the assistance which I hope will help us to work it out in a way that will be of benefit to the services, and at the same time secure the fundamental rights of military personnel.

Mr. STILLMAN. Thank you, Senator. I might say that the drill instructors in your neighboring State of South Carolina down at Parris Island probably do more to prevent some of the problems we were discussing earlier than anything else. Thank you. It has been our pleasure to appear before you and contribute what little we could.

Mr. CREECH. The next witness is Mr. Herbert Marks, attorney at law, Washington, D.C.

Senator ERVIN. We welcome you to the committee, Mr. Marks, and may I express to you the appreciation of the commitee and of the committee staff for your interest in this and for your study of this problem. We hope you will give us the benefit of your experience as a trial lawyer, Mr. Marks.

STATEMENT OF HERBERT MARKS, ATTORNEY, WASHINGTON, D.C.

Mr. MARKS. Thank you, sir. I would like to make one correction of tremendous importance for the record.

My name is spelled M-a-r-k-s, and not M-a-r-x as shown on the witness list.

Having disposed of that, the first thing I would like to stress is I am appearing here as a private witness who has a lively interest in this area. I had the good fortune to serve the United States in the Air Force for a number of years. I was a trial lawyer as far as my military experience goes, and my comments should be here viewed in that perspective.

I did not make policy, usually. I was not on the appellate level. I worked with the system and I have a number of reactions that are as set out in my statement. That statement makes it obvious that those reactions are quite definite.

Senator ERVIN. I would like to add, if you will pardon the interruption, that I think some of the most helpful observations and suggestions have come from lawyers in your situation exactly.

Mr. MARKS. Thank you, sir.

Senator ERVIN. Because you have enough experience in military justice to become acquainted with the problems, and enough independence, as a result of having turned to similar employment, to view those problems in an entirely objective light.

I don't mean by that that the people in the military are not independent, but we sort of look at things from where we are sitting, and it is well to get a viewpoint from one who has seen it from both angles. Then I think we come nearer getting the perspective of two viewpoints.

Mr. MARKS. With the permission of the chairman I would like not to read the text of the statement. I would like it incorporated in the record. I thought I would make just a few general comments, and since the staff's and Senators' comments are quite extensive, I thought I would just throw myself open to questioning.

Senator ERVIN. Let the record show that the statement of Mr. Marks will be printed in full in the body of the record immediately after his remarks.

Mr. MARKS. There are a few salient characteristics of the legislation that I think are worthy of special comment. The thing that makes a

system of jurisdiction work is the independence of the judiciary and the integrity of the lawyers in the system.

Both are necessary, and one can not supplant the other, although if one is forced to choose between all or nothing, one would certainly take one.

Therefore the devices that are outlined in the proposed legislation, such as the Navy JAG, strengthening the boards of review and the courts of military review, the field judiciary system, all these are worthy of support. This is based on just the very basic principle that if justice is to prevail, there has to be a person or persons—the officers of the court, the judge and his lawyers—who are willing to take a strong position and sometimes an unpopular position in defense of their client.

Senator ERVIN. I can't resist the temptation to interject myself at this point, because of the observations that in the ultimate analysis these things rest upon the integrity of the men who are charged with the duty of trying to protect the rights, the prosecutor and so on.

I have always thought one of the finest things I ever read was in an advertisement of Squibb Medicine Co. which said: "The priceless ingredient in every compound is the integrity of its maker."

Mr. MARKS. Yes, sir. I think it follows that you can have all the rules in the world in statutory or in other forms, but unless there is someone on the spot who is going to say "No"—that is called making the record—you are in trouble.

The next observation which I dwell upon at length in the statement is the intangible, which sometimes becomes terribly tangible, that is, "command influence." This is subtle, it is often unintentional, but I think it is a reality that must be kept in mind in devising a system of military justice.

One should not come to the conclusion that the military authorities, in command functions or in senior staff functions, are always going around trying to do injustice, trying to pick on people and trying to railroad people. That is not true.

If we just say that they function more or less as normal human beings, and we know about the frailties of human beings, and we remember Lord Acton's comment about what happens when you attach substantial power to human beings, I think the necessity for being conscious of this problem becomes rather obvious.

The exact formulation of policies to curb this problem present tremendous problems, because you have another countervailing factor. That is, you must have command influence in the military organization, or you don't have a military organization.

So it is something you have to live with. It is not something that should be called bad. It is just something that is there, and must be dealt with, and I think should be faced squarely.

The next general comment is that I think if I were asked my reaction as to the military justice system as the term is used by the military department, meaning the court-martial system, I think I would have to say that by and large they run a good shop. The abuses are there, but I would say that they may not be too much more extensive than what prevails in the civilian court system.

This is not to say there shouldn't be revisions, but I think that if there is an economy of the effort to be expended, this is an area that

can be considered of secondary importance to the primary area, and that is the administrative discharge area.

Part of the problem here is generated by the fact that everyone keeps talking about the strict dichotomy. This strict dichotomy is a wonderfully useful way of saying, "Boy, we have an area in military justice where you have got all sorts of rules, but let's have a strict dichotomy. Let's have a form where you can play without rules."

That has been done too often. It is done sometimes in subtle ways. It is done sometimes in ways less subtle.

One should not jump from that position to the position that every elimination from the service or every facet of punishment in the military services should be by the full judicial process. This is not necessary.

I think there is a happy medium, where you can have an administrative proceeding which follows basic safeguards, but yet has very different quantums of proof from that which are required in a judicial proceeding.

I don't think it would shock anyone to have the administrative proceeding like it is now, a show-cause proceeding with the burden on the individual to defend his retention. If it were an otherwise fair administrative proceeding, using the terms of the Administrative Procedure Act, and if it were otherwise a fair administrative proceeding, even that disproportionate burden of proof would not disturb one. Or, a conventional civil burden of proof, the preponderance of the evidence even shaded in favor of the defendant, would not bother anyone.

I do not feel personally that the "beyond a reasonable doubt" quantum should be implanted on the administrative discharge system, nor do I think that all the panoply of rules should be brought over.

My last comment is again a generalization. Legislation is needed. Departmental rules can change. Departmental rules can be followed or not followed.

This is not an observation that is peculiar to the military departments. I think it would be common to all Government agencies. The sanctity of a rule is often in proportion to the source from which that rule is derived.

It would seem to follow, as a logical premise, and I think it is a practical premise, that a statutory rule is going to have a greater impact on the individual administering the system than a departmental rule.

My comments on the individual statutes and my statement of no comment to several of these are set out in the appendix to my general comments. At this time, with the subcommittee's permission, I would like to make myself available for any comments that the committee might have.

(The prepared statement of Mr. Marks follows:)

STATEMENT OF HERBERT E. MARKS

PURPOSE OF STATEMENT

This statement is submitted to the subcommittees considering the proposed legislation S. 745 through S. 762, inclusive. For the most part these bills seek to revise the Uniform Code of Military Justice (UCMJ) and to provide rules of procedure for administrative eliminations from the military services. I sub-

mit this statement as a private citizen who has an interest in the protection of the rights of individuals while they are in the military services, and in the maintenance of proper discipline, fairly applied, within those services. My comments are intended to give the subcommittees the impressions of an outsider who was once an insider. Sometimes, one who has nothing to gain or lose from proposed legislation can perceive matters from a more objective viewpoint. It is with this intent, and based upon my experience that this statement is offered.

BACKGROUND AND EXPERIENCE

Presently I am an attorney in private practice, associated with the firm of Wilkinson, Cragun & Barker, in Washington, D.C. From 1961 through 1964 I was on active duty with the U.S. Air Force as a judge advocate. During that period I served as trial and defense counsel before courts-martial, as summary court officer, and as respondent's counsel, recorder, and legal adviser on administrative boards. I was an adviser to various subordinate commanders and staff agencies and for a period of 4 months was a staff judge advocate (senior legal officer on base). My active duty tour was spent at base level. Since 1964, I have been in the Reserves assigned to the Office of the Judge Advocate General of the Air Force and have worked in the claims and military affairs division. From 1964 through mid-1965, I was law clerk to the Chief Judge of the U.S. Court of Claims.

I do not purport to be a legal expert in this area, but I have had to live with the UMJC and work within its provisions, and I also have practiced before, referred matters to, and sat upon administrative boards. As a reservist I have been involved in the review of administrative boards. At the Court of Claims I have viewed these problems from a litigation standpoint. During most of this period, either as a matter of vocational or avocational interest, I have been somewhat concerned about the procedures involved in trials by court-martial, and rather disquieted by some of the aspects of administrative discharge actions.

REPRESENTATION

My appearance here is that of a private individual. I do not represent my law firm, the U.S. Court of Claims or the U.S. Air Force. My ideas are my own and do not necessarily represent the ideas of any person in any of these organizations.

GOOD FAITH

Let me make several points clear. First, I do not know of a case that was referred to a court or a board where that action should not have taken place. The legal officers and commanders were quite scrupulous in their estimation of basic guilt or innocence. This does not mean that there is no need for remedial legislation. These officers suffer from the same inadequacies as do civilian prosecutors, and the public in general. They are subject to becoming conviction oriented, and to being enraged by unpopular actions.

Second, the Air Force has been a front-runner in the drive for just judicial and administrative proceedings. In an Air Force special court-martial, the accused is furnished a lawyer as counsel. Further, it has been the policy of many Air Force commands to furnish lawyers as counsel for respondents in administrative discharge hearings.

Much of the current abuse comes from the human reactions noted above. These are compounded by a demand for quick action that characterizes the proper response to a commander's order, and by a certain amount of normal lethargy. When a case is referred, the easiest course is to proceed quickly, and to avoid as many complications as possible. This is most apparent in board actions where the use of statements in lieu of live witnesses is not unusual.

In order to overcome these natural proclivities, it is necessary to provide detailed rules to protect the individual from the passions of the moment, the will for victory, the demand for instantaneous action, and an urge for simplification bred by lassitude.

PERSPECTIVE

Before considering the detail of the individual bills there are certain matters that cut across the whole area of military justice and administrative discharges This background must be kept in mind at all times when evaluating any given procedure.

COMMAND INFLUENCE

The problem of command influence is a factor which must be taken into consideration in any evaluation of procedures within a military organization. The military services, by nature, definition and necessity, are monolithic and hierarchical. This is the way they must operate if they are to order men into battle. The authority of a commander to give orders, the requirement that he be obeyed, and his expectation of being obeyed color every matter with which the commander is concerned.

It is naive to believe that this manner of doing business will not affect the administration of military justice and the administrative discharge program. To be more specific, the average commander of a base or larger formation is accustomed to giving orders and to being obeyed. His subordinates are used to obeying him. He is not expected to nor does he need to give reasons for his orders. The major restrictions on his action arise only when his orders contravene specific, clearly stated, regulations or statutes. For the most part he is granted wide discretion.

A commander is the convening authority of a court-martial, and the person who sends a case to an administrative board. In making the decision to refer the case to a court or a board he, in effect, has decided that the person so referred is guilty, or merits elimination from the service. This is not a criticism of the commander because were he not so convinced, he would most often not refer the case.[1] Once the commander (on the advice of his staff judge advocate) has resolved that a case should go to a court or a board, he is obviously interested in a favorable result, at least partially as a confirmation of his decision.

The judge advocate officers usually use good judgment in recommending referral of cases to the boards or courts, and generally act in good faith in their administration of the system. However, the nature of the discipline system, the subordinates' responsibility to the commander, and the exercise of discipline, and the rating system make the influence of the military commander powerful and pervasive. It is very difficult for a subordinate to say no to his boss. To put the subordinate in a position to say no, the junior officer must be able to point to specific rules and regulations when queried by his superior.

Therefore, as a general principal I heartily recommend to the subcommittees that they prescribe by statute detailed rules of procedure to be followed by military courts and military boards. These matters cannot be left to the individual judgment of the commanders or even of the military departments. In order for these rules to be obeyed and for the board and court procedures to be fair, the rules must be spelled out by the highest forum possible.

SPECIAL REGULATIONS

In another context, command influence creates difficulties. Sometimes there are promulgated regulations by higher headquarters which state broad policies with respect to retention in the service or immediate disciplinary actions. These are usually issued to remedy what are considered too frequent lapses in discipline at given point in time. They are usually quite forceful in their tone and are deemed to leave little doubt as to what action is expected of subordinate commanders when someone appears to contravene the terms thereof.

The problem with these promulgations is that when they first come down they are interpreted as meaning that the commander concerned is personally interested in the given area of discipline. Needless to say, the interest of a commander is something that should not be taken lightly. Often in response to these regulations there is a stampede on the part of subordinate commanders to send a case to trial or to a board, in order to be "with the program." As this regulation becomes older and is around for a while, people learn to live with it and it will eventually be viewed in its proper perspective.

BRIEFINGS AND PANELS

Another problem area is that the officers comprising a board or court often work for the convening authority and it is no secret that his reference to the board means that he or one of his staff agencies believes that a person should

[1] Of course there are examples when there is substantial doubt and the reference is merely in order to allow the resolution of the uncertainty by a factfinding body.

be eliminated. There is a strong inclination to go along with the commander. This natural inclination is strengthened when the commander or a representative from his staff gives a briefing.[2]

These briefings are often slanted in favor of the Government because of a lack of judgment by an overzealous staff officer giving the briefing. However, even when these briefings are technically objective they nevertheless are always interpreted as being pro-prosecution, that is, toward returning a conviction or an elimination. This is so because the existence of a briefing by the commander's representative indicates a lively interest in the individual case coming before the board or court.

HUMAN NATURE

The chances for the miscarriage of justice become greater when the individual commander becomes particularly incensed over an individual incident. The Commander is a very human person and as such suffers from the normal human frailties. When he is incensed his reactions may be less than rational. He will bring presure to bear and his lawyers and other subordinates must be in a position to resist these all too normal impulses. To do this they must have the benefit of statutory restrictions.

This problem is not peculiar to the military. We have a government of laws and not men because in certain cases the human imperfections cause the persons involved to demonstrate less than Solomonic wisdom. We have prescribed by a constitution, statutes, and in rules of court, detailed procedures regulating the conduct of both civil and criminal litigation in our civilian court system. It seems to follow a fortiori that a similar detailed set of rules should be prescribed for the military system which by definition exists in a less democratic environment than that in which our civilian courts operate.

ADMINISTRATIVE DISCHARGES

The administrative discharge system works a hardship on the individual eliminated from the service in two distinct ways. First, a general discharge or undesirable discharge taints the individual in his future civilian contacts. Employers routinely ask for information about a person's military service and anything other than an honorable discharge causes problems. This is not to say that other than honorable discharges should not be given. The person who has honorably served his country is entitled to be distinguished from that person who has been less than satisfactory in his military service. However, discharges other than the honorable discharge, because of their effect on future employment, should be given only after careful consideration in a fair and orderly proceeding.

The second facet of the administrative discharge has received less attention. The person eliminated forfeits all his inchoate retirement rights. Under current law an individual must usually perform 20 years of active service before he is eligible for any retirement (except in disability cases). A man can have 17 years honorable service and then through misfortune or otherwise, fall upon hard times and be eliminated from the service. He will forfeit his entire entitlement. If a man is going to face forfeiture of the benefits built up over many years, it is absolutely necessary that it be done only after he is accorded a fair hearing with the representation of counsel.

Realizing that the military departments, as employers, must have the right to control the quality of their employees, consideration should be given to legislation that would permit the retirement of a person prior to 20 years of active service with the receipt of some retirement benefits. For example it might be wise to provide retirement with less than 20 years at a diminished rate. If this were done, it would be less necessary to stipulate extended procedures for elimination. Much is to be said for allowing the military services to have a procedure to quickly and easily eliminate an individual. The military services, as an employer, need discretion in this area because of the difficult situations in which it may have to place its employees and the necessity of being quite sure of their responses.

However, as long as the eliminated employee loses retirement benefits and is subject to a taint because of his elimination, he must be accorded substantial

[2] See *Cole* v. *United States*, No. 112–63, Court of Claims, June 11, 1965, where an Air Force discharge was set aside. This case highlights the dangers implicit in even "nonpartisan" briefings.

protection. Recommendations on the exact nature of such a plan are beyond the scope of this statement. However, one might provide that after a probationary period a person can no longer be separated without these detailed procedures. However, the Secretary of the military department or his high level designee has the option to arbitrarily separate a person if he deems it in the interests of national defense. This type of separation must be honorable and accord substantial retirement benefits. If an individual is retired with substantially all of his retirement benefits, and if he received an honorable discharge,[3] it would seem wise to allow the military an abbreviated procedure for the elimination of those individuals who they do not feel can perform in a manner consistent with the requirements of the position. But absent these two conditions precedent, a balancing of interests militates toward strong procedural safeguards against the elimination of the individual.

FURTHER INQUIRY

If the subcommittees are interested in objective evaluations of the military justice and administrative discharge systems, it would be worthwhile to circulate a questionnaire to former judge advocates who were noncareer (served only 3 years active duty) and who have been separated from active service within the last 5 years.

This group does the overwhelming percentage of the trial work in the Air Force, and I presume also in the Army. They are out of the service, and therefore are free from any pressures or special motives. Further, this is the group that often furnishes the most effective defense counsel. Being noncareer and short termers, they are not subject to the pressures that loom over the career officers—the adverse effectiveness report. The officers are sometimes criticized for their overzealousness, and perhaps sometimes this is justified. But, on a day-to-day basis, they make a major contribution toward keeping the system fair.[4]

SPECIFIC LEGISLATION

Keeping the above ideas in mind, let us look now at the specific legislation proposed. As a general rule I would support the legislation, however, in several aspects I believe it to be too restrictive on the military and in other particulars believe it to fall short of providing the protection needed.

S. 745. *Recommend enactment.*—Placing the law officer outside the control of the convening authority creates a truly independent judiciary. This is a sine qua non for any fair trial proceeding. This goes a long way to vitiate the effects of command influence. This provision, coupled with S. 752 which allows an election for trial by the law officer provides an effective alternative to a change of venue and allows for a trial more free of local pressures.

S. 746. *Recommended enactment.*—Any legislation which promotes the professionalism of attorneys in the military is worthy of support. The military attorney, to the extent he exerts himself as an attorney, is the most important safeguard of the rights of the individual.

S. 747. No position taken on this legislation.

S. 748. *Recommend enactment.*—This legislation upgrades the boards of review to Courts of Military Review with certain structural changes. It gives stature and more independence to this appellate judiciary. These are two factors that contribute to the adequacy of the system, and the chance for a fair review upon appeal.

S. 749. *Recommend enactment.*—It is important to set out in writing and in detail the fact that command influence is deemed improper. Such a stricture, by its very wording, will cause honorable men to think twice before they attempt any improper influence. But more importantly, it gives a ready reference for the subordinate in dealing with his superior. If a military lawyer, either before, or at trial, can show this provision to his commander the latter will be much more reluctant to attempt to improperly intervene in the proceedings.

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[3] An "honorable discharge" should be required, not a "general dicharge under honorable conditions." The latter has been often used to eliminate persons warranting lesser grades of discharge. For this reason, it has come to be considered a designation of opprobrium.

[4] Since I was a noncareer officer recently separated, the above comment must allow for a certain immodesty.

S. 750. *Recommend enactment with expanded coverage.*—A provision which requires counsel before an individual can suffer a major compromise of his personal rights is worthy of support. This is an important part of our constitutional system. There seems no reason why the situation in the military should be different.

I would question whether the second part is not too restrictive. Why should the individual who has many years of service and comes before a board, not also have the right to counsel, notwithstanding the fact that he may receive a general or an honorable discharge. At some point his accrued, but inchoate, retirement rights become so important as to be worthy of the protection afforded by representation by counsel. May I suggest a provision that would require for any individual, with over 5 or 6 years' service, the representation of counsel (and other procedural protection) before any board which may have the power to eliminate him.

S. 751. *Recommend enactment.*—This legislation merely brings the military rules in line with their civilian counterparts.

S. 752. *Recommend enactment with further recommendations.*—The comments under S. 745 are applicable here. The portion which allows waivers of trial by court and trial by the law officer is quite important. We must always remember that the convening authority picks his court. It is fair to assume that a convening authority selecting the panel will choose persons who he feels will return a verdict favorable to the Government. Therefore, it is important that an effective alternative to this system be allowed. The waiver of trial by the court and trial by a law officer who is not under the command of the convening authority, are steps in the right direction.

In addition, consideration should be given to modifying the UCMJ to require the selection of court-martial panels by lot or by some system other than selection by the convening authority. If it is thought that this creates too many problems, a very minor adjustment could be made in the current law, which would be of tremendous practical value. Article 41 (10 U.S.C. 841), subpart (b) allows each party one peremptory challenge. This should be expanded to four or five peremptory challenges. This has a significant impact, because mathematically it is much more difficult for the convening authority to come up with 10 reliable hand-picked officers for a general court-martial than to come up with only 6. The defense having this additional weapon at its disposal, can, at least to some extent, insure a more balanced court-martial panel.

S. 753. *Not recommended for enactment.*—First the Court of Military Appeals does not take many cases and in effect the administrative board proceeding would receive no court review. By making COMA the exclusive agency for review, you would cut out the court of claims and the district courts. Under these circumstances I would not support the legislation. If the legislation is enacted it should be made clear that unless COMA takes the case, other courts are not excluded from exercising jurisdiction.

S. 754. *Recommend enactment with expanded coverage.*—The reasons here are elaborated under S. 750 above. The administrative board can work substantial harm on the individual by providing the taint of an other than honorable discharge as well as the forfeiture of substantial retirement benefits. I would go further than this bill and require counsel and a law officer in any proceeding where an individual may forfeit accrued retirement rights after his fifth year of service.

S. 755. *Recommend enactment.*—This legislation attacks the problem of command influence by placing the individual members of the board of review beyond the efficiency ratings by their chief and therefore makes them more independent of him.

S. 756. *Recommend enactment with modifications.*—This legislation is unduly restrictive on the military services as an employer. There are reasons for having trials for violation of criminal law and there are considerations which militate toward a separation of an employee. The two systems are not necessarily mutually coextensive, neither with regard to their moral basis nor their procedural requirements. It may well be that a man is worthy of acquittal before a criminal court yet should be separated from employment. However, it would not be fair to require the military to elect between alternative remedies. The legislation would allow for use of an administrative proceeding after a court-martial if an honorable discharge is given. This procedure should be made explicit.

I would support that part of the legislation that precludes running a second board after first board recommends retention, this is sheer harassment. Air Force regulations prohibit such a practice. The Government should be able to run a new board if substantial additional grounds are advanced, or possibly if the Government can demonstrate clear error running to its prejudice.

S. 757. *Recommend enactment.*—Pretrial conferences are useful tools in judicial administration.

S. 758. *Not recommended for enactment.*—My comments under S. 756 are germane here. As a general principle a person should not be able to foreclose a challenge to his employee status by demanding trial in a criminal forum. If this bill is enacted, it should be made clear that a person need not be granted trial by court-martial if his discharge is to be honorable.

S. 759. *Not recommended for enactment.*—There is still a place for the summary court-martial. The commander has extensive authority under the expanded article 15. However, there should be an effective forum where an individual can have quick justice for minor offenses from someone other than his immediate commander who may well be prejudiced. The summary court provides such a procedure. It may be well to specify that all summary court officers be lawyers. This would be an effective training ground for the future law officers.

S. 760. *Recommend enactment.*—This type of legislation provides the powers which make the administrative boards effective and fair.

S. 761 and S. 762: No comments on these pieces of legislation.

CONCLUSION

The subcommittees are to be commended upon the legislation presented. Although I do not support the bills in toto, they do reflect serious and knowledgeable thinking in a complex area. It is clear that the individual needs more procedural protection before military tribunals. It is equally clear the military departments must possess adequate management prerogatives. Thus a balancing of interests must be accomplished.

Should the subcommittees have any further questions, or desire the expansion of the comments made in any part of this statement, please call upon me.

Mr. CREECH. Mr. Marks, I noted in your statement that you gave quite a bit of attention to the subject of command influence.

Mr. MARKS. Yes, sir.

Mr. CREECH. I noted also that you were in the Air Force I believe from 1961 through 1964.

Mr. MARKS. That is correct.

Mr. CREECH. At the time the subcommittee began its initial hearings and study of the *Kitchens* case, which involved command influence——

Mr. MARKS. That is the Fort Jackson case?

Mr. CREECH. Yes, and subsequently the subcommittee has been told, as a matter of fact was told here last week——

Mr. MARKS. I thought it was an Army camp.

Mr. CREECH. But the subcommittee was told as recently as last week that today there is virtually no command influence insofar as members of courts-martial and administrative discharge boards are concerned, and that there have been virtually no cases on the subject.

The subcommittee's research has indicated that there have been perhaps two or three cases since the *Kitchens* case, and that there are one or two pending at the moment before the Court of Military Appeals.

I wonder, sir, if you had any additional information, or if you would care to comment further on the assertions which you made in your statement, and also specifically with respect to the bills 749 and 755, both of which you indicate you feel are desirable.

S. 749, of course, is the bill which would amend article 37 of the Uniform Code to prevent command influence of members of the courts or boards and prohibit preparing fitness reports based on members' decision in a board or court.

By the same token, 755 is the bill which would amend article 66, to prevent the preparation of a board member's fitness reports by other board members.

With regard to those two bills, the arguments have been made that the case of S. 749, that it may prevent evaluation of legal officers by the staff judge advocates, and with regard to 755, that this would be legislative interference on essentially a management function.

I wonder, sir, what your feeling is with regard to these positions taken by the Defense Department in opposition, by the Defense Department with regard to these two bills.

Mr. MARKS. I think your question falls into three parts. I think your first question was with respect to the current day existence of command influence generally, and then with respect to the two bills.

With respect to the present day existence of command influence, there is both patent and latent command influence. Where the commander can pick his court; let's put it this way, if you are given a chance to select the people who are going to make the decision with respect to a case that you referred, who are you going to pick? That is a permissible kind of command influence under the current system. But I think it would have to be viewed in perspective of command influence nevertheless.

You pick people whose efficiency reports you either write or endorse. This is more usual than not. If you are mad enough at their decision, either consciously or subconsciously, it is going to be reflected. That is another kind of command influence that comes up.

I would be very surprised if much before May or June of this year that briefings, albeit objective briefings on the responsibility of board members were not prevalent. In fact I think I can say that with some degree of certainty.

So maybe you don't have a colonel calling up people and saying, "How come you were so light on the sentence," and some of the more overt forms of command influence, but with respect to certain areas, you have the permitted forms, and these briefings are probably very prevalent. It was up until very recently, in fact just a few months ago, and I don't think that the departments have taken a position to the contrary. I have commented in detail why I don't think there is such a thing as an objective briefing by a representative of a senior commander. I don't think it can be. I think it is slanted by the mere fact that he walks into the room.

As to the bills which restrict the right of comment about the efficiency of board members, by fellow members of boards, I think you do have some practical problems. I have not doubt about it.

In the last analysis you must rely on the good faith of the people involved, because if an efficiency report is going to be written any place, it of course can to some extent be and will be or may be affected by what the person did in his job capacity.

But the more remote you place the efficiency rating function, the less likely it is to become a tool of oppression which is most prevalent

when the person writing it is intimately concerned with the matters at hand.

Now granted you also at the same time at least to some degree decrease the value of the efficiency report, because you are putting it up the line a little bit. This is one of the problems in this area that must be evaluated in terms of the importance of the end to be accomplished.

You have a balancing function in this whole procedure. You have the requirements of discipline, you have the requirements of management on the one hand, and you have the requirements of fairness to the individual on the other.

Senator ERVIN. If the senior member of the board who tries the man or the senior member of the court who passes on the rights of the serviceman is entrusted to give a value at efficiency report on one of a subordinate members, you really can't trust him to try the case, to pass on or to sit on the board, can you?

Mr. MARKS. This would only come up in a case that was surrounded with a great deal of animosity. But this can happen. And even in chambers there develops in some of the courts even among jurists, strong likes and dislikes, and I am not sure that even there you would like to permit, let's say in the Federal district court, or in the U.S. court of appeals, the chief judge pass upon the conduct of other members of the bench.

Senator ERVIN. Of course people trained in the law are a little bit more immune from influences, I think, than laymen, because they are used to feuding, fussing, and fighting on some legal proposition. That would be one advantage to having more law-trained men sitting on boards and courts.

Mr. MARKS. I think that is very true.

Senator ERVIN. Because we live a controversial life, especially trial lawyers, and if we fall out with every fellow that we have any legal controversies with, we wouldn't have any friends left after the passage of a substantial period of time.

I know I sat on an appellate court for something over 6 years, and I am sure that my fellow members of the court, all of whom were senior to me when I went on—although, of course, I became senior to some others later—were the best judges about my capacity to discharge the duties I was performing.

The military says that a person who devotes most of his time to serving on boards or courts is engaged in a specialized activity, and that an efficiency report based on such activities can best be prepared by persons who observe his work. What do you think about that?

Mr. MARKS. Yes, sir; no doubt about it. But this does not mean that the efficiency report must be written by the personnel with whom he is in immediate contact. I think this would disturb me. I would pass it up the line a little bit.

Again we are sacrificing some of the quality of the report for some of the protection you need to preserve the position of the individual as an individual. I think it is one of the concepts that comes through quite often. I think it pervades not only the military departments——

Senator ERVIN. Our whole life.

Mr. MARKS. Our whole life, that this is why you have appellate courts.

Senator ERVIN. Yes.

Mr. MARKS. The district judge, the trial judge sitting there in the middle of a trial can become terribly involved, and you let somebody a little bit up the line, who is a little bit removed, have the final say.

Senator ERVIN. If we had some kind of miraculous power to amend people, it would work much better than amending the law, wouldn't it?

Mr. MARKS. Yes, sir.

Senator ERVIN. I would like to ask you another question about command influence. I am of the opinion, based upon my observation and experience, that ordinarily command influence comes from a very sincere officer who errs simply because he regards military justice as a means of discipline rather than a means of ascertaining the truth in respect to a particular case.

Mr. MARKS. Yes, sir. In the opening part of my statement I made the point that these people are very sincere, and went so far as to say that I know of no individual case, that I would not have referred to the forum to which it was referred.

I only want to put one qualification on that. I might have sent it to a forum which could have given a more severe penalty. I don't think this is a problem.

But I think what you do get is part of a problem that is inherent in the institution, and that is this is an emergency outfit where people are used to being told on very short notice, "Let's get something done. Do it now."

There was one statement made once, "Don't say you don't have time enough unless you can tell me you have been working 24 hours a day 7 days a week." Now it is not always easy for a senior officer or any officer under these types of pressures in this kind of system not to follow his normal everyday required instincts, and apply them to the judicial procedures.

Now really the purpose of legislation and the rules is to set apart and close off a special area of military life and say, "Look, this is a little bit different, and we do this because of certain fundamental factors in our existence and in our civilization."

Senator ERVIN. Mr. Creech.

Mr. CREECH. Thank you, Mr. Chairman.

Mr. Marks, I noticed on page 6 of your statement, in the last paragraph, the last two sentences, you say that it is very difficult for a subordinate to say "No" to his boss. To put the subordinate in a position to say "No," the junior officer must be able to point to specific rules and regulations when queried by his superior.

Is this, sir, your reason for recommending approval of 12 of these bills either in total or in part, because you feel it is desirable to have legislation to which the subordinate can point?

Mr. MARKS. Yes, sir. Let me amplify just a bit. When you have legislation, you have a section in the United States Code that you can go to the library and pick out; and when you are saying, "Sir, you can't do that," and he asks, "Why can't I do that?" you point to it.

It is much more difficult to say, "Well, there are strong legal precedents against it," and to go to a court decision and try and use that as a precedent. Unless it is a Supreme Court case, it may not necessarily be binding law.

If it is a circuit or district court opinion, you may be in a different circuit or district. Or there may be an appeal pending. Anyway, take an average opinion to a layman and try and say it means this or that; he reads it and he says he is not sure what it means.

I think you need something in a clear and reasonably unambiguous format. You are dealing in most cases with very junior officers. It is not unusual to have first lieutenants as defense counsel. I would be very interested in the statistics. I would say that the overwhelming percentage of defense counsels will be first lieutenants or captains. And if it is a general court, you may well have a convening authority who is a general officer involved, and anyone with any military experience knows that one does not lightly tell a general—you don't lightly hardly tell him anything, and definitely you don't tell him "no" very easily.

So I think you have to give some help to the defense counsel and to the respondent's counsel on a board, if you are going to put him in this position of having to adequately represent his client. Further, he is often a reasonably inexperienced lawyer.

It is very interesting to note that all of us, I think, would say that the last case we worked on was a much better job than our first case. But you have to have something to help the man doing his first job, particularly in the case where the defense counsel and the respondent's counsel is usually the junior lawyer available, if he is a lawyer at all.

Mr. CREECH. Sir, in view of what you have just said, is this one of your reasons for recommending S. 745?

I notice that you state that you recommend enactment of this because, "it is placing the law officer outside of the control of the convening authority. It creates a clearly independent judiciary."

Then you go on to say that:

This provision coupled with 752 which allows the election of trial by the law officer provides an effective alternative to change, and if anything allows a trial more free of local pressures.

Mr. MARKS. Well, this goes to the other point, that where you let the same man refer the case and pick his court; it makes for a pretty rough system.

I think the statement was once made that it is not a very good system where you are forced to place your head in the lion's mouth, hoping the animal to be a vegetarian. I am afraid some of the rules which everybody defends by saying, "well, let's assume good faith," well, you know this is a human world, and that makes for a pretty tough system.

I think this giving the law officer true independence, gives the defendant recourse to a person with true independence from command influence and is one of the easiest solutions of a court selection problem. There are other solutions. I have made a couple of recommendations, but this one is the easiest to accomplish.

Mr. CREECH. I noticed that you cited *Cole* v. *United States*. In that case, which was handed down last year, which was an Air Force case, can you tell us please in which year the separation of that officer took place? Do you recall?

Mr. MARKS. August 31, 1962, was the date of separation.

Mr. CREECH. 1962. The subcommittee was told approximately at that time by the Department of the Army that it was issuing a direc-

tive, that it did in fact issue a directive precluding pretrial lectures in the case of courts-martial. This I presume was a show-cause action.

Mr. MARKS. It was a show-cause proceeding.

Mr. CREECH. Yes, and this of course was in the Air Force. Now in your experience in the Air Force, is there any directive or any reason why a court-martial or for that matter any type of administrative board cannot be given a pretrial or a preboard lecture by the convening authority or anyone else?

Mr. MARKS. Let me answer the question in a rather unsatisfactory way. Since I know of no case of a pre-court-martial briefing, I never had to research the problem. Up until quite recently, this year, board briefings were permitted, and were set out in regulations.

Mr. CREECH. In the Air Force?

Mr. MARKS. In the Air Force.

Mr. CREECH. And this was the basis, was it not, for this case?

Mr. MARKS. Well, like a lot of cases, it has a lot of bases.

Mr. CREECH. This was one of them.

Mr. MARKS. Judicial interpretation, and lawyers' arguments later on, will say which one was crucial. I wouldn't want to speculate on that.

Mr. CREECH. But this was one of the issues involved.

Mr. MARKS. That certainly was one of the issues. Of course that case is a very difficult case, because you had the briefing given by a major general. There might be some thinking that because of the nature of the system, any time a major general says almost anything, it might be coercive.

Mr. CREECH. Moving again to S. 745 with regard to creating a field judiciary, the subcommittee has been told that one of the problems with this legislation would be that it would create difficulty in that the officers would no longer be as flexible, and they need flexibility in the changing circumstances in the military service. I wonder if you would care to comment upon this?

Mr. MARKS. By flexibility do you mean that under current conditions a law officer is usually a staff judge advocate or a senior legal officer in another function, and that he is a part-time law officer, and that this type of flexibility is good? Was that the import of the statement?

Mr. CREECH. I belive the import of the statement was—that was one aspect of—I believe the import of it actually was that under the terms of S. 745, the law officer would not be readily available for transfers and things of this sort.

This would make him a less flexible individual, and that this would create an independent field judiciary, so that the man would not be amenable to easy transfer to other positions.

Mr. MARKS. Oh, I think that follows. The question is, Is the price worth freezing some people? Our judges don't move around too much. They are not terribly flexible. We get back to the basic consideration here. Is it worth it, and I think it to be a small price to pay.

Mr. CREECH. As you know, this system is now used in the Army and the Navy. It is not used in the Air Force. Have you had occasion to do any comparative studies of the system as to how it exists

in the Army and the Navy, with the field judiciary as compared with the Air Force system?

Mr. MARKS. No, sir.

Mr. CREECH. Mr. Everett has some questions for you.

Mr. EVERETT. Mr. Marks, it is your impression that the Air Force briefings prior to board proceedings were halted after the decision of the Court of Claims in the *Cole* case as the results thereof?

Mr. MARKS. That is my impression.

Mr. EVERETT. You mentioned that there could be a substantial difference of opinion about the statement in the *Cole* case dealing with the briefings, which as I recall could be construed as a dictum or an alternative holding.

In light of your familiarity with the Court of Claims jurisprudence, how do you interpret the decision with respect to its due process implications?

Mr. MARKS. Because of my connection with the Court of Claims jurisprudence, I think it would be unfair for me to comment on that.

Mr. EVERETT. May I ask you this? With respect to the waiver of trial, the suggestion has been made that the waiver of trial by members of the court under S. 752 should be made contingent upon consent by the Government and by the court itself, as is the practice under the Federal rules. I believe that practice was recently upheld by the Supreme Court.

What do you feel on the differentiating features, if any, which would justify a different rule in the military, allowing waiver only by the consent of the accused?

Mr. MARKS. I don't think the analogy between the two systems is fair, because the other factors involved in the two systems are not the same.

By no stretch of the imagination is the court-martial panel selected like a jury panel, so your choices are quite different.

If you had a selection of the court-martial panel in a manner approximately that of the jury system, then I think you would have a fair criticism, and I might agree that it should be with the permission of the Government.

But since it is my impression that we are unlikely to have any serious change in the method of court selection, I view the waiver as a procedure to soften some of the unfairness that is a characteristic of the current system.

Mr. EVERETT. Then it would appear that you view this waiver by the action of the accused alone and the provision for extra peremptory challenges as being antidotes to possibilities of command influence which would not be present in civil courts?

Mr. MARKS. Yes, sir; and stressing again that I am not talking necessarily about the handpicked briefed courts. I think any time you allow a person to sit down and consider the personalities, the histories, and his personal knowledge of individuals from his base and pick those whom he thinks are more prosecution prone and are more shocked by a given offense, you do not have a very good system.

Mr. EVERETT. In your experience in the Air Force do you have the feeling that in many instances anyone did actually select members of a court with that in mind, or is this a recital of possibilities which you feel might exist?

Mr. MARKS. I think it is fair to say that I think it is standard with everybody. As I asked before, if you had the chance to pick and you had a roster, and you know many of them from personal knowledge, who do you pick? I know what I would do.

Mr. EVERETT. In your Air Force experience, what did you find was the procedure for the actual selection of the court members? Was it typically done by the convening authority personally? Was it handled by the Judge Advocate's office or how was it actually handled?

Mr. MARKS. As far as I know from my own experience—when you talk about experience this includes chatting with a lot of other people from other bases—I would say that the standard procedure is for the staff judge advocate to prepare a reasonably long list, and forward it to the convening authority for deletions, additions, et cetera.

It may well be passed to another staff officer who will be more familiar with their availability. I would say the list probably starts out with the staff judge advocate and works its way around.

It could emanate from another place, but it would be I think a rare case that it didn't pass through the staff judge advocate at some time.

Mr. EVERETT. In light of that fact, would you expect the staff judge advocate to suffer at all from this unconscious bias mentioned? Wouldn't he be less prone to suffer from that bias than a layman, for example, or would he be more prone to suffer from it, as you have observed it?

Mr. MARKS. Being an old trial lawyer himself, I think he would be even more able to pick himself a good jury list than a lay commander, not that the intent is any different, but I think his ability is greater.

Mr. EVERETT. With respect to S. 753, you point out that by making the Court of Military Appeals the exclusive agency for review, the Court of Claims and district courts would be cut out, thereby precluding a jurisdiction which apparently they are exercising extensively at the present time.

Now wouldn't it be desirable to centralize the review in one court, in this instance the Court of Military Appeals, which is particularly familiar with military law, rather than having several alternative routes which can take you to a district court in Montana, to the district court in the District of Columbia, to the Court of Claims, or to almost anywhere else?

Mr. MARKS. Of course all lawyers like to choose their forum.

Mr. EVERETT. Is there a desirable objective?

Mr. MARKS. Viewed obectively, I assume we are concerned here only with review of administrative discharges, and if the Court of Military Appeals in fact reviewed and heard the cases, I might change my position. What bothers me is the lack of record.

Senator ERVIN. In other words, if the Court of Claims and the district court can try the case de novo——

Mr. MARKS. Give you a de novo trial, yes, sir.

Senator ERVIN. Whereas the Court of Military Appeals sits solely as an appellate court.

Mr. MARKS. Yes, sir; and I don't think that the quality of the records, historically, justifies their review on an exclusively appellate basis at this time. This may be a factor that might change in the future, but as of now I would be very nervous about limited review.

Mr. EVERETT. In your comments about S. 756 and S. 758, you indicate that you are very cencerned with preserving the right of the Government as an employer, as it were, to get the serviceman an honorable discharge irrespective of what happened to criminal prosecution.

Would it be fair to say that for these purposes you would make the analogy of the legal status to that of the Government employee which I believe has been passed on several times by the Court of Claims?

Mr. MARKS. I think that is a fair analogy. I have the distinct reaction that we may have to be a little more solicitous of the military personnel. This is with respect to affording them proper safeguards. I would not feel that the Floyd LaFollette type of protection would be enough: (*a*) The military member is subject to compulsory service. They are not voluntarily in their job; and (*b*) the stigmas that have attached to elimination from the military service as a matter of fact, whether rightly, wrongly or why, are much more severe than a permissible resignation from civil service, which is often allowed if things get too rough, for even a major cause.

Mr. EVERETT. Thank you, Mr. Chairman.

Mr. CREECH. Mr. Baskir has a few questions, Mr. Chairman.

Mr. BASKIR. To follow up the last question, does it sum up your feeling on that problem to say that convenient administrative procedures should remain, that the discharge should be limited, in cases involving misconduct, to an honorable or perhaps an honorable and a general discharge only?

Mr. MARKS. This presents something of a problem. I think part of it may have been generated in reactions to this committee.

The pressure has been on to be careful in the handling of administrative discharges, and I think that probably—from my very limited experience—they have been careful.

But I think the general discharge has been used in lieu of the undesirable discharge, so that, again, as a practical matter, the general discharge now has a stigma attached to it because of its use that it certainly was not intended to convey.

So you have to play a numbers game and start having new kinds of discharges, but maybe this one has just gotten so badly handled—and, strangely enough, in an attempt to be fair—that this may be a partial answer.

Mr. BASKIR. Will you accept the situation whereby a man who has engaged in certain kinds of misconduct which might rightly be the subject of a court-martial, but which for certain reasons the military prefers an administrative proceeding, will be given just one or two kinds of discharge, the honorable for the man with honorable service, and general for everybody else? In other words, do away with the undesirable discharge?

Mr. MARKS. You mean not have the option to hold a proceeding and give it?

Mr. BASKIR. I include the proceeding, but I am trying to think of a situation where you can have an administrative system, and yet not overburden it with technical legal requirements because you are worried about due process.

Mr. MARKS. Sure. But if you are going to say that there is no remedy in the administrative system to get the person who is guilty of an offense involving moral turpitude or whatever other standard of serious crime you want to use, I think you would be unduly burdening the military.

I think any management—well, let's take a case than can evolve. You can't get beyond the reasonable doubt standard, but you have got enough on him under a preponderance of the evidence theory, or maybe you have enough on him under the show-cause theory where he has the burden.

I don't know why their hands should be tied, and they have to keep this man. So I think they have to have a proceeding. They have to have some way of getting him out.

Now the next question is how much do they have to do? Well, this depends on what is at stake.

It is my feeling that if the military departments want to give an honorable discharge, and by the way, I am concerned with loss of retirement rights, at least after some probationary period of time, if they want to let him out for the good of the service, just to get rid of him, like management often does, you buy up the contract of a senior executive to get rid of him, you accept resignations, you do lots of things sometimes when you can't tag the person sufficiently, but you have to get rid of him.

I think there should be a way. Of course, you need other legislation, to allow the departments to summarily, without anything, get rid of somebody with an honorable discharge and with substantially all the accrued retirement rights.

Senator ERVIN. You hit an expression there that might be some solution: allowing a man to resign.

Mr. MARKS. I think there are certain sound business judgments that sometimes have some relevance in this area.

Now if you are going to take a man and provide him with one of the types of discharges that either rightly or wrongly historically have developed, a tone of opprobrium in the public eye, I think the man has a right to say something about it. He has a right to have a hearing.

Maybe you don't have to have a corpus delecti, if we have a confession, as long as it voluntary. Maybe you can (certainly you should) allow some deviations from the hearsay rule.

As a matter of fact, it wouldn't bother me at all, as long as you give the defense the right of subpena, to pretty well let the Government come in with their written statements, or you could give them wider deposition rights. I don't think you have to have the full panoply of protections of the judicial proceeding.

But if you are going to take something from a man that is substantial, then you have to make a decision at some point as to what is substantial, then I think he has a right to a way to fight back.

Mr. BASKIR. Can I move to another aspect?

At the present time, even considering the new directive and the bills as presently framed, after the undesirable discharge is recommended by the board, it is subject to review by the convening authority. In the Navy and the Marine Corps all undesirable discharges, as I under-

stand the present system, must go to the Bureau of Personnel, I believe, or to some higher headquarters, but not so in the other services.

The review system that is presently established, the boards of review and the boards for correction of military records, all come into play after the discharge is granted, when the man is out.

Do you see any problem about this? Do you see any need for some sort of independent review by a tribunal of some nature before the discharge becomes effective, so as to preserve certain rights, if certain rights are going to be jeopardized?

Mr. MARKS. Well, if you are going to start out with a system which makes for a fair record and a fair proceeding initially, a full-fledged proceeding, the luxury of such a review may be unnecessary.

If you start off with the current system, with a very limited ex parte review at higher levels, I think something like that would be desirable.

I think the sum total of my comment is that at some place or another, at some level or another, the man is entitled to a fair hearing and fair as we know it in conventional legal terms. You should have some sort of an appellate function, which is not ex parte, but is adversary also.

I would like to make one point that I made in the statement, and it cuts across a few of these items. I made the statement here that I am irrevocably opposed to forcing the military to elect between a court-martial and administrative proceeding, or giving the individual the choice to compel the selection.

I just think they are two different animals and different considerations exist, and I think a workable system can be made that would at least cut down the abuses of double jeopardy.

Mr. BASKIR. One last matter. You discussed the subtle problems of command influence amongst trial lawyers. By that I mean defense counsel primarily.

In the earlier hearings in 1962, that was a matter of some concern. Some allegations of taking successful defense attorneys and putting them elsewhere were made. We haven't seen any of those allegations being made so far in 1966, but you have indicated that there are certain pressures that are there.

Mr. MARKS. I wouldn't be surprised. If the staff judge advocates had a choice between two people, he is going to take his best for prosecution. You pick your best man for that side that you feel should prevail.

Since this is the staff judge advocate, the man who advised on the reference for court-martial, he thinks the case should be won, and he is not going to put his junior lawyer on the prosecution up against his sharpest defense counsel. Sometimes he is compelled to do so through staffing difficulties.

Mr. BASKIR. Recognizing that problem, I would like to ask you a two-part question. Do you feel that that situation is bad enough for the Congress to take some cognizance of it and, secondly, if you do, what kinds of things would you recommend; a drawing by lot of counsel, or the attorneys there by rotation, or perhaps an independent defense system?

Mr. MARKS. Let me answer that with another very unsatisfactory answer. I don't know.

I would want to know a lot more before I could answer your question, "Is it bad enough to require legislation?" I have a strong personal feeling that the best system, the best experience for a lawyer is for him to defend and to prosecute. I think he becomes a better lawyer. I think he gives both sides better service. And I think he probably, consciously or subconsciously, becomes a fairer individual.

In civilian life we have professional prosecutors and professional defense counsel. Sometimes they don't talk to each other. Whether the military's situation is bad enough to require legislation I just would not want to venture.

Mr. BASKIR. Would you say the situation is ripe for some sort of change, perhaps not by legislation but perhaps by regulations, that it is something the military might want to consider, one of those alternatives that I suggested, or some other?

Mr. MARKS. If you are asking me were I running a shop which I wanted to perpetuate as first class, or I wanted to create or educate first-class attorneys, and let's look at the military system, you have got a bunch of young men usually coming in fresh out of law school, they usually spent only 3 years, so it is an educational function.

If I wanted to really educate first-class men, hoping that those who stayed would be good first-rate attorneys, I would make sure that they had all forms of experience. I would probably have them handle noncriminal work, also. It is good for an attorney to have many types of experience.

You got me off on the area of law school education, and my comments may well be beyond the scope of what your question was directed to.

Mr. BASKIR. Thank you.

Senator ERVIN. As I interpret your remarks, you are a firm believer that there is a logical division to be made between the judicial functions of the military and the administrative functions of the military in this field?

Mr. MARKS. Yes, sir; as long as that distinction is not used as a crutch, as long as being "nonjudicial" does not mean "nonrules," and I am afraid that this is where the abuse has developed. It does not necessarily follow that this should be so, but it has followed that this is so.

Senator ERVIN. As I also construe your testimony, you feel that in the case where the military wishes to discharge a man because he has committed a crime of a serious nature, and the military feels that their interest is to get him out of the service on that basis, and not to inflict punishment for the crime, that they should have some method of doing that by an administrative process which would at the same time protect his fundamental rights?

Mr. MARKS. Yes, sir. I think they should have a shot at court-martialing him, because you know you can't tell what is going to come up in the middle of a trial. Many times you will sit there, you have got a beautiful case, and your key witness all of a sudden looks at you, smiles, and everybody might as well get up and walk out. Well, should you say they have had their day in court? It is over with.

You might have reasonably sound evidence that would support an administrative proceeding in all fairness. I don't think they should

have carte blanche to at that point throw away all the rules and say, "Now we are on the administrative side. We don't have to do anything." I think there is room for separate and fair proceedings.

Senator ERVIN. Do you share my opinion that a military lawyer should have experience in the prosecution and also in the defense, and it makes a better and a more well-rounded lawyer?

Is it not true that experience on both sides has a tendency to teach a lawyer, you might say, the essential elements of crime from the legal standpoint, and also the possibility or the probability of a conviction or acquittal?

Mr. MARKS. Yes, sir. There is a favorite tactic that I think it takes a lawyer skilled in both sides really to appreciate, and that is the problem called opening the door by the defense.

Defense lawyers who haven't had prosecution experience may get a little careless, and there is that wonderful day for the prosecutor when he looks around and smiles at the defense counsel and says, "Counsel, you opened the door in that area. Let's go into it."

Senator ERVIN. Are there any further questions?

The committee will take a recess until 10 o'clock in the morning. I want to thank you very much for your appearance before the committee. You have made some very thoughtful suggestions.

(Whereupon, at 5:15 p.m. the subcommittee recessed to reconvene Wednesday, January 26, 1966, at 10 a.m.)

MILITARY JUSTICE

WEDNESDAY, JANUARY 26, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND SPECIAL
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senator Ervin.

Senator ERVIN. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this morning is Mr. DeEarle M. Logsdon, USN retired, past member of the Navy board of review.

Senator ERVIN. Mr. Logsdon, we are delighted to have you with us. We appreciate your willingness to come here and give us your experience and observations.

STATEMENT OF DeEARLE M. LOGSDON, U.S. NAVAL RESERVE (RETIRED), PAST MEMBER, BOARD OF REVIEW, DEPARTMENT OF THE NAVY

Mr. LOGSDON. Thank you very much. As a matter of correction, Mr. Chairman, I am not a retired naval officer, I am a retired Naval Reserve officer and a retired civilian member of the Navy board of review.

Inasmuch as I did not have an opportunity to have copies made of this statement, possibly it would be better for me to read it.

My name is DeEarle M. Logsdon. I am an attorney and was a civilian member of a Navy board of review from 1950 until my retirement last month. During that 15 years, it has become increasingly apparent to me that article 66 of the Uniform Code of Military Justice under which the boards of review of the Armed Forces operate should be extensively modified. It is my opinion that S. 748 accomplishes most of these desirable changes.

One of the fundamental changes is a belated recognition that these appellate tribunals are courts and not boards. It seems strange that the drafters of the Uniform Code did not recognize the incongruity of the label that they applied to the appellate tribunals that they were creating between the courts-martial and the Court of Military Appeals, but an examination of the superseded legislation throws some light on this matter.

The Elston Act, as well as certain earlier amendments to the Articles of War, empowered the Judge Advocate General of the Army to

establish in his office boards of review and a judicial council. The officers detailed to these review activities were subject to removal at the will of the Judge Advocate General, and their decisions were merely advisory. Boards in the military services are normally the creatures of the officer who appoints them, and their findings, opinions, and recommendations are his to accept, modify, or reject. That was the role played by boards of review before the enactment of the Uniform Code of Military Justice.

Article 66 of the code grants to the boards of review established thereunder authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact and to affirm only such findings of guilty, and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

It provides further that the Judge Advocate General shall, "unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review."

Thus the code made these boards very powerful appellate courts, but left the appointment and tenure of the members subject to the will of the Judge Advocate General.

Article 67 of the code, which established the Court of Military Appeals, however, specified a tenure of 15 years and provided that the judges "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or upon the ground of mental or physical disability, but for no other cause." S. 748 affords to the Court of Military Review which it establishes at least some of the continuity and judicial independence which the code has provided for the Court of Military Appeals. That, in my opinion, is a great step forward.

Several months before the Uniform Code of Military Justice went into effect, Rear Adm. George L. Russell, then the Judge Advocate General of the Navy, approved the establishment of five boards of review in addition to the board which had been maintained in his office as an advisory board for several years. Each of these boards consisted of a senior unrestricted line officer who was qualified under the code, a civilian, and a law specialist. The Judge Advocate General stated that he had decided on this composition, over the protests of the other two Judge Advocate Generals, because he felt that boards so constituted would have a more balanced view of military justice in the Navy and Marine Corps and would present a better public relations aspect to the two services and to the public in general than would boards consisting only of military officers.

On February 21, 1951, Rear Admiral Russell addressed a letter to each of these six boards of review which read in pertient part as follows:

1. The Judge Advocate General has this date approved the composition of six boards of review * * *.

2. The Uniform Code of Military Justice contemplates that in the review of cases within their cognizance the boards of review shall be free of all coercion. This applies, of course, not only to outside influences upon the boards but to the relationship between individual members of a particular board. Except

in respect to the usual amenities, any disparity of rank between members is to be disregarded. So far as precedence between members of boards is concerned, civilian members shall be considered in a status equivalent to the grade of captain, with seniority as of their respective dates of appointment.

3. The members of the boards of review will come directly under the Judge Advocate General for evaluation of performance (fitness reports and efficiency ratings).

4. The internal administration of the individual boards is assigned to the chairman. The function of the chairman will be to preside at the meetings of the board, and to supervise and coordinate the distribution and accomplishment of work within the board. The chairmanship will be rotated between the members every quarter.

Rear Admiral Russell, after receiving from the senior line officer detailed to one of the boards of review a vehement protest against ever "serving under" a civilian, canceled his letter of February 21 by one dated April 9, 1951, which was identical in language with the one quoted above except that for the last sentence of paragraph 4 quoted above the following was substituted:

Until further notice, the senior military member will be chairman.

There has not to this date been any further notice on this subject. On the contrary, there has been continuing sustained effort to subordinate the civilian members to the military. Military members, most of whom have had no prior experience as members of boards of review, are automatically placed over civilian members who will soon have completed 15 years continuous service on boards of review.

A further example of subordination of civilian members occurred about 3 years ago. There were then in Washington three boards of review, each consisting of two civilians and one military member. All boards were directed that in the absence of the board chairman, no board opinion would be promulgated until it had also been reviewed by the chairman of another board. This was obviously unnecessary, since the concurrence of two members constitutes the decision of the board, but it did serve to further derogate the civilians.

The caseload handled by the boards of review of the various services and the importance of their work in the administration of military justice is well shown by the following figures taken from the annual report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces for the year ending December 31, 1964. That report shows that during the period July 1, 1963, to June 30, 1964, the numbers of cases reviewed by the boards of review of the various services were as follows: Army, 1,491; Navy, 2,727; Air Force, 761; Coast Guard, 13; making a total of 4,992 cases.

The report shows further that during the same period, 868 case were docketed with the Court of Military Appeals, 851 by petition and 17 by certificates of the respective Judge Advocates General, and that 758 of the 851 petitions were denied by the court. Thus decisions of the boards of review were, for all practical purposes, final in all but 110 of those 4,992 cases, or in nearly 98 percent of all the cases decided by the boards of review.

Each of the services had four boards of review at the time covered by this report. The caseload per board per year among the three services was therefore as follows: Army, 373 cases; Navy, 682 cases; and Air Force, 190 cases. During the calendar year 1965 the Judge Advocate General eliminated one of the Navy boards of review.

Although the total caseload had decreased somewhat, to about 2,300, the caseload per board was thus increased to about 770 for the year. Although I have never seen any Navy Judge Advocate General attempt to exercise any control over or to exert direct influence on the decisions of a Navy board of review, failure to recognize the existence of an excessive caseload must certainly have an adverse effect on the quality of the work done by the boards of review.

Among the arguments raised by the military services against S. 748 is that its requirement that at least one-third of the membership of each panel of a court of military review shall be civilian and that the military members have a specified tenure is unduly restrictive on the services in that it is very necessary to have flexibility of assignment of board members in order to remove members who are found to be temperamentally or intellectually unsuited for membership on an appellate tribunal. This is admittedly a problem, but it is a problem which confronts any one charged with the responsibility of selecting judges. No one, whether military or civilian, should be appointed or assigned to such a tribunal until his qualifications have been carefully and thoroughly examined. The Armed Forces, with their comprehensive personnel records, fitness reports, and selection boards, should certainly have no more difficulty in selecting competent judges for the courts of military review than does the President in selecting suitable nominees for Federal judgeships.

Sufficient tenure to attain proficiency in the discharge of judicial duties is universally recognized as essential to the administration of justice. The concept of flexibility of assignment of personnel detailed as judges of the courts of military review runs counter, of course, to this tenure requisite. Of even greater significance, however, is the devastating effect of the unrestricted power of removal on the objectivity and independence of any judge. Without some statutory restraint on the removal power the judge tends to become compliant to the will and wish of the official who has such power to remove him from office.

Ideally, the proposed courts of military review should consist entirely of carefully selected civilians or of a mixture of such civilians and equally carefully selected military officers who will complete their military careers as judges of these courts and therefore would not be subject to reassignment.

The provisions of S. 748 requiring at least one civilian on each panel of the court has also been attacked with the argument that in the event of war the number of panels would be greatly increased, necessitating the appointment of a large number of civilian judges who could not be easily removed during the inevitable postwar contraction of the Armed Forces. This argument, of course, completely ignores the experience of World War II when large numbers of civilians were employed under personal service contracts or a war-service employees. There appears to be no reason why such methods of appointment could not be used to obtain the services of judges whose tenure would not extend beyond the war period.

One of the spokesmen for the Department of Defense expressed the view that the enactment of this bill, "with its implication of lack of confidence in the ability of military lawyers to fill important positions

in the administration of military justice, will make it even more difficult to attract qualified lawyers for service in the Armed Forces." When I heard this statement I could not avoid wondering how much more adverse must have been the enactment of the Uniform Code of Military Justice which swept out the judicial council with its three general officer billets and substituted for it the all-civilian Court of Military Appeals.

S. 748, however, retains two-thirds of the membership of the courts of military review for military lawyers. On the basis of the present composition of the boards of review, the military lawyers would lose only 7 positions out of a total of 30. It is difficult for me to see how this could very adversely affect the officer procurement efforts of the Judge Advocates General.

The point has also been raised that the provision of paragraph (b) of the proposed amendment to article 66 of the code requiring any prospective appointee to the court of military review to have had not less than 6 years' experience in the practice of military justice would too greatly restrict the eligible civilian appointees to the court. I agree with that contention, and point out that it would also exclude some otherwise eligible commissioned officers who have become specialists in other fields of military law. I therefore respectfully suggest that this limitation be stricken from the bill, leaving the question of qualifications to the discretion of the Secretary concerned. It is worthy of note that there is no such restriction on the appointment of judges to the Court of Military Appeals.

The opposition of the military officers to the enactment of S. 748 is reminiscent of the efforts of certain of them to restore the judicial council in substitution of the Court of Military Appeals. Those efforts provoked the following comments by Chief Judge Quinn at the 1962 hearings on constitutional rights of military personnel:

> * * * I understand that 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.

In my opinion the comments made by Judge Quinn apply equally to the opposition voiced by the military services to the enactment of S. 748.

I will be glad, Mr. Chairman, to attempt to answer any questions the committee may have.

Senator ERVIN. You draw an analogy between the appointment of military officers to boards of review and the appointment of Federal judges by the President.

Mr. LOGSDON. Yes, sir.

Senator ERVIN. It seems to me that there might be a very good case made for the proposition that there could be better selections

from military personnel or persons sitting on the board of review, because the military is free from all the political obligations devolved upon the President selecting Federal judges, and they do not have to listen to the demands of Senators.

Mr. LOGSDON. Yes, sir; that is correct.

Senator ERVIN. I certainly agree with your observation that if anyone exercising a judicial function is to be independent—is to act free from outside influences of any kind—you have to give him a certain reasonable tenure of office. I think there is much in your suggestion that military officers who are appointed to serve on courts of review should be appointed at a stage of their military service where they can terminate their service as members of the boards of review. Certainly this would tend to give a desirable independence.

Mr. LOGSDON. I believe that it would; yes, sir.

Senator ERVIN. Now, I am a little rusty on a lot of these statutes, but when Rear Admiral Russell provided for the creation of boards of review with civilian members as well as military members, he was acting under general authority conferred by the statute and not acting under any specific mandatory requirements; is that not true?

Mr. LOGSDON. That is correct. It was optional with him because the code provided that the boards of review so constituted would consist of either officers or civilians.

Senator ERVIN. Now, of course, I think you and I as human beings know that it is quite natural that the military would have a tendency to oppose the bringing in of civilians to exercise the functions of members of boards of review—at least, that is understandable to me. I think you lawyers would resent it if a layman were appointed to be a judge in one of our courts. But it may be that sometimes it is well to get things out of the jurisdiction of a particular individual or a particular group.

(Discussion off the record.)

Senator ERVIN. Admittedly, so many of our developments, so many of our laws and institutions have been on a gradual basis. What do you think about the proposition of a statute that would make it expressly permissive rather than mandatory for the services to have so many civilian members of boards of review?

Mr. LOGSDON. Sir, I think it would be a rather futile provision of the law, because I do not think it would be done.

Senator ERVIN. I might say that I was very much impressed by the letter, the quotation that you read of the original letter of Admiral Russell, Judge Advocate General of the Navy. It seems to me that he makes a pretty good summary as to how boards of review should function with respect to discharge of their judicial responsibilities, and also——

Mr. LOGSDON. I think it was very unfortunate that the philosophy of that letter did not continue.

Senator ERVIN. And also with respect not only to how they should discharge their duties, but also how they should govern their relations between each other.

Mr. LOGSDON. That is right.

Senator ERVIN. That is a rather statesmanlike document.

Mr. LOGSDON. We were very pleased with that letter, the first letter that he sent out. And the more junior members of the boards among the military were also well pleased with it.

Senator ERVIN. I may have to leave before counsel gets through with your examination, so I shall take this occasion to express my deep appreciation, personally and also officially on behalf of the subcommittee, for your appearance here and the very thoughtful paper you have prepared and submitted to us. I may have to leave, as I say, and I hope you will understand, because I have some ramparts of freedom to watch over there on the Senate floor.

Mr. LOGSDON. I know you have.

Senator ERVIN. Mr. Creech has some questions.

Mr. CREECH. Mr. Logsdon, I note that your tenure of service on the Navy board of review actually has covered the full span of the board's tenure up until very recently. Is that correct, sir?

Mr. LOGSDON. Yes, even beginning before, because I was on an advisory board there before the code went into effect. Even then, the Judge Advocate General put civilian members on that board. So he had precedent to go by when the code came into effect.

Mr. CREECH. So actually, there has been no opportunity for—you served as long as or longer than anyone in this capacity?

Mr. LOGSDON. That is right, including Judge Quinn.

Mr. CREECH. Now, sir, I notice that on page 1 of your statement, you say that in your opinion, S. 748 accomplishes most of the desired changes, and you are referring here, of course, to the changes in article 66 of the Uniform Code. Now, I wonder, sir, are there other modifications which you have not touched upon here in your statement that you feel are desirable?

Mr. LOGSDON. I do not know of any. Of course, as I implied there, I would—again speaking from the point of view of a civilian judge, I would rather see these boards set up much the same as the Court of Military Appeals is—that is, being all civilian. But I will admit that that is a biased viewpoint, and it certainly would have to yield to a compromise. I think that this bill does afford that compromise.

Mr. CREECH. Sir, you touched upon that in your statement by drawing an analogy between the criticism which has been leveled against this bill, that it misconceives the nature and purpose of appellate bodies, and that by preventing military lawyers from qualifying as the presiding judge, it will erode morale. You drew an analogy between this criticism, I believe, and that of the Uniform Code of providing for a Court of Military Appeals, which is all civilian. I wonder, sir, inasmuch as you feel that it is a compromise and it would provide military and civilian participation, I wonder if you feel that the criticism that the military lawyer will have his morale eroded by the knowledge that he cannot qualify as a presiding judge, if this is a valid criticism?

Mr. LOGSDON. I do not believe that it is valid, because there are too many instances throughout all of the armed services and the Department of Defense where military and civilians work in coequal capacities, and they work satisfactorily. Most of these objections are high level objections. It is much like the fights that occurred among the services themselves. The officers at the working level got along

beautifully well, but the generals and the admirals did not get along so well.

I do not say that is still true, but for many years after the Unification Act, that was the condition and it was not a working level fight.

We have that, of course, in the operation of the boards of review. There has been no animus among the members of the boards. The civilians work very harmoniously, by and large, with the military members. But we have this constant overriding, this looking over the shoulder by the Judge Advocate General, I think by the Judge Advocate General.

Mr. CREECH. I wonder if you would care to expand upon that statement, sir, what you mean by the constant looking over the shoulder by the Judge Advocate General?

Mr. LOGSDON. We sensed it at least—these things are not smoked out in the open, you know. They do not come out and put them in writing and it is largely a matter of sensing the way they feel. I know that particularly since the Judge Advocate Generals have been law specialists rather than line officers with legal training, that they have resented the presence of civilians on these boards of review. They have been retained because there was not too much that could be done about it without creating a good deal of furor. Some of the civilian members have access to Members on the Hill and pressure could be brought to bear on the military if they were to attempt to unceremoniously unseat them.

But I know that at least one Judge Advocate General said that if he had his way about it he would not have any civilian members. Now, those are words that are just spoken over cocktail glasses, and that sort of thing, you see. They do not put them in writing.

Mr. CREECH. Now, on page 2 of your statement, in speaking of the provisions of S. 748, you say that it affords to the Court of Military Review at least some of the continuity and judicial independence which the code has provided for the Court of Military Appeals. I wonder, sir, if you would indicate whether you feel S. 748 should have provisions to provide for even more judicial independence, or if there are additional provisions which you feel should be included.

Mr. LOGSDON. Near the end of my statement, I pointed out what I considered to be the preferred constitution of these Courts of Military Review, that they either be all civilian or that they be a mixture of civilians and officers serving their last tour of duty as military judges. I am not urging that the law so provide, because it would create more opposition than it already has. But, I think that is the case and I know when we first started, the unrestricted line officers who were detailed there were usually on their last tour of duty. They left from there to go on the retired list.

Senator ERVIN. You would hope that that would be adopted as a matter of policy? Your view is that you feel it would be better to adopt that as a matter of policy——

Mr. LOGSDON. Yes, I do, rather than as a statutory requirement. The trouble with building these into the statute is that they can become unworkable with rapidly changing conditions. If you get into a war, for example, it could be highly undesirable to have that as a rigid requirement.

Mr. CREECH. Sir, on page 5 of your statement where you give the statistics for the period July 1, 1963, through June 30, 1964, pertaining to the caseloads of the boards of review of the various services, you indicate that for the three services, the caseload was as follows: For the Army, some 373 cases; for the Navy, 682 cases; and for the Air Force, 190 cases. I was impressed, sir, with the sizable increase of the number of cases handled by the Navy over those handled by both the Army and the Air Force combined. I wonder, sir, if you would care to comment on that?

Mr. LOGSDON. I do not know why there is that disparity in the caseload. It would indicate, of course, that more punitive discharges are being given by the Navy than by the other services, because every punitive discharge has to be reviewed by a board of review. But I do not know why. My observation of the actual curve of sentences is that the Navy courts-martial are not quite as harsh as the other two services, particularly the Army.

Mr. CREECH. Sir, would you feel that these statistics for this particular year, fiscal year, vary appreciably from those for other years, or does the Navy consistently——

Mr. LOGSDON. The Navy has consistently been higher.

Mr. CREECH. Has it always been appreciably higher, as it is in this instance?

Mr. LOGSDON. I think so. I did not just pick this out because it was high. I picked it out because it was the most recent accurate information that I had, rather than because of the disparity in the number of cases.

Mr. CREECH. I notice also that you go on to say that although you have never seen any Navy Judge Advocate General attempt to exercise any control or exert any direct influence on the decisions of the board of review, their failure to recognize the existence of an excessive caseload must certainly have an adverse effect on the quality of the work done by the boards. Would you care to expand upon that statement, sir?

Mr. LOGSDON. Well, I think, if I may speak quite frankly, if I were a Judge Advocate General and was dissatisfied with the number of cases in which there had been a modification of, say, the sentence by the boards of review, I would feel that the best way to get around that is to load them with so many cases that they would not have a chance to look into the thing.

Mr. CREECH. Now, under the terms of S. 748, the Secretary of each military department shall appoint persons to serve as judges of the Court of Military Review for his Department. The Court of Military Review of each Department shall consist of as many three-judge panels as the Secretary concerned shall deem necessary. Is it your view that this will overcome the situation that you are describing now?

Mr. LOGSDON. Yes, I think that it would. In the first place, I would think that the Secretary of the Department would at least pay some attention to the recommendations of the members of his courts, and particularly to his chief judge whom he had appointed himself. The way it is now, there has never, so far as I can recall, been any instance where the members of the boards of review were asked about whether they considered the caseload too heavy or whether they would

like to see a change in the rules under which they operate. They have not been consulted. These decisions are made in the ivory tower and the boards are notified after the decision has been made. I would hope that the Secretary would not follow that pattern, but would consult with the members of the court.

If I may add another advantage, S. 748 requires that the rules under which the boards operate shall be drafted by the three chief judges, the chief judges of each of the Courts of Military Review, and the chief judge of the Court of Military Appeals. So they would then have a much closer working relationship with the Court of Military Appeals than the boards of review now have.

Mr. CREECH. With regard to the composition of the boards, you commented upon the statement in opposition S. 748 that fixed tenure for military members is too inflexible. You directed your comments primarily to the criticism concerning the removal of members who were found to be temperamentally or intellectually unsuited. Do you feel that there would be a firmer basis for considering this criticism if it were predicated upon some other military consideration, or should there be any other consideration with regard to inflexibility? Here I think in terms of other assignments.

You have indicated subsequently in your statement that you feel this type of assignment would be preferable if it came at the end of a military career. But do you feel that even if there were other considerations with regard to mobility of the serviceman that the Congress should be impressed by this argument?

Mr. LOGSDON. Well, I am not too impressed with the concept that there are other more important functions that a military lawyer could discharge than sitting at this highest court within the reach of the military. And it seems to me that it would be a very unusual case where the needs of the service would require the early removal of a military judge.

Mr. CREECH. Sir, you have indicated that you feel that tenure prescribed by the bill would not be sufficient to provide the proficiency which the discharge of judicial duties requires. I wonder what you would consider to be the minimum period desirable?

Mr. LOGSDON. Well, I will say this: In a period of 3 years, of course, they achieve a rather hight level of proficiency. It does take about a year for an officer, at least in the Navy, for an officer to come in and properly discharge his duties as a judge. After that, his proficiency increases.

Five years would, I think, be better, but this I take it, was a compromise, this 3 years.

Mr. CREECH. Sir, you have indicated that you feel that the requirement that a candidate for this position have at least 6 years of experience in the field of military justice might preclude some very desirable people being considered for such an appointment.

Mr. LOGSDON. Yes, I think it could. I do not believe that experience in military justice per se is as important as has been indicated in other testimony before this committee. The member of the Court of Military Appeals certainly have not had that level of military justice experience, they are not required to have it, and they do not, in fact, have it.

Mr. CREECH. With regard to your colloquy with Senator Ervin concerning the desirability of judges having judicial experience or experience which would qualify them for a judicial role, do you feel that there should be some minimum requirement with regard to the qualifications?

Mr. LOGSDON. I think there should be, but I believe it would be better to leave that in the discretion of the Secretary rather than try to spell it out in the statute.

Mr. CREECH. Would you feel that any one considered for such a post should have had some type of military experience or——

Mr. LOGSDON. It could be advantageous, but if you are going to have military personnel sitting on the board, it seems to me that they would furnish the military background necessary for a sensible determination.

Mr. CREECH. So from your point of view, you feel that the military experience could be taken care of by the military members, and that as long as the civilian attorneys qualified in every other respect, this should not deter the appointment?

Mr. LOGSDON. I do not think that it should. Actually, in the present composition of the Navy boards of review, every civilian members has had military service. All but one were Reserve officers, either in the Navy or the Marine Corps.

Mr. CREECH. Would the requirements of this bill, the 6-year requirement, have eliminated any of those who served, any of the civilians who have served, to your knowledge?

Mr. LOGSDON. Yes, it would.

Mr. CREECH. Would you care to reflect a moment upon those whom you know and indicate what percentage would have been affected of those who have served in this capacity?

Mr. LOGSDON. Actually, I do not know of any of them who would have had that much experience in military justice alone. There is one member who was a Reserve officer and continued on active duty for a number of years after the end of the war. He finally was sent to inactive duty, and then was immediately appointed to the board. But he had served as a board member in his military capacity, also. I think he probably would have met the qualifications. He is the only one that I know of.

Actually, most of our military members would not have had it at the beginning of the program.

We have, for example, in the Navy, we still have admiralty officers who would not meet that qualification.

Another thing that bothers me about the qualification is I do not know quite what it means. Does it mean exclusively devoted to military justice matters? If so, you would probably find a great deal of difficulty among the military members because they may be occasionally detailed as trial or defense counsel, say, yet assigned to other phases of military law not having to do with military justice. Now, I do not know. You ran into a matter of definition.

Mr. CREECH. So it is your feeling that if this language were left in the bill, it should be more definitive?

Mr. LOGSDON. I think that it should, yes.

Mr. CREECH. By the same token, I presume that you would feel that any stipulation with regard to experience should be more definitive? You find this language vague and uncertain?

Mr. LOGSDON. I do find it vague and uncertain, yes. But I do not think it should be so restrictive as to exclude otherwise well-qualified prospective appointees.

Mr. CREECH. Mr. Everett would like to ask you some questions at this time.

Mr. EVERETT. Mr. Logsdon, you mentioned that there are a number of examples of mixed boards in the Department of Defense, where you have civilian and military membership. Do you recall offhand some of those boards that examplify this?

Mr. LOGSDON. I was not thinking just of boards. I was thinking of various kinds of duties that are performed in the military services.

For example, before I became a member of the board of review, I was director of a division and I had quite a number of officers working under me.

Mr. EVERETT. In that type of situation, where you have civilians and military working side by side and performing similar duties, has it been your observation that there is any type of morale problem by reason of salary and pay discrepancies or otherwise, or has there been no morale problem so far as you know?

Mr. LOGSDON. There is a problem there. We are dealing generally, however—they normally do not sit around and carp at each other like Kilkenney cats because of the discrepancy in pay they are receiving for equal duties. But I do think that there is an injustice there. I do think that the pay that they receive should have been increased.

Mr. EVERETT. Now, there was testimony before the subcommittee last week to the effect that it was customary to appoint to the boards of review in all of the services senior officers who have had 20 to 25 years of experience in all phases of the administration of military justice. Would you comment to the best of your observation—has this been true in the Navy? Have the naval members had their 20 to 25 years of experience in all phases of the administration of military justice, those who have served on the boards?

Mr. LOGSDON. Again, we run into a question of mixed duties. Actually, if you are taking 25 years—you see, the bulk of our officers are part of the World War II hump and they came in at various times, even before the war started until near the end of the war. Of course, the younger ones came in after that.

The kind of duties that they performed have not all been military justice. That is not all that the Judge Advocate General of the Navy does, and by all odds, it is not all that the Judge Advocate General of the Army does. Actually, he covers fields of law that the Judge Advocate General of the Navy does not cover. Commercial law, for example, is still within the purview of the Judge Advocate General of the Army, but not of the Navy.

So it would be rather hard for me, again, to say that these people have had that much experience. In fact, I doubt very much that the Army has many officers who have served only in military justice per se.

Mr. EVERETT. There was also testimony, and I believe this pertains to the subject matter on which you testified earlier, there was also testi-

mony last week that the enactment of this legislation was an implication of lack of confidence in the ability of military lawyers to fill important positions in the administration of military justice would make it even more difficult to attract qualified lawyers for service in the Armed Forces. To what extent are you concerned with this problem?

Mr. LOGSDON. I do not think it presents any problem at all. I think it is merely an argument.

Mr. EVERETT. Now, in your testimony, you mention that you have retired as a civilian member of a Navy board of review. Have there been any other requirements in the recent past of civilian members of Navy boards?

Mr. LOGSDON. There was one other civilian member who retired earlier than that, one of our members resigned in order to accept a Presidential appointment.

Mr. EVERETT. What has been the practice with respect to filling those vacancies on review boards? Have they been filled with other civilians or filled with naval personnel?

Mr. LOGSDON. They have been filled with naval or Marine personnel.

Mr. EVERETT. Now, there has been testimony to the effect that in one of the services, the practice is still followed which previously was followed in other services of having efficiency reports, effectiveness reports of board members submitted, or prepared, rather, by the chairman of the that board, and that this is desirable in terms of his immediate experience with the performance of the junior members of the board. In your opinion, does this factor, immediacy and accuracy in preparing a report, outweigh any possible disadvantages of this practice? Would you comment on this practice?

Mr. LOGSDON. I am inclined to agree with General Hodson's view that although there may be nothing wrong with it, it has the appearance of evil which should be avoided. It depends so much on the temperament of the officers you are considering. You could have an officer who was a martinet and who would use that power for the purpose of influencing the decisions of the junior officers serving under him on a board or a court. But most of them—at least it has been my observation that most of them are not martinets and they do not use their power in that way.

Mr. EVERETT. Mr. Logsdon, by reason of your familiarity with the administration of naval justice, do you have an opinion concerning the desirability of legislation to establish at this time a Navy JAG corps?

Mr. LOGSDON. Well, I do not believe that it would make as much difference as has been indicated in the testimony that has been given to both Houses of Congress. The impression that has been created is that that would greatly enhance the attractiveness of the service for young law graduates. I doubt that it would. I do not think that it makes much difference whether they wear crossed plumes or a star on their sleeves. They can be disillusioned just as quickly wearing crossed plumes as they can wearing a star, and many of our Reserve officers who are serving their times of obligated service in legal duties have been disillusioned because of various things that occur.

For one thing, of course, during time of prosperity, it is so much easier to make more money outside than it is in uniform. I think that is the main problem that is confronting the Judge Advocate Generals

now in obtaining recruitment. The opportunities outside are just too attractive. In time of peace, historically, the American people have not been too happy to get into uniform. Of course, they are not too happy in time of war, either, but they have to then.

And of course, now we do have the selective service and they have to serve, but they serve their period of time and they are very happy to get out and get back into civilian status. I think those are the problems, really, that are back of the inability of the Judge Advocate Generals to fully man their various billets.

I think they are going to have vastly more trouble within the next 5 years when this large number of World War II veterans comes up for retirement. I know the Navy is going to have a tremendous problem.

Mr. EVERETT. Mr. Logsdon, you have had an opportunity to observe through the record of trial the performance of Navy defense counsel, going back to the beginning of the code and even before. Have you observed any changes in the equality of such performance, any improvement, let us say, during that period of time, and how do you currently evaluate the performance of the defense counsel appearing in Navy courts-martial?

Mr. LOGSDON. Generally, it has been good. I presume you are thinking in terms of defense counsel who are not lawyers, or are you thinking of both?

Mr. EVERETT. I was thinking primarily of lawyers, but I have forgotten that you would be reviewing also a number of special court-martial cases which would involve nonlawyers.

Mr. LOGSDON. Many of them have been defended and prosecuted by nonlawyers before the special courts-martial, of course.

Mr. EVERETT. What is the level of performance in those cases?

Mr. LOGSDON. Generally, they have done a good job on routine cases. The bulk of our cases, of course, involve absence offenses, and on those, neither the prosecution or the defense is too difficult a thing. There is a matter of the record. They bring in the record showing the beginning and the termination of the absence and that is about all the proof the trial counsel has to bring forward. And the defense—there usually is not much of a defense to it—the defense counsel has to concentrate his effort on attempting to get as light a sentence as he can, so he brings in matters of mitigation after the plea of guilty or the finding of guilty is entered.

They generally have done, I think, a pretty good job. Their performance, except for spotty situations, has been improving.

Mr. EVERETT. How about with respect to the lawyers performing before the general courts? Have you noticed any change in quality of their performance since, say, 1951 or 1950, when you first went on a board of review?

Mr. LOGSDON. Yes, I think their performance now is better than it was then. In the first place, they now have a great deal of experience behind them. Although these officers who are acting as trial counsel and defense counsel do not themselves necessarily have such a vast amount of experience, nevertheless, they are backed up by officers who have had a great deal of experience and who can advise them and guide them and train them. So I think that the quality of their performance has improved.

Mr. EVERETT. In light of that circumstance and your observation, could you make any comparison between the quality of representation that an accused is currently receiving in a Navy court-martial, where a lawyer is assigned, let us say a general court, and the quality of representation that a defendant will be receiving in a Federal criminal court? Is it approximately equal, in your opinion, or would it vary one way or the other?

Mr. LOGSDON. In the normal defense of a case—that is, the normal defense of a criminal case in a civil court, I think probably our level of performance is as good as it is in the civilian criminal court. I am not talking now about these star performers, the great names in criminal law. I am talking about the average, run-of-the-mill lawyer who undertakes the defense of a criminal case.

Mr. EVERETT. Now, making allowance for the fact that many of the special court-martial cases, including those that result in bad conduct discharges, involve relatively routine offenses such as the unauthorized absence, what is your opinion concerning the desirability of legislation prohibiting the punishment of bad conduct discharge unless the accused has been represented by a qualified lawyer? Do you have an opinion as to the desirability or necessity of such legislation?

Mr. LOGSDON. I personally would prefer that protection, the protection of legislation, to insure representation by qualified counsel.

Mr. EVERETT. One of the proposals received by the subcommittee envisages the consolidation of boards of review or courts of military review at the level of the Department of Defense rather than the military departments. On the other hand, there have been suggestions to the Secretary that this would be highly undesirable because each board of review is responsive to the particular conditions in the military service whose case it is reviewing. Could you give us your opinion as to the relative advantages of consolidation on the one hand and diversity on the other in this particular field?

Mr. LOGSDON. I think you would get greater flexibility in the utilization of your courts if you had them all under the Department of Defense. You would not have the disparity that I have shown here in this caseload, for example.

As far as the intricacies of the various services are concerned, I think that could be adequately taken care of by providing that a military member from that service in which the case arose sit on the panel which decides the case, say, from the Army or Navy or Air Force. I think that could be well taken care of.

But, after all, we are dealing with a uniform code, and it is only when we get into the area of violations of regulations and that sort of thing, or of a custom of the service, that we could run into any difficulty.

Mr. EVERETT. With respect to the divergent workloads of the boards of review in the Navy on the one hand, the Army and the Air Force on the other, could this be a reflection of the fact that Navy is using the special court bad conduct discharge to a great extent, while the Army has discontinued it and is not allowing special courts to give BCD's?

Mr. LOGSDON. I doubt that that would explain the great disparity in figures there. Because in the first place, the convening authority must

decide whether to appoint a reporter to a special court-martial, and I think that is the determining factor in the Air Force and the Army—the convening authority merely refrains from appointing a reporter. If the court-martial does not have a reporter, there will be no verbatim record and the court cannot impose a puitive discharge.

Mr. EVERETT. It is the subcommittee's understanding that the Army has a special regulation which, as a practical matter, excludes the reporter of all special courts, and thereby automatically precludes the court for administering a bad conduct discharge.

Mr. LOGSDON. I do not think that is true of all their special courts-martial. I am under the impression that they have special courts-martial that do impose punitive charges. But they probably are using qualified counsel in such courts.

You see, there is one thing to bear in mind. Again, the converse of this caseload, the Navy does not have anywhere near as many lawyers in uniform as the other two services.

Mr. EVERETT. So they are handling more cases——

Mr. LOGSDON. They are handling more cases with less people.

Mr. EVERETT. Thank you.

Mr. CREECH. Mr. Logsdon, Senator Ervin has asked me to say that the subcommittee is very grateful to you for your coming here today to give the subcommittee the benefit of your experience and your knowledge in the field of military justice, specifically with regard to the matters which are before the subcommittee today.

Thank you very much.

Mr. LOGSDON. Thank you, sir.

Mr. CREECH. The next witness is Mr. Neil Kabatchnick, attorney at law, Washington, D.C.

Mr. Kabatchnick, Senator Ervin has asked me to say that the subcommittee is grateful to you for coming here today to give the subcommittee the benefit of your experience and your study on the bills which are being considered. He is on the floor of the Senate at this time. He hopes to return shortly.

STATEMENT OF NEIL B. KABATCHNICK, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. KABATCHNICK. I appreciate that. Thank you for your comments.

Do you wish me to proceed at this time?

Mr. CREECH. You proceed in any way which is most convenient for you.

Please identify yourself for the record and proceed.

Mr. KABATCHNICK. I will. I am an attorney at law, a member of the bar of the District of Columbia, with offices at 910 17th Street NW., Washington, D.C. I have been admitted to practice before the U.S. District Court for the District of Columbia, the U.S. Court of Appeals for the District of Columbia Circuit, the U.S. Court of Claims, U.S. Court of Military Appeals, and the U.S. Supreme Court. I am a member of the Bar Association of the District of Columbia and the American Bar Association. I am presently a member of the Military Law Committee of the District of Columbia Bar Association and have

served on said committee since 1958. I am also a member of the Court of Claims Committee of the District of Columbia Bar Association, and I am presently serving as chairman of a subcommittee of the court of claims committee dealing with the matter of legislation pertaining to the correction of military records. I am also a member of the Judge Advocates Association. My practice is primarily devoted to the representation of military personnel or former military personnel in matters relative to their status or former status as members of the military establishment. I am appearing here on a purely personal basis, in response to your invitation, and not in a representative capacity of any of the aforementioned associations.

Mr. Creech, I do have a prepared statement which outlines my views with respect to the legislation that is before the subcommittee, and if I may address myself along the lines set forth in the statement, sir——

Mr. CREECH. Please proceed.

Mr. KABATCHNICK. The U.S. Court of Claims, in the case of *Cole v. United States*, Ct. Cl. No. 112–63, decided June 11, 1965, restated the concept that due process of law under the U.S. Constitution does extend to military personnel. In recognition of the applicability of constitutional safeguards to military personnel, the necessity at this time for legislation of the nature contemplated by the Senate bills under consideration is not only timely but, indeed, in certain respects, long overdue. In this regard, I had the privilege of appearing before the Subcommittee on Constitutional Rights in early 1962. Since that time extensive consideration has been given to the subject matter of the proposed legislation. It is hoped that the following comments will serve a useful purpose in the consideration of the proposed legislation:

S. 745. *Field judiciary system and military judges.*—It is believed that since both the Army and Navy have established field judiciary systems, it would be desirable to furnish a statutory basis for this practice and to make it uniformly applicable to all of the Armed Forces.

With respect to the utilization of civilians as "military judges," it is believed that although provision might be made for appointment of such individuals, discretion in making such appointments should be reposed in the respective Judge Advocate General of the various military departments. This would permit the use of civilians only in those situations where it was deemed imperative to the needs of the service concerned, and in the absence of a sufficient number of military personnel to carry out the judicial program of the various departments at any given time.

It is believed that the facets of S. 745 relative to the redesignation of the term "law officer" to "military judge" would, among other things, accord the "law officer" adequate recognition of his status within the framework of the military judicial system. Consideration might be given to making the "military judge" the presiding official in court-martial proceedings.

S. 746. *Establishment of a Judge Advocate General's Corps in the Navy.*—The desirability of such a corps is self-evident. The Navy is the only armed service without a Judge Advocate General's Corps or department. This legislation should be enacted at the earliest possible time.

S. 747. *Establishment of a Department of Defense Board for Correction of Military Records.*—It is my personal and very considered view, at this time, that the creation of a Department of Defense Board for Correction of Military Records would not be in the best interests of carrying out the basic intent of 10 U.S.C. 1552. If such a board were established, it would ultimately necessitate some form of compartmentalization or other delineation of the operations of such a board as its activities would be directed to the specific problems or cases arising out of service of individuals in the Army, Navy, Marine Corps, and Air Force.

The sole—and very significant and vital—purpose of the boards for correction of military records is to correct errors and injustices. The work of the boards functioning under 10 U.S.C. 1552, I believe, is of the greatest importance. The very real value of these boards to military personnel and former military personnel, as well as the families of such members of our citizenry, cannot be overemphasized or stressed. The end product of a decision founded upon the action of a correction board, in granting or denying relief, has far-reaching ramifications on the life or career of the individual applicant. I have personally observed the eradication of grave and otherwise irreparable injustices which, but for these boards, would persist for time immemorial.

Because of the significant and somewhat unique nature of their mission, every possible assistance should be extended to the correction boards in the interest of furnishing them with information or evidence upon which they may evaluate the merit of any application. In assessing the concept of the procedures or operation of the boards for correction of military records, I wish to take this opportunity to reiterate the view, which I believe is universally shared by other members of the bar engaged in matters pertinent to 10 U.S.C. 1552, that 10 U.S.C. 1552 should be amended at the earliest possible time with respect to the fundamental procedures under which these boards function. The most important facet of this assistance, I am convinced, and as I have personally long advocated, would appear to be provision for the granting of a hearing as a matter of right.

The matter of granting of a hearing as a matter of right is probably the most difficult to resolve since the military departments have consistently opposed such an amendment. The basis for the opposition has primarily been the matter of disposing of applications which are patently without merit, that such a procedure would create an undue burden upon the boards, and the matter of the boards being able to affirmatively resolve or dispose of applications administratively or without the necessity of resorting to a hearing. It is true that there are cases which can be, and are, resolved without a hearing. It is true that there are cases and it is well recognized that, as in any judicial or quasi-judicial process, there are and will be applications which are, on their face, without any permit whatsoever. There can be no question that granting a hearing as a matter of right would significantly increase the burden of the administration of the functions of the various boards. However, the granting of relief administratively or without a hearing in certain cases, or the creation of an additional workload, cannot be utilized as adequate justification for not approving the amendment of 10 U.S.C. 1552 to provide for a hearing as a matter of right—as is the practice under 10 U.S.C. 1553.

Certainly, the work of the correction boards is just as important, if not more important in innumerable instances, as the boards functioning under 10 U.S.C. 1553. Therefore, it is believed that 10 U.S.C. 1552 should be amended to make some definite provision for the granting of a hearing as a matter of right, reserving to the boards the authority by summary proceedings to reject those applications which do not establish evidence, which is the burden of the applicant, indicating the existence of probable material error and/or injustice.

As an alternative to 10 U.S.C. 1552, as amended under this proposed bill, it is suggested that 10 U.S.C. 1552 be amended as follows:

(1) To provide for a hearing as a matter of right, reserving to the departmental boards the authority by summary proceedings, to reject those applications which do not establish evidence indicating the existence of evidence of probable material error or injustice.

(2) In lieu of a full-time board, as proposed by S. 747, it would appear appropriate that the existing panels of members could be increased or expanded to provide sufficient membership so that sessions of the board could be held as frequently as deemed necessary and, at least, more often than once a week as is essentially the existing practice.

(3) 10 U.S.C. 1552 should be amended to provide that in those cases where an application would be denied without a hearing on the merits (i.e. in the nature of the proposed reserved summary proceeding) any such preliminary recommendation to the board would be made available to the applicant for purposes of rebuttal prior to submission of such preliminary recommendation to the board.

If I may digress for a moment here, it was my view in 1962 that there should be a full-time board and but for the resistance that might be created to such, the enactment of legislation as proposed, I submit this as an alternative, that if the legislation providing for a full-time board were not enacted, that certainly the panels of members could be increased in number or expanded accordingly.

S. 748. *Courts of military review.*—It is believed that redesignation of the boards of review in the Military Establishment as contemplated by this bill is appropriate and feasible. The proposed legislation would go far in enhancing the judicial stature of these boards. Article 66, UCMJ, makes provision for civilian membership on boards of review. I do not believe it would be essential to implement the restriction as proposed in subsection (d). I believe it would be desirable to provide that the tenure of the military members be for a fixed period of 3 or 4 years.

As a substitute measure insofar as the individual member who would serve as chief judge, it would appear that this could be accomplished on a rotating basis.

S. 749. *Command influence.*—The enactment of this bill is earnestly recommended. The greatest need for such legislation is in the area of administrative forums which are utilized so extensively in the Military Establishment and which have such broad, permanent, and significant effect upon the lives, careers, and families of the members who are the subject of an administrative proceeding. Too often the relaxation of the requirements of the most fundamental rules of evidence or judicial procedures, including the limitations imposed on challenging

members of an administrative forum, clearly impair the rights of the individual in the adjudication of the issues entailed in the subject matter of an administrative proceeding. The use of administrative forms in lieu of judicial forums is so extensive in these times—and I might digress here for a moment, if I may. I do not restrict myself to the Military Establishment, but I think in our society as a whole, there is this extensive use of the administrative forum—that this use is so extensive in these times and will, without any doubt whatsoever, continue to be so utilized that specific and definitive guidelines directed toward formalizing, unifying, and delineating the procedures governing military administrative bodies are self-evident. For all intent and purposes, the administrative forum is presided over by one not trained in the law. Its membership is invariably comprised in whole, or substantial part, by laymen. Those who review the actions of the administrative body are, invariably, laymen.

Here I have in mind, the convening authority who might be a major command commander or the like along that line. As such, it is imperative that specific and definitive rules, laws, and guides must be established if the constitutional rights of an individual are not to be abrogated. One area, among many, many others, wherein the requirement for such legislative guides is needed is in the area of command influence. Hence, the necessity for such legislation is apparent.

Although that portion of the proposed bill which relates to command influence in administrative discharge proceedings could be enacted as a section in chapter 59, title 10, United States Code, it is believed that the prohibitions should be retained in article 37, UCMJ, since there are also other forms of administrative proceedings in which command influence can be exercised and which, in the language of the last clause of (b) to S. 749—are "matters materially affecting the status or rights of any member of the Armed Forces" (e.g., flying evaluation boards, physical evaluation boards, or reduction boards).

S. 750. *Right to counsel and record of proceedings in cases involving issuances of bad conduct discharges.*—This bill would amend article 19 of the Uniform Code of Military Justice to preclude issuance of bad conduct discharges in the absence of a complete record of court-martial proceedings and unless the accused is represented by qualified legal counsel. The bill (sec. 2) also provides that no member of the Armed Forces could be administratively discharged or separated under conditions other than honorable unless the individual concerned has been afforded an opportunity to appear and present evidence in his own behalf before a board of officers, unless he waived such right, such waiver to be accomplished only in connection with representation by counsel with the same qualifications as a defense counsel under article 27, UCMJ. It is believed that this bill is an essential prerequisite to any effort intended to strengthen the constitutional rights of military personnel.

In the light of my views, as expressed in 1962 before the subcommittee, I earnestly believe that the subject matter of this legislation is urgently needed in the interests of protecting the constitutional rights of our military personnel. I heartily endorse this legislation, especially section 2 pertaining to administrative separations. This latter provision is needed urgently when one evaluates the information avail-

able indicating the number of administrative discharges which are issued, especially in comparison to the number of other than honorable discharges which are issued as a result of court-martial action.

With respect to the incorporation of section 2 of the proposed bill into the Uniform Code of Military Justice as article 141, it is recommended that section 2 be enacted as a separate section to chapter 59, title 10, United States Code.

The language of the legislation relative to execution of a waiver should embrace the requirement that a waiver may not be submitted in a period of time less than 48 hours after notice of the adverse action is served on the individual. The requirement of counsel's endorsement of the waiver should also be mandatory.

S. 751. *Extending time for granting new trials.*—This bill amends article 73, UCMJ, to enlarge the period within which an individual may petition for a new trial. It is believed that this legislation should be enacted as an expansion of the constitutional rights of military personnel. It would certainly conform with the provisions of rule 33 of the Federal Rules of Criminal Procedure.

S. 752. *Law officers in special court-martial, etc.*—It is believed that the objectives of this bill should receive favorable consideration. Its primary intent is to provide a law officer for special court-martial proceedings in order to adjudge a bad conduct discharge and to give an accused the opportunity of waiving trial by its members and in lieu thereof being tried by a law officer, or military judge. This is certainly a very worthwhile remedy to existing military jurisprudence.

I have some reservation relative to the trial of capital cases by a single law officer.

S. 753. *Judicial review of proceedings under 10 U.S.C. 1552 and 10 U.S.C. 1553.*—It is believed that in view of the present rights accorded an individual to seek judicial relief in an appropriate Federal district court or in the U.S. Court of Claims, there are in existence forums available to any individual seeking redress from an action of a board functioning under 10 U.S.C. 1552 or 1553.

Of possibly greater greater significance in assessing the objective of this bill is the fact that review by the Court of Military Appeals of cases considered by the correction boards—here I have in mind the review of court-martial proceedings or court-martial cases—would entail the court conducting a second review of such cases and, consequently, it would appear, create an anomalous situation.

The criteria for the granting of relief by a correction board is founded on its determination that a military record, and/or evidence developed during the consideration of an application, establishes the existence of an error or an injustice. Therefore, although a conviction may, for all practical purposes, be legally sufficient and/or a sentence not excessive, the correction boards, under their existing criteria for granting relief, can take affirmative action—purely as an extraordinary act of clemency or solely by reason of equitable considerations. In view of the great divergency in the nature and scope of review that would be essential for the court to utilize in conducting appellate review, as contemplated under S. 753, it is believed that judicial review of the actions of the discharge review boards and correction boards be retained in the existing Federal judiciary as it functions today.

In lieu of the remedy contemplated under S. 753, it is believed that legislation directed toward clarifying and strengthening the existing remedies, especially the matter of according an applicant the right to be heard by the correction boards and giving the Court of Claims authority to remand proceedings to the department concerned would be effective and reduce the extensive burden that the proposed legislation would place upon the Court of Military Appeals.

The proposed bill would limit review by the court solely to matters of law, as I understand it. The vast majority of cases under 10 U.S.C. 1552 and 10 U.S.C. 1553 involve questions of fact. In these circumstances, therefore, it would appear that comparatively few of the cases would actually be available for review by the court.

S. 754. *Administrative separations—Procedural requirements.*—The subject matter of this bill is urgently needed legislation within the sphere of military jurisprudence. It is urged that legislation of this caliber be enacted at the earliest possible time.

It is my earnest belief that section (a) should be amended to specifically define the minimum procedural requirements of the "rules and regulations" to be promulgated by a Secretary in the administration of the bill. These amendments should include the following basic requirements:

1. Provision for a verbatim transcript of the entire proceedings of the board of officers.
2. Provision for the finality of a board's recommendation of retention in the service of the individual concerned.
3. Provision for a definitive standard with respect to the degree of relaxation of the basic rules of evidence.
4. Provision for a requirement that all evidence, including statements, affidavits, interrogatories and depositions, would be under oath or affirmation.
5. Provision that no documentation pertaining to the case would be made available to board members prior to the convening of the board.
6. Provision that the Government would have the burden of proceeding and burden of proof.

It is believed that this legislation should be enacted as a section in chapter 59, title 10, United States Code, rather than as an article to to the Uniform Code of Military Justice.

S. 755. *Rating of performance of members of boards of review.*—It is suggested that the scope of this bill be extended to embrace a prohibition of this nature to all judicial, quasi-judicial, and permanent or standing administrative bodies, such as physical evaluation boards. It should also include counsel who are assigned as permanent staff members of such boards. Separate legislation relating to administrative bodies (such as boards established under the Army Council of Review Boards, the Navy Council of Personnel Boards, or the Secretary of the Air Force Personnel Council) could be adopted as a separate section under chapter 59, title 10, United States Code.

S. 755. *Administrative discharges prohibited in cases involving allegations previously adjudicated by courts-martial trial or administrative board action.*—It is recommended that this bill be enacted.

It is suggested that this bill be enacted as a section in chapter 59, title 10, rather than as a separate article to the Uniform Code of Military Justice.

S. 757. *Pretrial procedures in general courts-martial cases.*—It would appear that the objectives of the proposed bill would greatly enhance the administration of military justice. It is recommended that it be enacted. It is recommended that the words "pretrial proceedings" or "pretrial hearings" be adopted in lieu of the term "conference."

S. 758. *Right to demand trial in lieu of administrative discharge action for misconduct.*—It is urged that legislation of this nature be enacted. Too often, court-martial action has not been taken in a given case because of apparent or anticipated legal deficiencies in the known or available evidence. Because of the consistent relaxation of the rules of evidence, the shifting of the burden of proof, and similar procedural safeguards otherwise available to an individual in a court-martial, action will be taken to circumvent the limitations of a judicial proceeding and the administrative discharge route selected as a course of action. Time and time again this has been done so that when objection is made, among other things, to the shifting of the burden of proof or the receipt of evidence or information which is patently objectionable (such as unsworn statements or hearsay evidence), the presiding official of the administrative forum summarily rejects or overrules the objection with a reminder that the individual is before an administrative forum and that the rules of evidence and allied procedures available in a court of law are not applicable to the administrative body. This legislation should forthwith be enacted.

S. 759. *Abolition of summary court-martial.*—In view of the apparent effectiveness of article 15 it is recommended that this bill be enacted so that summary courts-martial will be abolished.

S. 760. *Compulsory process for administrative boards, etc.*—It is urged that this legislation be enacted at the earliest possible time. Throughout the years of practice in this field, a recurrence of the inability to secure significant evidence has been encountered before the administrative forum solely because of the absence of provision for any form of compulsory process. There is no valid objection to the enactment of this legislation.

It is suggested that consideration be given to expanding this legislation to embrace specific provision for pretrial discovery procedures similar to those available under the Federal Rules of Civil Procedures.

S. 761 and S. 762. *Trial of former servicemen, civilian dependents, and civilian employees.*—The objectives of this legislation are clear. It is believed that legislation of this nature would enhance the administration of military justice, and, therefore, that such legislation would be desirable.

I wish to express my appreciation for the opportunity of conveying my views on this most vital and significant legislation.

I do wish to thank you for your time, gentlemen.

Mr. CREECH. Mr. Kabatchnick, Senator Ervin has asked if you object to answering questions at this time, and if not he has directed that counsel proceed with questions.

Mr. KABATCHNICK. I have no objection at this time, sir.

Mr. CREECH. That being the case, there are some questions which counsel would like to pose at this time. Mr. Everett has some questions which he would like to ask.

Mr. EVERETT. Mr. Kabatchnick, with respect to your discussion of S. 760, which appears on the last page of your statement, could you describe the specific provision for pretrial discovery procedures that you have in mind that should accompany the compulsory process?

Mr. KABATCHNICK. Yes, sir. In the average case that has been my experience or that has come to my attention, the individual is served with a notice which may—I have had it run the gamut from merely citations to a paragraph in a regulation, with broad allegations of acts of homosexuality or homosexual tendencies, possession of homosexual tendencies, or unsuitable behavior, to rather specific "on occasion," and I think this would be the minority on occasion, to rather specific allegations of misconduct. It has been my experience that in the average case, the notice may be accompanied by additional documentation in the way of written statements secured from the individual himself, statements secured from other witnesses, references to the record, to the official record, and documents along that line.

Now, the selection of what information will accompany the notice is a judgment which is formed by someone over whom the individual has no control whatsoever, so that you have no specific knowledge of all of the information that might be available. Among other things, you may have an individual, and I have a case in mind where a polygraph examination was conducted and no reference at all was made to the polygraph examination or the results of that polygraph examination having been used to form the judgment that action of this nature would be initiated.

The only action the individual can take, the respondent who has been served with notice, is to make a request, a written request usually, to the recorder of the board or the convening authority, requesting that certain documentation or the specific documentation or all facts be produced. This, the action on whether or not this information will be granted is, on occasion, not even left to the discretion of the recorder of the board. The recorder may feel that he has to go to a staff judge advocate, he may feel he has to go to the convening authority for release of this information, or for a ruling as to whether or not the information in and of itself would be released.

The individual respondent, in other words, must rely on the good graces of the recorder and/or the convening authority as to whether or not certain information will be released to him.

Then you have a situation where a witness known to the Government is maybe not at the specific installation that you are concerned with, and you ask that he be made available, and again, there is left to the discretion of the—it may be the board, the board president—this matter may be ruled upon by the president of the board, it may be acted upon by the recorder, or may even go to the convening authority, as to whether or not this witness is so reasonably available.

Mr. EVERETT. May I interrupt you just to clarify that point?

Mr. KABATCHNICK. Yes, sir.

Mr. EVERETT. When you say reasonably available, this context, you mean reasonably available for questioning before the hearing for discovery purposes, or reasonably available to appear as a witness?

Mr. KABATCHNICK. I have not gotten that far yet.

Mr. EVERETT. I am sorry.

Mr. KABATCHNICK. I had in mind where, first of all, you ask that the witness be made available. There is discretion to begin with as to whether or not that witness is reasonably available. Then there is a question of whether or not he is available for deposition or other discovery procedures. But the problem of witnesses is always a very, very perplexing problem as to whether or not they will be made available. But more important, as far as discovery procedures are concerned, is even the matter of getting the basic raw documentation that you may deem essential to the development of your defense of a case and whether or not this information will be made available is left to the discretion, and purely discretion, of the individual who must make a ruling as to whether it is available or not available. You just do not have any right to demand production of the documentation. And I am not thinking specifically of cases where security considerations are a factor. I do not know if that answers your question.

I would hope that there would be some provision by statute, and I would prefer to see this by statute—I noticed the observation of Senator Ervin the other day where he made the comment that he would prefer, I believe, or the committee would prefer, to have certain of these procedural considerations enacted into statute so that you do not run into the problem of changes in regulation. I think this is a very keen observation on the part of the chairman, that these matters should be formalized in a more permanent form, in the form of statutory authority. But there should be some specific means available to the individual to get this information prior to the hearing.

Along this line, you have the problem which, is equally important, of who is going to make that ruling, whether it will be the president of the board or whether it will be the convening authority. This again is a problem, as I have noted, I believe in my statement, of the board members having access to certain of the information prior to even the convening of the board.

Mr. EVERETT. In this latter connection, do you know of instances where the members of the board had documentation available prior to the hearing or at the hearing, presumably prior to the hearing, which was not made available at any time to the defense counsel, which he did not know of as to specifics, so that in a sense, they were adjudicating the case on the basis of undisclosed information?

Mr. KABATCHNICK. I am trying to search my memory as to specifics. Of course, one of the problems here, Mr. Everett, is the matter of the board members having access to information which you do not know about, such as—I can conceive of security information that would not necessarily come to the attention of the individual concerned or his counsel. What I have in mind is not even information that is not disclosed to the individual. I am thinking of the situation where statements accompany a notice, are furnished to the board before the board even convenes and, certainly, this has to have some effect upon their judgment. They can't just receive this information in a vacuum. Time and time again, you will ask the board members, and I am sure they answer in good conscience, "No, this does not have any effect, I can still make an independent determination on the merits of an

action." But I cannot help but feel, as a practical matter, that having access to allegations or having access to statements which will accompany a notice, in and of itself, has got to have some effect, and I think we can rely on human experience in this area.

This is particularly damaging to an individual where ultimately, a document may be stricken from the record as being prejudicial or certain evidence being stricken as being prejudicial, after the board members have seen it. Then they have to again rely on their good judgment to eradicate that aspect of objectionable evidence from their minds. I just do not feel that this is the way we ought to proceed.

Mr. EVERETT. Now, still continuing with your discussion of S. 760, the compulsory process for administrative boards, in the absence of subpena power, is it not the custom today of the military departments to issue invitational orders for civilian witnesses who are requested by a respondent who might otherwise be unavailable, with some effort made to produce the witness?

Mr. KABATCHNICK. I cannot recall, on the spur of the moment, a case where it dealt with civilian witnesses. I do know that certain boards, and I will say this—and this is why I think the correction boards have done wonderful work. I still harp on the matter of a hearing, but I do know, for instance, that the correction boards do feel that they have, under the authority of the Secretary, to bring anybody in on an invitational order or TDY orders. I cannot recall offhand a case where invitational orders were sent to a civilian witness concerned, but I do know that steps can be taken under correction boards or the discharge review boards to bring people in along that line. I believe that the new DOD directive made some provision along that line. But I think, I still feel, as the chairman has indicated, that regulations can be changed very easily.

Mr. EVERETT. Well, with respect to the subpena power, what controls, if any, should be provided with respect to the issuance of subpenas?

In other words, is there not a danger that the request for subpenas will become a method used by respondent's counsel to harass the Government unless there is come control.

Mr. KABATCHNICK. I almost become incensed when I hear this argument asserted as an objection to the creation of any form of compulsory process. As a whole, I see absolutely no justification to this.

First of all, I believe under the proposed legislation, and under the existing regulations within the various departments, each individual respondent will have counsel and I think that this is a matter of the judgment of the counsel as to whether or not he in good conscience will request a subpena or request by compulsory process witnesses to become available. I do not think the integrity, and I have had the privilege of working with appointed military counsel in these administrative proceedings, and I do not think there is any danger whatsoever of any abuse of this process if it were created. I am convinced of this.

There may be isolated occasions, remote isolated. But I think the gains, the benefit, and the protection of the constitutional rights of military personnel far, far, far outweigh any threat, and that is all it is, or potential threat. And I might point out that the presiding

authority or the convening authority, if there was any abuse of this process, I think could exercise appropriate sanctions upon counsel if there were any threat along this line. I just do not believe that there is—there is no reasonable basis for any concern about abuse of this process.

Mr. EVERETT. Well, Mr. Kabatchnick, in connection with your last comment, when we get into the area of a presiding authority exercising sanctions on counsel, is this not a rather dangerous area, a dangerous precedent that you are setting? Then with respect to the danger of harassment, has not the Court of Military Appeals had cases where rather palpably, requests for witnesses were made to harass the Government?

Mr. KABATCHNICK. As I say, I cannot predict the future with any basis whatsoever. But I just do not feel that there is any—the possibility of harassment, yes. This could happen. I again do not believe that there would be any reasonable—maybe 1 in 10,000 times you will get an overzealous counsel who will feel, "I have to have everybody in the country there to attend the hearing." But I just do not feel that there is any real—there should not be any real concern.

I might point out along this line, I believe that in the new DOD directive, there is provision for requesting witnesses but there is a requirement, as I understand it, that the individual witness who is requested, that there must be some description of the nature of what he is expected to cover in his testimony. I think this is absolutely prejudicial to the rights of a respondent, that he should be required to divulge this.

I realize that in our judicial system, in a *forma pauperis* case, where you want a subpena issued, you have to make some indication of the nature. Now, in my own personal view, I do not think this is fair, especially where conceivably, you have a case where you are not going to put your man on the stand, but you need some other witness to corroborate something in defense of an individual. I think it is unfair and I think it is prejudicial to the rights of an individual to be required to disclose what he wants a witness for.

And bearing in mind that the vast majority of these cases, the very great majority of these cases, are handled by military counsel, I do not believe that military counsel—and I feel confident I can also speak for civilian counsel, the bar as a whole throughout the country—that any counsel is going to use this as a technique to harass the Government, or to bring in witnesses whose testimony is not going to be germane to the matter at issue.

Mr. EVERETT. I would assume, then, that you would also conclude that a requirement of showing or stating what the witness will testify to as used in court-martial and as used in the Federal Rules of Criminal Procedure is prejudicial to the defendant?

Mr. KABATCHNICK. This is just my own personal view, Mr. Everett.

Mr. EVERETT. Now, moving to page 10 of your statement and your discussion of S. 754, administrative separations—procedural requirements, you suggest certain amendments to include six basic requirements, one of which is that the Government would have the burden of proceeding and the burden of proof. Could you describe for the subcommittee the extent to which in officer or enlisted cases under

present statutes and procedures, the Government does not have the burden of proof and the respondent on the other hand does have this burden?

Mr. KABATCHNICK. Yes. If you take, I believe, AFR 36–2, or AFR 36–3, which is a regulation for elimination of officers, this is the pattern throughout the Military Establishment, as I understand it—I just use that as a reference. As I understand the procedure, and it has been my experience in the procedure, a commander will get a piece of information that might be from a civilian police authority, might be from military investigative authorities, of some type of conduct or misconduct or deficiency in performance or traits of character or something like that, along that line, that comes to his attention. The commander must make a judgment as to whether or not he feels there is a sufficient basis for intiating some type of action against the individual concerned; a recommendation of this effect is forwarded to higher authority, and at some juncture, at a higher command echelon, the matter is then referred to a selection board for consideration, a show-cause selection board. That show-cause selection board ordinarily will have a documented file—I can't recall a case which has come to my attention where a show-cause selection board has ever called in any witnesses or anything along that line. But of course, the basic philosophy is to determine whether, from the existing evidence, there is enough to require the individual to meet a board of officers, elimination board, or board of inqury.

The show-cause board having made a determination that there is sufficient evidence, the case then goes to a board of inqury, at which time, the individual concerned is apprised of the evidence and the record—and usually it is the documentary file—is placed in evidence and then the board hears the respondent's presentation. And at the outset of the board of inquiry proceedings, the respondent is advised that he has the burden of proof and the burden is on him.

Now, I just do not feel that the respondent should have the requirement placed upon him. It is an awesome responsibility to be placed in the position of having the burden of showing cause why he should be retained. If in the judgment of a military department there is sufficient evidence to warrant his elimination, I think that the department should be required to proceed and—well, they essentially pro forma proceed. But the burden of proof is placed on the individual and I think that burden rests on the department. This again is my personal view of the situation.

I might point out, Mr. Everett, one thing that I have not mentioned in my statement, which I think is an area which I think warrants some consideration. That is in the matter of the absence of any provision for dispositive motions. This I meant to touch on in my statement specifically. But I do feel that some provision should be made to permit a respondent to resort to dispositive type motions, either before a hearing by a board of officers or at the end of the Government's case. Again, I have in mind a situation where in my judgment, the evidence upon which the Government relies is for one reason, let's say, barred, is not appropriate for consideration. There is no specific provision made for the board of officers or the convening authority to entertain such motions.

Considering the traumatic effect and impact that even the allegations themselves can have upon an individual and his family and his associates, I do feel that some provision should be made for authority, for a convening authority or somebody, to entertain this type of motion.

Mr. EVERETT. May I seek to clarify this a little bit for the record, Mr. Kabatchnick? One of the proposed bills which is the subject of these hearings pertains to pretrial proceedings or conferences in court-martial cases.

Mr. KABATCHNICK. Yes.

Mr. EVERETT. Is it your suggestion that there be some similar type of procedure for the administrative hearings so that——

Mr. KABATCHNICK. Yes, this would be ideal. I might point out along this line that in the civil service system, in the Department of the Air Force, they have a prehearing-type procedure, and it has been very effective in the matter of stipulating evidence, or of a pretrial resolution of evidence. It has been very effective and I think this would also reduce the workload.

Mr. EVERETT. Would not this require in effect having a legal adviser for each board or some law officer, if I may use that term, for each board, who could meet with counsel before the hearing to rule on these dispositive motions?

Mr. KABATCHNICK. That is correct, and you have such a procedure in existence today for all intents and purposes, because if a convening authority initiates a notice of proposed elimination and some preliminary matter comes up and today all you can do is maybe write a letter and say, well, this is objectionable for this reason or this action determining such and so, the board will turn to the Staff Judge Advocate General for advice, or maybe the personnel department will go to the Staff Judge Advocate General for advice, or maybe the regional command; so there is authority for consideration or advice by the convening authority as to how these matters should be disposed of.

But, in other words, there is no formalization of this type of procedure and I think it would save in the long run, in a lot of cases, it would save the Government time, money, and effort, the necessity of requiring him to put on witnesses, to bring in witnesses, to produce evidence. It certainly would relieve the respondent of a great burden upon him.

Mr. EVERETT. Returning to page 10 of your statement and your six procedural requirements that you propose for enactment by statute, the second one deals with provision for the finality of a board's recommendation of retention in the service of the individual concerned.

Now, with respect to the scope of your suggestion, do you mean by this that if a board recommended retention, the Government would have no power to separate the person involved for the convenience of the service or otherwise?

Mr. KABATCHNICK. Mr. Everett, I will answer that, yes. I do not want to go into the specifics because of matters which I am personally involved in at this time. But my answer to that is yes.

Mr. EVERETT. Irrespective of the type of discharge they would give him, the Government could not separate him even with an honorable discharge for the convenience of the Government?

Mr. KABATCHNICK. That is correct; yes, sir.

First of all, I think one point that is being missed here is that supposedly, the board members are senior officers, mature individuals, with great military experience, long military experience, and generally speaking, this is the case. Now, the convening authority has selected these individuals. They are members of the Military Establishment and they have formed an independent judgment in this type of situation, in good conscience, and performing their duties under oath, and there is absolutely no justification in that type of situation, where a board recommends retention, that an individual should then, after going through all this, be subject to ex parte action—ex parte action—by a convening or higher authority that "for the convenience of the Government" an individual would be separated.

Mr. EVERETT. Well, take this case, Mr. Kabatchnick. Suppose, using Air Force regulations, that a man was considered for separation under AFR 39–17, which deals with unfitness, and let's assume that misconduct was the basis of the proposed separation action. Now, in that situation, if the board decided that the man was not guilty of the misconduct and voted to retain him, would the convening authority be precluded from any action to separate this man even though he thought that his effectiveness had been completely reduced by reason of the allegations, even though they had not been proved?

Mr. KABATCHNICK. You are saying under the existing regulation?

Mr. EVERETT. Under your proposal.

Mr. KABATCHNICK. I would say the convening authority would have absolutely no justification for acting in contravention of the rights of the board of officers findings to retain him.

First of all, if I may make just one observation here, the man's efficiency file, using your example, the man's efficiency file, the APR's of an individual, using airmen's performance reports, are made available to the convening authority and usually invariably, without exception, made available to the board of officers so they are considering the efficiency or effectiveness of an individual. Assuming the basic allegation is some form of misconduct, they are considering—in fact, one of the standard items in the notification of proposed elimination, is a man's character and efficiency. So these matters are fully considered by the board of officers.

Mr. EVERETT. With respect to your discussion of S. 753, judicial review of proceedings under 10 U.S.C. 1552 and 10 U.S.C. 1553, I believe you indicated that you did not favor granting powers of review to the Court of Military Appeals. Now, would this mean that the powers of judicial review would remain in the Federal district courts and in the Court of Claims, or do you feel that this is more desirable than centralizing it in the Court of Military Appeals?

Mr. KABATCHNICK. Yes, sir. I do feel that it is more desirable. As you know, until recently—I cannot recall whether it was 1962, 1963, taking military cases, for example, were at the seat of the Government and there was legislation that specifically provided that certain types of cases go into the district courts. This was a great assistance to a citizen, for example, who is out in Idaho or Nebraska or Arkansas, who would not have to travel, so to speak, to Washington to litigate his case. I think that this is beneficial to the individual citizen; also,

I think that the procedures under the Court of Claims as they exist today give a litigant a tremendous opportunity to present his case and his side of the story and to get the relief that he seeks and I think the Court of Claims has proven its worth in this area. I do not—I have the greatest respect for the Court of Military Appeals and its function and I think that even the military departments would like to restrict or minimize the scope of the appellate review by the Court of Military Appeals.

I do feel, the one area where I feel that the statutory authority of the Court of Claims might be of some benefit would be to permit the Court of Claims to remand a case back down to the military department and, specifically to a correction board for further litigation. At this time they do not have the authority and I think this would even there reduce litigation. I certainly hope something would be done to clarify that.

But I wish to point this out: I think that the correction boards serve a tremendous purpose, they perform a tremendous service for our citizenry, whether it is someone on active duty or not on active duty or even to the family of, say, a deceased former member. I think that they have basically done a tremendous job. Where I disagree with them a lot of times is on the matter of being given the right to be heard. I do not think that probably statistically, the number of cases that resort to judicial review is necessarily great in number, considering the thousands or tens of thousands of cases that the correction boards do consider. So that I do feel that in those cases where an individual wishes to seek judicial review, if he has resort to a local district court, this is to his advantage. If he elects otherwise, of course, he has the Court of Claims available to him in that regard. So I think in all due deference to the intent of the legislation, it is my humble opinion that this system essentially should be left intact.

Mr. EVERETT. With respect to the correction boards, your discussion on page 4 and 5 of your statement, where you are talking about S. 747, you propose a summary proceeding whereby the correction board could dispose of an application for relief without granting a hearing.

Mr. KABATCHNICK. Yes, sir.

Mr. EVERETT. I gather that the chief difference between this summary proceeding and the present denial would be that the correction board would, in effect, notify the applicant that it proposed not to grant a hearing, write a brief opinion as to why it proposed not to grant a hearing, and give him an opportunity, to in effect, petition for a hearing and refute the proposed recommendation. Is that about what you——

Mr. KABATCHNIK. To give him the opportunity.

In other words, at some juncture, a determination is made upon review of the record, which is done *ex parte*, that an applicant has not sustained the burden of proof; to wit, furnished evidence to indicate the existence of probable error or material error or injustice, this of course being the standard, which is an awfully difficult standard to apply. Some documentation, some memoranda, has to be prepared for the board's consideration of whether or not error does or does not exist.

Now, I think that it would not create any burden whatsoever except possibly an administrative burden of handling an extra piece of paper,

for the board to transmit to the applicant a preliminary determination or advise of a preliminary determination that this is what is going to go to the board. So that if alone—for instance, if a factual piece of information happens to be erroneous or there is a weak spot in the evidence that the applicant has presented, he can then go out and get additional evidence to plug up a void in the evidence that is available to the board. I think that ultimately, the correction boards would then have the best evidence available to make that preliminary determination as to whether or not the man should be given a hearing.

I realize, and I appreciate the fact, that the correction boards do have cases come to their attention where they are patently without any merit and that any forum in the country, any judicial forum, would agree with them.

But considering the seriousness, the grave seriousness of the nature of the cases that come to the attention of the correction boards, I think that there should be a right to be heard, with this reservation, that a board could say, "We are going to deny your application by a summary proceeding."

This ties in some way with the point I raised before that in the administrative board type of proceeding, discharge type of proceeding, you do not have any preliminary dispositive motion procedure. This is what I have in mind, something so that the man would have the right to be heard, with the reservation that the correction board could make a summary disposition of the case. And if they are wrong, he has the courts available to him. If he is wrong, the correction board was right.

I think—I do feel that this would be a remedy to this. And I assure you, Mr. Everett, that I speak—I do not speak, but I think my views are shared by those members of the bar and even certain of the other service organizations if not all of the service organizations, would agree that the man should have this right to be heard. When you consider the fact that the discharge review boards under 1553 do give a man a hearing as a matter of right, I certainly do not think there is any justification for making a distinction between 1553 and 1552.

Mr. EVERETT. Thank you.

I have no further questions.

Do you have any questions?

Mr. WOODARD. No, thank you.

Mr. EVERETT. Mr. Baskir?

Mr. BASKIR. Has it been your experience that there is any difficulty on the part of civilian counsel in becoming informed of the progress of administrative hearings? Is there any difficulty in obtaining copies of papers, notices, things of this nature?

Mr. KABATCHNICK. You are not speaking of the correction board?

Mr. BASKIR. No, I am thinking of the administrative hearing itself.

Mr. KABATCHNICK. The field board type?

Mr. BASKIR. The field board.

Mr. KABATCHNICK. Your question as I understand is "Does the civilian counsel find it difficult to obtain information on hearings?"

Mr. BASKIR. Many of these things are required to be served on the servicemen. Has it been the practice to serve them also on the civilian attorneys?

Mr. KABATCHNICK. This has been in some areas a problem, but fortunately, I think—well, there has been a statute which was recently enacted, as I understand it, which would cover this requirement that correspondence, where counsel has been designated by an individual, that copies of the designations, interim actions, be served upon counsel. But this has been a problem in certain areas in the past, where the individual is served with the paper and he may be hundreds or thousands of miles away from you and it may require immediate action or there may be a very close timing or a short time interval for making elections of certain kinds. This has been a problem. But I think by reason of the—I do not have the citation in front of me, but in the last session of Congress, I would interpret the provision of the statute I have in mind as requiring the military departments to comply with that statutory requirement of serving counsel with copies of correspondence.

I might say that recently, at least in my experience, recently this has been very closely complied with by the military departments.

Mr. BASKIR. I asked that because the subcommittee has received suggestions, perhaps complaints, that these documents are presented to the servicemen but there is no adequate channel to get this same material directly to the counsel.

Mr. KABATCHNICK. I think this might have been one of my complaints in 1962. But as I say, this situation seems to have been corrected. If it were not by the departments themselves, it certainly may be as a result of this recent legislation.

Mr. BASKIR. I would like to direct your attention to S. 754, which is in the nature of a double jeopardy provision, and which would prevent an administrative elimination based on the same conduct which was the subject of a court-martial, which court-martial did not result in elimination. The Department of Defense has issued a new directive and to that new directive, an amendment, which provides essentially the same thing with the following exception clause: "Except when such acquittal or equivalent disposition is based on a legal technicality not going to the merits." S. 754 makes no exception. I wonder if you could comment on this difference?

Mr. KABATCHNICK. It would seem to me, and this has only come to my attention this morning in the citation that you mentioned, but my initial impression and immediate reaction is that this may be legally objectionable in the nature of being discriminatory. In other words, when a man is found not quilty by a court-martial which has adjudicated the case on the merits, substantively on the merits, this regulation, as I understand it, which you brought to my attention, would bar his elimination.

But in those cases where, for one reason or another, because of "legal deficiencies" or "legal technicalities," this would not preclude the elimination action from taking place, I think No. 1, it would be discriminatory in nature, and No. 2, as a member of the bar, I am very sensitive to this business of legal technicalities. I am no criminal lawyer as far as civilian practice is concerned, or maybe even the military establishment. But it seems to me that we have certain safeguards set up in civilian courts in criminal proceedings to protect the basic fundamental rights of an individual. If one of these is to protect one

by reason of legal technicalities, and it has served and we have been operating under this system for some 200 years, it seems to me this distinction is completely contrary to our Constitution as I understand it. It is certainly discriminatory in nature.

Mr. BASKIR. The directive also provides that "the proceedings of the board will be maintained as prescribed by the Secretary of the military department but as a minimum shall contain a verbatim record of the findings and recommendations."

Can you comment on this element in the directive; whether it is a change in one direction or another from past proceedings?

Mr. KABATCHNICK. This goes back to the comment, and I hope somewhere it won't be lost.

Mr. BASKIR. Page 10, I believe.

Mr. KABATCHNICK. At the bottom of page 9, I refer to the specificity of the definition of the minimum procedural requirements of the rules and regulations to be promulgated by a Secretary. I think again, as I interpret this passage, this would preclude the necessity of a board or an administrative board of maintaining a transcript, a verbatim transcript. In other words, all they would be required to "maintain" would be the verbatim record of findings and proceedings. This could be a one-sheet printed form, which I think is used by the discharge review boards, for instance, under 1553. Their findings, proceedings, recommendations and approval can all be on one piece of paper. Now, I do not know what significance there is to the word "maintain." Are they saying for record purposes, or are they saying maintain during the conduct of the proceedings? This is vague and I do not see anything in the language that you read to me that will require a Secretary or the military departments to conduct proceedings where a verbatim transcript would be made. So many of these actions are subject, or in those actions where it is subject to review, you have to have a record, a verbatim record, to assess the merit, for instance, in a correction board case, to assess whether an error or injustice has been done to a man.

I have in mind one regulation that shocked me. There was a change in the regulation on flying evaluation boards, where there is, I believe, specific provision today—I have not looked at the regulations in the last day or two, or very recently, but I think there was a change, maybe 2 or 3 years ago. But prior to that change, the respondent in a flying evaluation board case was entitled to a copy of the transcript. That regulation was changed and expressly provided that the individual respondent in a flying evaluation board case would not be given a copy of the transcript. I had a case come to my attention—two cases I have in mind—where for a long period of time, the alleged error or injustice did not come to the attention of the individual because he did not have access not only to the transcript of the board, but also to the action of the reviewing authorities.

Now, I cannot recall specifically what provision is made, because for instance, in a flying evaluation board case, the final decision may rest—the board merely recommends and that has to be approved by the convening authority and higher authority.

I think there definitely should be a requirement that in any proceedings—I might point out, this is not even a discharge-type case I am speaking of, directly a discharge-type case. But if a rated officer in

the Air Force is suspended permanently from flying status by reason of an administrative action by an administrative board, to wit, a flying evaluation board, in effect, in my personal judgment, his career is ruined. He is finished. He may survive, yes. He may go on to complete his 20 years of service or 30 years of service. But the writing is on the wall, because every selection board that sees his file sees the code number which indicates on his efficiency report and/or in his form 11, the personal history form, that he has been suspended from flying status. This immediately raises a doubt.

This man's career—he might be a pilot or he might be a navigator and that has been his whole career for 15 or 20 years and all of a sudden, it is over with, he is suspended. Well, what did he do wrong? I think this is a classic example of why legislation of this nature is needed.

Maybe I digressed too far, but I certainly feel that a respondent should have a copy of the transcript. I think he should have a copy of the findings, conclusions and recommendations and I think he should have access to any post-hearing advice that he, the convening authority or any higher reviewing authority has, and I think he should have copies of all of the endorsements which are made by any intermediate commander, until the individual has final action, so his rights can be afforded and he can see what is going on before a final decision is made.

I don't know if that answers your question or not.

Mr. BASKIR. It does, thank you.

Item 3, under your discussion of S. 754, directs its attention to the provision, which I believe is general, that in discharge boards and boards of that nature, strict adherence to rules of evidence is not required. You suggest that there should be some standards as to the degree of relaxation. Would you be specific? Can you be specific?

Mr. KABATCHNICK. If you are going to relax them at all, you have created a problem to begin with. As I have pointed out in my statement, you take an elimination board proceeding, usually, for instance, there is a legal adviser who administers some assistance. But I am getting into other types—I am thinking not only of the administrative discharge board where we have some cause, some discharge for cause. I am thinking of, for instance, the physical evaluation board, or again, getting back to flying evaluation boards. And I include in there the elimination boards. You have laymen presiding. They must make a judgment on—they may be "legal technicalities," but they are not trained in the law. To what extent are these rules going to be relaxed? And invariably, counsel is reminded when he does raise an objection, "Sir, you are not in a court of law. This is not a judicial proceding; we are not bound by the rules of evidence."

Well, how far do you go in relaxing these rules? This is where I am convinced that the rights of individuals have been violated, because there is no uniformity and a lot of times, it is a matter of pure personal judgment and ordinary common sense that a presiding official who is ordered to act as the presiding official must rule upon. And they may come from any walk of life. He may be an infantry officer, an artillery officer, an ordnance officer, a Chemical Corps officer. In the Air Force, he might be a pilot, he might be a bombardier, he may be a supply officer, he may be an air traffic control officer, sitting

as presiding officer at one of these boards that is going to determine whether or not a man's career will or will not be terminated. Yes, they have legal advisers, but in the long run, it is the board's responsibility, the board's as a whole, responsibility subject to the objection of the members of the board, as I believe the language generally goes. That board composed of laymen must rule on the admissibility of evidence, on whether it is hearsay, any type of objection or challenge in the middle of a hearing—something may come up.

I have had this happen, where you may challenge one member of a board in the middle of a hearing and that challenge has to be resolved by maybe two other laymen.

This is a very difficult area and it is a very perplexing area. I unfortunately regret—I am sure that these boards act in good conscience as a whole. We are all human beings and we all have shortcomings.

Of course, in a lot of these cases, the boards—as I say, they have some indication before a board of elimination even starts that somebody has made a prejudgment that this man should meet that type of board. This combined with their ability or inability to discern the propriety of the application of a rule of evidence generally speaking is very little. But I would hope somehow that some standard or guide could be made applicable to these boards insofar as relaxation of the rules of evidence.

Mr. BASKIR. Taking this point and considering it together with other bills now before the subcommittee which would provide for counsel and certain other requirements, many of which are also in the new directive, is it your feeling that the discussion is now directing itself toward providing so many legal protections, so many elements of due process—not that that is necessarily wrong—that this will be creating something very much akin to a formal judicial proceeding, and that this will be hamstringing or throwing out the window the administrative proceeding and all its inherent advantages?

Mr. KABATCHNICK. Your question is are we taxing and unduly taxing the mission of the Military Establishment or the military services in expanding the safeguards which the individual serviceman would have, say, under the existing proposed legislation? Is that your question?

Mr. BASKIR. That is essentially it. What I am trying to get to is that we are creating through these discharge proceedings a system very much akin to what would be present in a court-martial. The general problem is whether to increase the protections of the administrative proceeding or whether to take as an alternative, or as an addition, the philosophy of S. 758 which would merely give the man an election.

Mr. KABATCHNICK. I personally do not—I do not think that, if I understand your question correctly, that giving the election as contemplated under 758 or of demanding a trial would create a burden, either upon the administration of the Uniform Code of Military Justice, or on the other hand, create a burden upon the administrative machinery within the various military departments. I think if I go back to 1962, if I recall correctly, the statistics which were presented to the committee were to the effect that this constituted a very small part of administrative—administrative elimination constituted a very

small part of the overall individuals who are discharged from the service. That in itself, I think, proves that we are not dealing with 25 or 50 percent of the military population. But whether it is one individual or 10,000 or 100,000 or 1 million individuals that we are dealing with, under our form of government, and I say this from the bottom of my heart, if we protect one individual by one law or one regulation, I think that law or regulation has served a useful purpose. And as I said in my statement, or intended—I hope I conveyed this thought—to me, there is no question that the administrative law aspect of our society, is expanding and will continue to expand. And I presume for time immemorial, it will do so, because even when you have so many courts of law, the courts are taxed already. So administrative bodies are going to be used, and administrative bodies are being used. Among other things here, we are dealing with the Military Establishment. But I think you can go from almost the day of birth when a statistic of birth is recorded to the time of death, and the average citizen at some time or another is going to have to go to some type of administrative body, whether it is an unemployment compensation board, or a welfare board, or any type of administrative body. They permeate every facet of our life, if it is a driver's license, is it going to be revoked or not revoked? And within the Military Establishment, you have these various types of administrative boards. But the difference is, you may lose your auto license, but that is not going to leave an irreparable scar on you. But if you have, if you compare it with the value of a discharge certificate and being aware of how sophisticated employers are as to the significance of various types of discharges, there is no comparison. And I think that there cannot be any justification or defense, there is no adequate or reasonable defense to an assertion that this is going to tax the military establishment or the administrative process.

Mr. BASKIR. In sum, then, if I am correct, you feel the approach should not only be to increase the protections of the hearing itself, but also to give an election to a man who has committed an act which is an offense under the code but which it is contemplated should be the basis for a discharge administratively. You would still give him the election as well as give him the protections in the hearing itself?

Mr. KABATCHNICK. Yes, I do not see why any burden is created by this election, and I think that it would serve a useful purpose. There are those cases, as I understand it, in the matter of abolition of the summary court-martial versus article 15. I draw this merely as a comparison. The proponents of retaining article 15 wish to give this election to the individual man. I think since statistics were cited, there was a certain percentage of individuals who were found not guilty as a result of a summary court. But I think that here again, preservation of this election is not going to create an undue burden upon the Military Establishment.

I do not feel in good conscience that any of the legislation here goes overboard in protecting the rights of an individual. I think that generally speaking, I may have some variance with the refinements of the legislation as proposed, but I think essentially, certainly this legislation is long overdue.

Mr. BASKIR. On the matter of abolishing the summary court that you just mentioned, do you feel then that this will perhaps work a

hardship to the individual serviceman who, being faced with a choice of accepting an article 15 or accepting a special court, will have to consider the fact that the special court can give a much more severe sentence?

Mr. KABATCHNICK. This is always a problem. It is the same thing when you are confronted with somebody coming in who has the right to, say, demand trial versus going through an elimination proceeding. Which route do you take?

It is the same thing here. Should I take article 15 or should I elect to go to summary court? The one specific reason that I think the summary court should be abolished is that it leaves a record of conviction which on subsequent employment can harm the individual from an employability point of view. It just came to my attention within the last 24 hours, another member of the bar mentioned to me where an individual was precluded from private employment—not even governmental employment but from private employment—because of a record of a summary court-martial proceeding. I believe on the form 57 in the Government service, there is a specific provision now for identifying a record of conviction by court-martial. I do not think 10 or 15 years ago or maybe even more recently than that, that form was changed. So I think that is the benefit of eradicating that scar on a man's record versus any lessening of the severity of punishment between article 15 and what a special court-martial can hand out.

I think it is important to bear in mind along this line with respect to the abolition of a summary court, the statement of I believe some earlier witnesses from the military departments that in the article 15 situation, you have relatively minor infractions so that you have a "minor infraction" that you are dealing with. Now, if it is a minor infraction, certainly that can be handled by the judgment and the integrity of the commanding officer and obviate this creation of this record of conviction if the man is convicted. So along that line, I do feel that the abolition of the summary court is a worthwhile undertaking.

Mr. BASKIR. Thank you.

Mr. EVERETT. Mr. Kabatchnick, the chairman has asked me to thank you in behalf of the committee for your appearing here at these hearings, for your statement and answering questions, and also to thank you for your cooperation in 1962, when you appeared and gave testimony at the hearings which preceded this legislation.

Also, he requested that we ask you at this time whether you would have any objection to answering any further questions if they are submitted to you in writing? Some may occur to the subcommittee on the basis of your testimony.

Mr. KABATCHNICK. I would have none, sir.

Mr. EVERETT. I believe there are no further witnesses at this morning's session. The chairman has asked that we announce that the subcommittee will be recessed until 3 p.m., when it will resume hearings, unless at that time there is some objection to the subcommittee's sitting by reason of the session on the floor.

(Whereupon, at 12:45 p.m., the subcommittee recessed, to reconvene Thursday, January 27, 1966, at 10:30 a.m.)

(There being objection to the meeting of the subcommittees, the hearings were recessed, subject to the call of the chairman.)

MILITARY JUSTICE

TUESDAY, MARCH 1, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND
SPECIAL SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin and Javits.

Also present: Senator J. Strom Thurmond of South Carolina.

(There was a brief off-the-record discussion before the subcommittee went on the record.)

Senator ERVIN. We will proceed.

Our first witness is Robert E. Quinn, Chief Judge, U.S. Court of Military Appeals. Judge, it is a pleasure to welcome you here.

Judge QUINN. Mr. Chairman and members of the subcommittee it is a pleasure to be here.

I have a prepared statement and would like to submit it to the committee and unless the committee desires me to read the statement—may I place it in the record? In the interest of time it would be just as well to submit it for the record.

Senator ERVIN. We will leave it up to you—if you would rather submit your statement we will put it in its entirety into the record immediately after your testimony.

STATEMENT OF ROBERT E. QUINN, CHIEF JUDGE, U.S. COURT OF MILITARY APPEALS, WASHINGTON, D.C.

Judge QUINN. I am in agreement substantially with all the bills prepared for your consideration of those bills. I think they are a step in the right direction. I have indicated that in three or four instances I thought they should apply in time of war as well as in time of peace.

With those amendments I would be in hearty agreement with all of the proposed amendments to the Uniform Code of Military Justice.

Senator ERVIN. Judge Quinn, in this connection I have heard too much of persons in the military suggesting that the Uniform Code of Military Justice should be suspended in theaters of operation during times of war.

Do you have any comments on that?

Judge QUINN. If I may digress a minute—I see no need for any suspension. I think in time of war the need for protection is more necessary than in time of peace.

I think it is a great mistake to suspend it and I see no necessity to suspend it. It worked during the Korean war and it works during the war in Vietnam and I am quite sure it would work under any emergency that might be encountered in the future.

Senator ERVIN. Let the record show that Judge Quinn's statement will be printed in full in the body of the record at this point.

Judge QUINN. Thank you, sir.

(The statement of Judge Robert E. Quinn follows:)

STATEMENT OF HON. ROBERT E. QUINN, CHIEF JUDGE, U.S. COURT OF MILITARY APPEALS, REGARDING PROPOSED LEGISLATION ON CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL

Mr. Chairman and members of the committee, at the outset, I commend the respective subcommittees conducting the joint hearings on the bills for their searching inquiries into this vast and important field of law. I commend them also for the monumental program of improvement they have recommended. If the work of all the subcommittees of Congress is as expert and as fruitful as the work of the subcommittees that have prepared the bills under consideration, the people of the United States may take comfort in the knowledge that Congress will continue to function effectively and efficiently in this age of multiple and complex legislation.

AS TO THE BILLS

S. 745. To provide for military judges for general courts-martial: The bill is generally desirable. A number of provisions may need further consideration.

a. Assignment by the Judge Advocate General: It would appear desirable to allow the Judge Advocate General to delegate responsibility to one of his principal assistants.

b. Eligibility: Extend ineligibility in a particular case to appearance as a witness for the defense, as well as for the prosecution, as now provided.

c. Eliminate consultation with court members on the form of findings as unnecessary and inconsistent with general criminal practice.

d. Eliminate the "time of war" exception as to assignments of nonjudicial duties. The need for a full-time judge is perhaps greater at that time, than in peacetime, because of the probable increase in the caseload. Also, the provision raises a serious question as to its applicability during a time when Congress has not actually declared war, as provided in the Constitution. See *United States* v. *Ayers*, 4 USCMA 220, 15 CMR 220. Under the *Ayers* case, the present situation in South Vietnam may be "a time of war."

e. As to the amendment of article 66: Grounds for disqualification of a board of review member might be enlarged to allow a party to move to disqualify the member for bias or prejudice or any other reason that would insure that the proceedings before the board of review be impartial. See Feld, A Manual of Courts-Martial Practice and Appeal (New York: Oceana Publications, 1957).

S. 746. *To provide for a Judge Advocate General's Corps for the Navy.*—This provision is generally desirable. In my opinion, the establishment of a separate Judge Advocate General's Corps will result in more efficient and effective legal service to the Navy.

a. If all law specialists of the Navy are redesignated judge advocates, the change will have to be reflected in the Uniform Code of Military Justice provisions referring to Navy law specialists, e.g., article 1(13), article 6(a), and article 27 (b) (1) and (c) (2).

b. A similar change may be necessary as to the term "legal officer," as it is used in the Navy.

S. 747. *Department of Defense Board for Correction of Military Records.*—This provision seems generally desirable.

a. It may be desirable to provide that the board may function in panels of three. (See S. 748, Court of Military Review.)

b. Instead of providing for finality of decision by the board, it would seem desirable to allow an appeal from an adverse decision to the U.S. Court of Military Appeals, by both the individual and the Secretary of Defense, on the same basis as proposed in S. 753 (appeals to U.S. Court of Military Appeals from decisions of Boards for Correction of Military Records).

S. 748. *To provide for courts of military review.*—The bill is generally desirable.

a. Qualifications of judge.—The 6-year practice provision may need clarification. In its present form it suggests that only experience as trial or defense counsel in courts-martial is qualifying.

b. Tenure of civilians.—The provision is desirable, but it seems incompatible with the limited term provided for the judges of the U.S. Court of Military Appeals. The term of the latter should be changed to life tenure.

c. Change of name. To more clearly differentiate the Court of Military Review from the U.S. Court of Military Appeals, and to avoid confusion of the bar and the public, it may be desirable also to change the name of the latter tribunal to the U.S. Supreme Court of Military Appeals.

S. 749. *Reduce command influence.*—The purposes of the bill are commendable.

a. The danger of overly broad language. The present phraseology seems to prohibit criticism of counsel by the staff judge advocate for such unprofessional conduct as inadequate legal research and insufficient preparation for trial.

b. If article 37 is to be effective as a deterrent against improper command influence, it should perhaps be framed as a punitive article, expressly providing that wilful conduct of the kind enumerated shall be punished as a court-martial may direct.

S. 750. *Limitation on bad-conduct discharge and discharge less than honorable.*—The bill is commendable. Again, however, I recommend elimination of the "time of war" exception. See comment *d* on S. 745. It is my opinion that the exercise of military power in time of war tends to be more arbitrary than in peacetime. In certain areas, the tendency may perhaps be necessary. However, the Uniform Code of Military Justice was occasioned by unacceptable practices developed during World War II.

S. 751. *Petition for new trial.*

a. The extension of the period within which to petition is desirable.

b. The grounds for the petition might perhaps be enlarged to include any reason that would promote the interest of justice. See my dissent in *United States* v. *Bourchier*, 5 USCMA 15, 17 CMR 15.

S. 752. *Limitation on bad-conduct discharge.*—The basic proposals are desirable.

a. Again, recommend elimination of the "time of war" exception, for the reasons set out in comment *d* on S. 745, and the remarks on S. 750.

b. The amendment of article 26 should provide that the law officer is ineligible to sit if he is a witness for either the prosecution or defense.

c. I think it preferable to eliminate the closed session conference with the court members on the form of the findings. The practice would thus conform to that in the Federal courts.

d. In making the law officer's ruling on mental responsibility of the accused subject to objection by the court members, I would add the words "on the merits" to distinguish that situation from one affecting the accused's competency to stand trial.

S. 753. *Jurisdiction in U.S. Court of Military Appeals to review decisions of boards for correction of military records.*—The proposal is generally worthwhile. In the interest of conserving judicial time and expense, I recommend elimination of the provision limiting the action of the U.S. Court of Military Appeals to issues certified by the Secretary. On review by the court, other issues may appear which are dispositive of the case. The court should be empowered to deal with these issues.

S. 754. *Due process in administrative actions.*—Again, I question the advisability or desirability of excepting the new protections accorded by the proposed bill "in time of war." See my comments on S. 745, 750, 752.

S. 755. *Prohibits efficiency rating of member of board of review by another member.*—This provision seems generally desirable, and is in accord with the views expressed by the U.S. Court of Military Appeals in *United States* v *Deain*, 5 USCMA 44, 17 CMR 44.

S. 756. *Broaden constitutional protection against double jeopardy.*—I recommend that the protection be extended to provide that no discharge other than honorable be given, if based upon alleged misconduct for which the individual was previously tried and acquitted in a *civil court*, as well as in a court-martial. The extension is especially desirable in light of S. 758 which authorizes an undesirable discharge when the individual is convicted by a civil court.

S. 757. *Pretrial conferences by law officer.*

a. This provision seems too broad. It appears to give the Government the right to obtain preliminary rulings on all evidence it proposes to introduce. I prefer to see adoption of the practice in the Federal district courts, that is, give the accused the right to move before trial to suppress evidence obtained as the result of illegal search or seizure. Perhaps, the Federal practice can be extended to provide for preliminary hearing on the admissibility of a contested confession.

b. The proposed bill provides that the law officer conducting the pretrial conference can change his ruling at the trial. The language seems to limit the right to the particular law officer who presided at the conference. There might be a change in law officers between conference and trial; consequently, it would be desirable to provide merely that the conference ruling can be changed by the law officer presiding at the trial.

S. 758. *Providing for right to request trial by court-martial when faced with separation with less than honorable discharge.*—The proposal is generally desirable, subject to the following:

a. A conviction in a civil court should be a basis for an undesirable discharge only if the conviction is for a serious crime. This might perhaps be defined as one which, if tried by a court-martial, would subject the individual to a punishment extending to a punitive discharge and confinement at hard labor for 1 year or more.

b. Waiver of the right to plead the statute of limitations should not result if the individual is tried and acquitted of misconduct in a civil court. See comment on S. 756.

c. Excepting the protection of the provision "in time of war" should be deleted.

S. 759. *Minor offenses; eliminate summary court-marital.*—The objective is desirable.

S. 760. *Compel attendance of witnesses (art. 46).*—The proposals are generally desirable. However, it would appear that some protection ought to be accorded a witness. The Uniform Code of Military Justice operates worldwide. A witness ought not be required to go across the country or to an outlying possession for the small witness fee that is usually paid. Perhaps, the statute should limit the compulsory feature to witnesses within 200 miles and located in the same State or Territory in which the subpena is returnable, rather than have the matter prescribed by regulations.

S. 761. *Liability of discharged personnel.*—This is a desirable objective.

a. There is, however, no useful purpose served in subjecting a discharged serviceman to a Federal court trial for a purely military type offense, such as unauthorized absence (if the table of maximum punishment is suspended, the offense is theoretically punishable by confinement at hard labor for life) or disobedience to a superior officer. In my opinion, the offenses should be redefined.

b. The discharged serviceman should not be tried if he was previously tried for the same offense in a foreign court, as well as in a court of one of the United States. This addition would be consistent with the double jeopardy provisions of existing Status of Forces Agreements.

S. 762. *Subjecting civilians to trial in U.S. courts for violations of Uniform Code of Military Justice outside the United States.*—The objective is desirable, but I have serious reservations as to its scope.

a. The class of offenses to which the bill applies should be materially narrowed. For example a Federal court should not be burdened with trying a drunken driving case (art. 111, Uniform Code of Military Justice) or punishing a civilian for being an accessory after the fact to an unauthorized absence (art. 78, Uniform Code of Military Justice).

b. Subjecting a civilian to the crimes and offenses provision of article 134, Uniform Code of Military Justice, seems unnecessary. If the crime is one of extraterritorial applicability, the wrong doer is already subject to the statute; if the statute is not one of extraterritorial application, then the act should not be

made criminal by article 134, and thereby materially alter the traditional American approach to criminal conduct.

Mr. CREECH. Judge Quinn, I notice on page 2 of your statement that you suggest—enlarging the grounds for disqualification of a board of review member. Considering S. 748 which would provide for these courts in more or less of an appellate court under the Uniform Code of Military Justice—and passing over your comments on that bill—

If this change were enacted would you still recommend an enlargement of the grounds for disqualification, or should the disqualification be based on the same principles as apply in ordinary civil courts?

Judge QUINN. I think perhaps it should be based on the same principles as in ordinary civil courts, Mr. Creech.

Mr. CREECH. Sir, you state with regard to S. 746 that in your opinion the establishment of a separate Judge Advocate General's Corps will result in more efficient and effective legal service to the Navy.

I wonder if you care to expand upon that statement.

Judge QUINN. Mr. Creech, it seems to me that the lawyers in the Navy are desirous of doing legal work and as far as I know, almost every lawyer in the Navy is in favor of a Judge Advocate's Corps.

It has worked well in the Army. The Air Force officers apparently feel that they do not want to separate—that they have the equivalent of a corps now.

Certainly, the lawyers that I have anything to do with in the Navy for many years have been in favor of a corps for the Navy. It seems to me that qualified lawyers should be used for legal work.

I was a deck officer in the Navy. I qualified under the law to take charge of a battleship, but I was not capable of doing it; and I do not think the Navy lawyers are really trained to do anything except legal work, for the most part.

In an emergency, lawyers can do many things, generally speaking. It seems to me, however, that their work should be confined to legal work of one kind or another. Therefore, I think, there should be a Judge Advocate Corps for the Navy.

Mr. CREECH. On page 3, S. 747, I note you say it would be desirable to provide that the Defense Board for Correction of Military Records under this bill function in panels of three.

I wonder if you would care to expand that statement.

Judge QUINN. The volume of work is sufficient that perhaps they would function more effectively if they were able to sit in panels of three—as do the Court of Appeals in the District of Columbia and the courts of appeal in many circuits of our country.

I think they would perhaps be able to do their work with greater dispatch and with greater efficiency; and that is why I suggest that I thought they should be able to sit in panels of three.

Mr. CREECH. You feel by requiring that the board be composed of as many as nine members that this is an inordinately large number and would cause the board to be less efficient.

Judge QUINN. I would think so, definitely.

Mr. CREECH. In your view limiting the membership to three members could be the ideal number.

Judge QUINN. It would.

Mr. CREECH. Sir, moving to S. 748 you refer to qualifications to provide for courts of military review.

Would it be preferable to leave the qualifications to the Secretary, defining only the general language to the effect that, of course, high-caliber, legal personnel are required?

You point out that the 6-year practice provision may need clarification and I wonder if you feel that it would be desirable or preferable to leave legal qualifications to the Secretary of the service, requiring only that high-caliber legal personnel be required.

Judge QUINN. I certainly feel that the highest caliber gentlemen should compose those boards of review. I think it would be well to leave this to the discretion of the Secretary of Defense, Mr. Creech.

Mr. CREECH. I notice also in speaking of the tenure provided that you indicate that you feel that the tenure is incompatible with that provided for the judges of the U.S. Court of Military Appeals and I wonder if you feel that on both the Court of Military Appeal and this proposed new court that the tenure should be based on good behavior or do you care to expand that statement?

Judge QUINN. I think it would be well to have tenure based on good behavior. I think it was a great mistake as far as the military is concerned to delete terms providing for good behavior.

As the bill for the Uniform Code orginally went through the House of Representatives it provided that judges of the Court of Military Appeals would serve during good behavior. When it went over to the Senate, apparently there was some question as to the composition of the court. I am quite sure the discussion at that time indicated it was purely a military tribunal and that political hacks might constitute it.

After some discussion the term was cut to 15 years—with the first members serving 5, 10 and 15 years. That change has caused many difficulties during the course of the last 15 years and I think it was basically a great mistake to make it. Since that time, of course, the House of Representatives has again put through bills providing for tenure during good behavior, but the bills have never been considered by the Senate.

I think it is a great mistake. I certainly think the other Federal courts rather look down their noses at the Court of Military Appeals, and are inclined to think that it is not a court in every sense of the word.

The Court of Military Appeals deals with the lives and the fortunes of the flower of our American manhood—in other words, the Army, the Navy, the Air Force, the Marine Corps who guard our lives and liberties. Our work at the court is concerned solely with the lives and fortunes of those men.

While we do not deal in billions of dollars, we do deal in things that are more precious, in my opinion. I think our court should have equal standing with other Federal courts of the United States.

Mr. CREECH. With regard to the provision of S. 748 pertaining to membership on the Courts of Military Review—of course it provides that any commissioned officer shall be appointed for a term of 3 years where with a civilian appointed to a court with civil service regulations which would be the effect of good behavior—which it sees fit here for serving with good behavior.

Do you feel, sir, that this will cause any particular problem to have the civilian serving under one criteria, whereas the duty for the military personnel is for only 3 years?

Judge QUINN. I think it would be preferable for both to have the same criteria apply to them, Mr. Creech.

Mr. CREECH. Do you foresee any problem in adjusting this so that the legal officers who are appointed from the military still remain in the military service and yet be in different status from that of civilian members?

Judge QUINN. I think it would be more realistic to require this separation of the members of the board of military review. It seems to me no insurmountable difficulties in letting part be civilians and part military will arise.

Mr. CREECH. Sir, in regard to S. 749 concerning the reduction of command influence you suggest making the exercise of command influence a part of article 37 of the Uniform Code of Military Justice.

The subcommittee has been told that as a practical matter it would be difficult to bring about a prosecution.

Do you think this is necessarily true?

Judge QUINN. No, I do not. It seems to me there could be prosecutions. There haven't been any, although we have had cases of command influence in the past. I think it has been eliminated substantially, but there are still some cases of command control at the present time.

There should be prosecution for a violation of article 37. That is the reason the article was put in the Uniform Code of Military Justice and there is no reason to ignore it. I do feel, however, Mr. Chairman, and Mr. Creech, that command control has been largely eliminated.

Mr. CREECH. The subcommittee has been told, Judge Quinn, that this is the case, that it has been largely eliminated though I believe that there have been cases and there are one or two cases pending before your court at this time concerning command influence.

Am I correct?

Judge QUINN. That is correct.

Mr. CREECH. Although it is largely eliminated—and perhaps the cases have been insignificant in number as compared to other cases, in the administration of military you continue to receive cases concerning command influence.

Is that correct, sir?

Judge QUINN. Yes, we do, not very many but there are still some.

Mr. CREECH. Sir, one of the issues which the subcommittee has been very much concerned about—as you know—is the matter of granting legal review of administrative discharges and S. 753, of course, will amend article 67 of the Uniform Code of Military Justice to allow the new Uniform Code of Military Justice to review results of military board decisions in the form of an appellate tribunal—on page 7 of your statement, sir, in commenting on this I believe it is your position that this would involve additional burden on the court and I wonder, sir, if you would care to expand on that statement.

Judge QUINN. Naturally it would require time and effort on the part of the court. But, personally I believe it would be a good thing. I am not so sure that my distinguished colleagues would agree with me in this matter, but I see no reason why we should not make that

kind of a review. It is possible we would have to have some increase in the staff to assist us, but I certainly believe that the penalty that goes with a dishonorable discharge, bad conduct and undesirable discharge is of sufficient gravity to warrant a judicial review.

I have young men coming to my office day in and day out to tell me how difficult or impossible it is to get a job with any substantial concern because they have a bad conduct discharge, undesirable discharge or dishonorable discharge. Perhaps they should be penalized for getting themselves into a situation which requires that type of discharge. Although undesirable discharges are given administratively, they have severe penalities, and it seems to me some judicial review is necessary.

As far as I am concerned personally, Mr. Chairman and members of the subcommittee, I certainly would be willing to undertake that review if that is required of us.

I think my colleagues might be a little skeptical about our capacity to discharge the added responsibilities. I think we can do it and do it satisfactorily.

I would be willing to take responsibility.

Mr. CREECH. The Department of Defense has suggested that the burden would be very heavy, perhaps some 15,000 cases annually might be involved. What services exist for lightening the cases such as petition under present language of the bill?

Is there anything to prevent repeated petitions which would be overburdening the court.

Judge QUINN. I think it could be limited to good cause shown. We would have to examine the record to determine whether or not there was good cause shown.

Many things seem to be different from what they are on the surface. I remember when President Truman asked me to take this appointment. He said. "This is an impossible job. There are 8,500 cases staring you in the face, and no tribunal can ever get square with the board." We are square with the board.

We have no backlog. We have discharged our responsibilities. We are up-to-date with our calendar. While this added review might seem to be a large burden, I have no doubt we could discharge it if given the proper assistance.

Senator ERVIN. Someone who testified previously said all of these cases would be subject to review. But as a practical matter don't you agree with me that a very substantial percent of these men who were given less than honorable discharges might feel that they got off with rather light punishment.

In addition, at the administrative board they want the Secretary to have some review made.

Judge QUINN. We agree with you.

Senator ERVIN. Just from the standpoint of the administration of justice, a comparatively smaller percentage of cases which were disposed of at the trial court ever reach the appellate court.

Judge QUINN. Yes, that is very true.

Senator ERVIN. And that is the basis for the view that there will be any great difference in this respect in connection with less than an honorable discharge given by an administrative board and the administration of justice generally.

Judge QUINN. I would agree with you.

Senator ERVIN. I feel that those making those comments were conjuring up some ghosts that do not really exist.

Judge QUINN. I am inclined to think so. I do not think it would be an insurmountable burden for the court if Congress saw fit to add review of these discharges on the petitions for good cause shown.

Senator ERVIN. There is very little difference in it after punishment is received—there is very little difference between a dishonorable discharge given as a result of a court martial and the ultimate result of any discharge given by administrative process of a nature less than Honorable, isn't there?

Judge QUINN. I would say there is very little difference. As far as the civilian's ability to get a job, I would say there would be no difference.

Mr. CREECH. Judge Quinn, moving on to page 10 of your statement, sir—with regard to S. 758—current regulations restrict discharge for civil court conviction to matters which involve moral turpitude and the like—I see you recommend for confinement for 1 year or more as a punitive discharge.

Would you care to expand as to why you prefer this.

Judge QUINN. That would be a felony. In other words, I think it should be a felony rather than a minor misdemeanor to justify that action.

I don't think the traffic offense or other minor offenses should be the basis for any undesirable discharge. If the conviction is for a felony that might be a sufficient justification.

Mr. CREECH. Would you tell me, sir, where in that language it should specify then the intent of the 1 year punishment?

I realize that when you talk about discharge under UCMJ the conviction under states in which the statutory requirement with regard to felonies, misdemeanors differ—would you feel it reasonable to stipulate felonies rather than this limitation you specify here?

Judge QUINN. It seems to me that perhaps it would be preferable as a limitation. I think it amounts to the same thing, Mr. Creech.

(At this point Senator Javits enters the hearing room.)

Mr. CREECH. With regard to your comments on S. 760, on page 11, the need for protection of witnesses—do you think this protection is needed for others—military as well as civilians, and how should the case of a witness be handled who is more than 200 miles from the trial.

Should they be given larger witness fees?

Judge QUINN. For civilian witnesses, you would have to pay their expenses. I don't think it fair to have them come from more than 200 miles for the ordinary witness fee.

As far as the military witnesses are concerned, I don't think this is a problem. The military can supply transportation or can give them orders to come wherever they like.

Mr. CREECH. On the matter of administrative discharges the bill takes a number of different approaches.

First, they seek to add procedural protection to the hearing process.

Secondly, they allow the election of a trial which would contain additional protection.

Thirdly, they provide for legal review by a court of military appeal.

Do you regard these approaches as complementary? Or are all three necessary? Or if one or two is to be selected on what basis should they be selected?

Judge QUINN. I think they complement each other. I think generally speaking that a man who is going to be given a discharge of that nature should, under ordinary circumstances, be given the right to elect to either take a trial or the discharge after he has had proper legal counsel. I think in addition to that, he should be given the right to judicial review.

I think one protection complements the other; and all three are desirable.

Mr. CREECH. Sir, the representation has been made to the subcommittee with respect to procedural protections proposed for administrative hearings; that there is an advantage in having personnel in administrative actions as much advantage will be lost by incorporation of legal technicalities and the end result would be essentially identical systems for misconduct—the court and the board—and this is not a desirable thing.

Would you care to comment on this assertion?

Judge QUINN. I would be reluctant to accept that approach. It doesn't sound sensible to me.

It seems to me that all the protection that can be afforded to these young men should be given to them. They are facing a very serious situation. It seems to me that if indigent prisoners are entitled to counsel, and if we are to go along with the mandate of the Supreme Court we ought to give the same protection to the young people in the military service.

Senator ERVIN. It has been suggested by some of the witnesses that there should be a condition precedent to the power of the armed services to issue an administrative discharge less than honorable.

One of the conditions should be that the servicemen have some benefit of advice and counsel as to the consequences of their action before being given a discharge without these proceedings. He ought to sign a waiver which manifests his understanding of his rights and that he waives everything and is willing to accept the discharge.

I impart from your testimony that you would think some such requirements should be a condition precedent to the granting of an administrative discharge of less than honorable character.

Judge QUINN. I think it is a very serious consequence—a discharge of this character.

I agree that no young man should be required to accept an undesirable discharge unless he knows exactly what he is doing at that time. I don't think it is a fair thing to do.

Senator ERVIN. He ought not to be discharged and given a less than honorable discharge by administrative process unless first he is given a notice of the reasons which are assigned for possible action and the opportunity to receive advice from the military lawyer or, if he wishes, from a civilian lawyer of his own selection. After receiving such advice and being acquainted with his rights and the nature of the possible charge against him, he may then waive the right to resist such discharge.

Judge QUINN. I agree with that wholeheartedly.

Mr. BASKIR. The subcommittee has been informed about the Kitchen case, which I believe was before the court recently. This was evidently a quite serious case of command influence. I believe I am correct that you did find cause to send the case back.

Evidently from the information received by the subcommittee no disciplinary action was instituted—or at least the disciplinary action never came to the attention of this subcommittee.

Do you think that a punitive article in the code specifically on the subject would result in very many courts-martial?

Judge QUINN. I cannot discuss any case that might be coming back to the court but as far as I can see, it would result in few cases—I would say very few. We have had none up-to-date although there have been instances of command control.

As I have said, I think it has been substantially eliminated but we do find some cases where it still obtains. I do think if a deliberate attempt to exercise command control in any service is found there should be prosecution for it. Just because a general or admiral commits the offense, should not make him any the less amenable to prosecution than a private.

Mr. BASKIR. The effect of making violations of article 37 a court-martial offense would have a deterrent effect—would that in large measure be valid?

Judge QUINN. I think it might have.

Mr. BASKIR. S. 753, which has to do with the jurisdiction of the Court to review administrative discharges—on page 2 of that bill—it refers to review of all cases before a board established under sections 1552 and 1553.

The language apparently does not limit review only to discharge cases.

Do you believe the bill should be changed only to deal with discharge cases?

Judge QUINN. I would think it should be limited to that.

Mr. BASKIR. There is no need that you see for other kinds of cases that come before the board?

Judge QUINN. I am not an expert in that field. I am not qualified to answer the qeustion.

Mr. BASKIR. It has been suggested that perhaps these cases should be limited to those certified by the Judge Advocate General because of the burden on the Court of numerous petitions by the applicant. But you suggest it should be eliminated.

Do you believe that would be necessary because of the language that appears on page 7, sir?

Judge QUINN. I am just reading it——

In the interest of conserving judicial time and expense, I recommend elimination of the provision limiting the action of the U.S. Court of Military Appeals to issues certified by the Secretary. On review by the court, other issues may appear which are dispositive of the case. The court should be empowered to deal with these issues.

I think they have said just the reverse of what you have indicated Mr. Baskir.

Senator ERVIN. I want to see if I interpret your previous testimony correctly——

Do you feel that the determination of whether there is good cause to review a particular case should be decided by the courts?

Judge QUINN. Yes, I do Senator.

Senator ERVIN. I think you would say that the right to petition for review should be made by the party affected as well as by the Secretary or some one acting for the Secretary.

Judge QUINN. I would say petitioner should have some rights; and that the court should determine whether or not there is good cause, not the Secretary.

The bill provision is in line with the suggestion by some of the Judge Advocate Generals in the earlier days of the court's existence, that they should be able to determine what good cause shown meant. That could have destroyed the court. The court has to determine what good cause is.

Senator ERVIN. In my opinion, and I think your views coincide with mine, the right to petition for review in a particular case should be granted in any event.

(Senator Thurmond enters the hearing room at this point.)

Senator ERVIN. I think such right is absolutely essential to the administration of justice.

Judge QUINN. That is right, Senator, that suggestion had been made.

Senator ERVIN. I am sorry—I attributed it to you.

Judge QUINN. I just made reference to it.

Mr. BASKIR. S. 758 was discussed a moment ago. It gives an election to a man about to be administratively discharged—a choice of electing to have a court-martial.

In earlier testimony a certain number of cases were referred to in which it was felt that perhaps this election would not be practicable; certain cases such as sex perversion—in which it would be impossible to get any testimony because the witnesses would be reluctant to come forward. There are other cases in which the individual had a long chain of petty offenses which indicated that he was not fit for military service—but none of which would be serious to warrant discharge under the code. There are other instances which because of certain legal technicalities prosecution would not be successful.

If a man demonstrated that he was not fit for military service would you suggest or would you approve of exceptions being written into the bill, S. 758, to cover the cases such as I just mentioned?

Judge QUINN. I think where a man has two left feet, or probably is unable to become a good soldier or a good airman or a good member of the naval service that perhaps the service should be able to give him some kind of separation, but I do not think he should get an undesirable discharge. I think he should have some election—some system should be worked out to give him a separation which would carry no unfavorable connotations.

Mr. BASKIR. In all these cases where the service record did not warrant an undesirable discharge——

Senator ERVIN. Would you yield to Senator Javits?

Mr. BASKIR. Yes, sir.

Senator JAVITS. Judge Quinn, thank you very much. I note with the greatest of interest the fact that the judges are here who happen to be the men whom I served in the House and the Senate.

I am very glad to see them and I am very pleased to see the interest directed toward our committee for bringing about these hearings which I think is very richly deserved.

You are on a subject which interests me and I would like to direct your attention beyond the legal side.

My experience as a legislator and attorney general of my State indicates that there is nothing worse than a discharge other than honorable. It is worse than punishment, than a jail sentence. A man can get over having been in a stockade for a time if it is within reason.

But a dishonorable discharge really hurts.

If we talk about billions of dollars that is one thing—I hope Judge Quinn that in your evaluation of what needs to be done and in your recommendations of what we ought to do in the law that you will give that the utmost consideration from the point of view of human experience and I suppose you would know as much as anybody on earth that it is a discharge other than honorable that causes a man to be ashamed of his record and affects everything he does in life.

This really is the worst punishment you could give him, far worse than a jail sentence.

Judge QUINN. I am in complete agreement with you, Senator Javits.

Senator JAVITS. I assume in your recommendations you would have placed that vital essential upon the administration of this power.

Is that correct generally?

Judge QUINN. I am quite sure that my written statement supports your observation, Senator.

Senator JAVITS. Thank you, very much. Basically in those instances which have been suggested where S. 758 would not work these were all instances of conduct where it was felt that a man's record would not warrant an honorable discharge.

It was suggested in these cases that an undesirable discharge should be allowed and election for court-martial should not be allowed.

Judge QUINN. I disagree; if he is given an undesirable discharge he should have the right to stand trial.

Senator JAVITS. The man should get a dishonorable discharge if he prefers not to have a court-martial.

Judge QUINN. I would be reluctant to hand out honorable discharges. I think an honorable discharge connotes honorable service in one of the military forces. A man, however, could be separated from the service without an undesirable discharge or discharge other than honorable, where the significance and connotation of undesirability would not go with it.

I think if the services are administratively going to give an undesirable discharge the individual should have the right to elect a trial if he saw fit to have it and that he should have proper legal advice before he is required to make a decision.

Senator JAVITS. May I identify myself with that. I am so pleased to hear you say that—that is the only way to do it.

Senator ERVIN. Judge, I believe you and I would agree with the military that no man should be entitled to receive an honorable discharge unless the service he has rendered has been in an honorable manner.

Judge QUINN. Yes.

Senator ERVIN. The military takes the position—and I think it is very sound—that one of the greatest distinctions a man can have in civilian life after he leaves the service is the fact that he receives an honorable discharge. That is as high a badge as the military can give a man notwithstanding the medal of valor for fine service.

Judge QUINN. It is a mark of distinction in my opinion.

Senator ERVIN. I think if we could struggle ourselves with all the circumstances that existed at the time that President Truman told you that you had undertaken an impossible task, we would have to agree with President Truman that there were many factors that made this so.

In the first place, legally trained people have the tendency—I am conscious of it myself—to have a vested interest in the status quo, whatever it may be.

The military have been handling all of the problems themselves for generations in this country.

You have won the complete confidence of the country and you have also made the people very confident, not only in the work of the Court of Military Appeals but also in the administration of justice within the military establishments.

You have removed the need for the existence of a court of military appeal and have removed any basis for the contention that in the military justice was not justice.

I think you and your associates deserve the thanks of the American people. I for one have always been under the opinion that those who exercise judicial function and decide matters arising under the Constitution or laws passed by the Congress pursuant to the Constitution and under the treaties should serve during good behavior.

I think the Constitution meant that, and I am an advocate of making that provision of the Constitution effective in military appeals as well as in other courts.

I trust we will get the Senate to go along with the House in that matter.

Judge QUINN. I thank you very much, Mr. Chairman. I have two distinguished associates—Judge Kilday and Judge Ferguson. They are not only distinguished gentlemen, but they are hardworking men and have contributed to the success of the administration of military justice.

Senator ERVIN. The thought has been expressed here by the witnesses that a man does not have the right to be retained in the military service if he is unfit for military duty.

I will ask you if you do not think that the civilians who are informed agree with the military on that proposition.

Judge QUINN. I think they agree with them on that.

Senator ERVIN. Do you think if the law was altered to allow judicial review by a court of military appeals of the question of discharges other than honorable, that there would be a tendency on the part of the military appeals to make decisions to retain men unfit for military service?

Judge QUINN. There would be no danger of that.

Senator ERVIN. The civilian population is interested in having fit men in the military service.

Judge QUINN. Certainly.

Senator THURMOND. I would like to be associated with the distinguished Senator from North Carolina in what he had to say about the Military Court of Appeals and members in the court being held in the highest esteem.

I have heard many civilian and military people express their heartiest esteem for the manner in which the work of the court is now conducted.

I would like to make this further observation, too.

That the stigma and it is a terrible stigma for a man to get a discharge other than honorable—it does affect him in whatever he goes into—I think we have to have some balance there because the man goes into the service and wears the uniform of his country and before we give him anything except an honorable discharge or a discharge in any case that his conduct has been anything but honorable—then we better be careful.

It is a very serious thing for a man to get a discharge other than honorable. I would not hesitate to see a man get a discharge other than honorable if the facts warranted it.

I think one thing today that concerns me is this leniency and compassion that is shown for the criminal. It is shown for the defendant rather than society.

To my way of thinking the rights of the individual must be given every consideration at the same time that there is a conflict.

I think the rights of society must prevail.

(Senator Javits leaves hearing room at this point.)

Senator THURMOND. And I think this is a matter we have to consider—I am sure this distinguished court and its able members will review this matter in terms of the country's service as well as the individuals.

Judge QUINN. I am in agreement with your statement completely, Senator.

Senator THURMOND. Thank you, very much.

Senator ERVIN. Judge, you made one observation during the course of your testimony in which I was very much interested. You expressed the opinion that military lawyers should be permitted to devote themselves exclusively to the performance of legal duties in the armed services.

We have some of the services still hanging on to the old view that an officer should be able to perform many duties that might involve his branch of the service.

That view was to orient the officer with many duties in the days when weapons were simple—they consisted of a rifle maybe and a bayonet and a very minimum of artillery.

Since that time we have developed very intricate weapons. We have had a drastic change in the duties of the military in respect of their functions.

I share your view entirely. We have gotten to the age of specialization. We no longer reasonably expect every officer who is in the military to discharge every duty that can involve an officer of his rank of service.

You stressed that opinion with reference to legal officers in the military and I think it applies to them as well as to the officers who have

to have the knowledge and skills to operate intricate weapon systems that we have now.

We have reached the age of specialization in the military as we have in so many of the phases of civilian life.

Judge QUINN. I think that is about right.

Senator ERVIN. I think the Marine Corps says that legal officers should be able to do everything required of an officer.

Judge QUINN. I am not qualified to pass upon that.

I think generally speaking legal officers in the Navy are required to do legal work, which is as it should be because they are specially trained to do that.

Senator ERVIN. I will go along with the Marine Corps to this extent—I think it would be well to have every legal officer perform some other duty such as platoon duty but I would not keep them on one duty. I would assign them one duty and another duty through their military service.

I believe experience is the most efficient teacher of all things. I think that applies to military lawyers. I would endorse the fact that so many able men are devoting themselves to military service and I think you can expect a great increase in the quality of the service of a legal nature in the miltary forces for that reason.

Judge QUINN. I think the Judge Advocate General Corps for the Army is an indication that it would work equally as well for the Navy.

The Army first started the field judiciary and the Navy followed. Based upon that same idea, a judge advocates corps for the Navy would work out equally as well.

Senator ERVIN. Judge, the committee is indebted to you for giving us the benefit of your experience in this field and we want to thank you for coming here.

Judge QUINN. Thank you very much, Senator. It has been a pleasure.

U.S. COURT OF MILITARY APPEALS,
Washington, D.C., December 15, 1965.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Old Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you very much for your invitation to testify in connection with proposed legislation on constitutional rights of service personnel at the joint hearings in January 1966, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a special subcommittee of the Senate Committee on Armed Services. My brother judges and I welcome the opportunity.

At earlier congressional hearings, I pointed out that the U.S. Court of Military Appeals, which was established by Congress in the Uniform Code of Military Justice, 10 U.S.C. 801, et seq., has attempted to expunge the dictum in the military establishment that courts-martial are mere instrumentalities of the executive branch and, therefore, are not bound to accord to military accused the protections and privileges granted by the U.S. Constitution. By decision and discussion, the judges of the Court of Military Appeals have endeavored to demonstrate that military discipline is wholly compatible with, and encouraged by, equal justice under law. The war crimes trials after World War II established that, even in the field in time of hostilities, the military commander cannot disregard the rule of law.

Millions of Americans are committed to serve in our armed services in defense of our country and the free world. The preservation of their constitu-

tional rights and privileges is imperative. I commend you, and the other committee members, for the intense interest you have shown, and the work you have done, in this important field of law.

As requested, Judges Ferguson, Kilday and I will separately send you a written statement of our respective views on the pending bills.

With warmest regards, I am,

Sincerely yours,

ROBERT E. QUINN, *Chief Judge.*

Senator ERVIN. Our next witness is Judge Paul J. Kilday.

Judge Kilday, on behalf of the subcommittee I wish to express our appreciation for your willingness to be here and to give us the benefit of your experience on these matters pending before the subcommittee.

Judge KILDAY. I am glad to have the opportunity to be here in connection with these hearings. I do have a statement I would like to submit for the record and I will summarize it.

Senator ERVIN. Let the record show that the entire statement submitted by Judge Kilday will be made a part of the record.

STATEMENT OF JUDGE PAUL J. KILDAY, U.S. COURT OF MILITARY APPEALS, WASHINGTON, D.C.

Judge KILDAY. In this statement I state I am in substantial agreement with Judge Quinn. I think perhaps I should point out, too, that as to some of these bills, I doubt if I have an opinion of them because of my position as judge of this court as, perhaps, because of my prior experience as a Member of the House.

I know very little about the detail of proceedings for administrative discharge.

On the other hand, I know a good deal of the effect of administrative discharge upon the individual.

In my opinion an undesirable discharge is regarded by the civilian population as worse than a bad conduct discharge. They are likely to believe that a BCD indicates a failure to do something in a military sense.

If a man is totally undesirable—this is even worse than what he might have done to receive a bad conduct discharge.

As to whether the Navy should have a Judge Advocate Corps, I feel it should, and I endorse that legislation.

This is probably not derived from my position as judge of the court. The Army has a rather detailed organization—in the Air Force they are all commissioned alike except the medics and the chaplains, and it has worked well in the Air Force.

In the Navy you do have the Supply Corps, Civil Engineers Corps, and so forth—I think it would be definitely to the advantage of the Navy to have a Judge Advocate Corps.

I will be glad to answer any questions.

Senator ERVIN. My recollection is that you spent a substantial period of time on the Armed Services Committee of the House prior to becoming a judge on the court.

Judge KILDAY. Throughout my service of a little less than 23 years I served on the Committee on the Military and then went to the Committee on the Armed Services which was created in 1947.

Throughout my service I was on a military committee.

Senator ERVIN. And you served on one of the committees at the time the committee was considering the Uniform Code of Military Justice.

Judge KILDAY. The Elston bill which revised the code which applied to the Army system of military justice. Mr. Elston, of Ohio, was the chairman of the subcommittee which wrote it, and the act was generally known as the Elston Act.

I was ranking minority member of that subcommittee. I was on the full committee which considered the report of the Subcommittee on the Uniform Code of Military Justice.

Senator ERVIN. You have been concerned with these problems for some time.

Judge KILDAY. Yes; for a long period of time.

Mr. CREECH. Judge Kilday, I note that in your statement you say you are in agreement with the observations on each bill as expressed by Chief Judge Quinn in his testimony before the committee.

I wonder if you would care to associate yourself with any of the answers or comments made by Judge Quinn and also if you care to expand upon any of the answers of Judge Quinn?

Judge KILDAY. Not unless there is some specific area defined. I heard Judge Quinn's testimony and I am in substantial agreement with it.

Mr. CREECH. Sir, apart from the statements made by the chief judge with regard to provisions of these bills in view of your long experience with the administration of military justice I wonder if you feel that there are areas other than those covered by those bills which the subcommittee should be appropriately considering at this time as an adjunct to a supplement to the legislation which is proposed in these bills?

Judge KILDAY. At the time the bills were offered I read all of them and felt they covered the situation rather thoroughly. I think more emphasis should be placed on some of them. This is true in the field of special courts-martial without lawyers.

Of course, those which come before us are practically all from the Navy because the Air Force supplies qualified lawyers and the Army does not keep the verbatim record so no BCD can be given.

I am sure the committee will give further attention to cases where no lawyer participates in BCD cases.

We see the Navy cases and they cause a great deal of difficulty. The Army report last year showed some 14,000 special courts. Our court saw none of them because no BCD can be given in an Army special court.

Recently we had a case at Salt Lake City where a young man was sentenced to 6 months in a stockade without a BCD. He filed for a writ of habeas corpus and was discharged on grounds that he did not have effective representation of counsel.

A veterinary and a young lieutenant, who had no experience with military law were appointed to defend him.

A little bit later a case arose at Levenworth where a man was prosecuted for refusing to obey an order and was given 6 months and then prosecuted for refusing to obey an order in the stockade. He sued for a writ of habeas corpus. He had a year's confinement because of

the accumulation of two special court sentences and was confined at Levenworth in order to serve that time.

I think in this area of special court-martial cases even though they do not involve a bad conduct discharge merit careful consideration.

Mr. CREECH. Sir, you indicated that whereas you are not entirely familiar with all of the procedures with regard to administrative discharges that you are very familiar with their effect and that you have had an opportunity through the years to be observing administrative discharges.

I wonder, sir, what your feeling is with regard to the board of the military appeals being given jurisdiction to review these discharges?

Judge KILDAY. Because of the effect these discharges have on individuals I think that a review is called for.

Until you mentioned this morning that possibly 15,000 of those cases existed I had no idea of what the number might be or as to what the impact might be upon the court.

If they should come to us on petition for good cause shown I have no doubt we can handle that workload. If we had to review all 15,000, and I take it it is an annual figure of 15,000—this would be a physical impossibility.

Mr. CREECH. Sir, the subcommittee has encountered with regard to complaints stemming from administrative actions in board proceedings and there have been a number of complaints received by the subcommittee—which indicate that this does happen from time to time—that individuals have received board action on the basis of alleged misconduct for which they have been acquitted in civil courts.

They have been subject to board action and in instances in which we have requested trial by court-martial it has been denied them.

As you know these are issues which the subcommittee has been very much concerned with and which would be covered by these bills.

I wonder whether in such measures where the individual requests trial by court-martial or refused trial by court-martial or gets board action—if you would care to comment on this or if you care to comment on actions taken by boards when someone's misconduct has been sufficient to justify a court-martial but an accumulation of misconducts which has brought about board action.

Judge KILDAY. For instance, you have a lot of fellows in civil life that everybody feels ought to be in jail but they are always just short of the line and you are not able to get them to a court so nothing is done as to them. So this is not peculiar to the military.

I seem to remember administrative discharges having been given for identical conduct of which a man has been acquitted by court-martial.

I understand this cannot happen in all cases. There is some limitation on it. I understand it does happen. A man could be court-martialed, acquitted, and be subjected to a less than honorable discharge administratively for what they do not sustain in court.

If you had judicial review this would not happen—that would probably reduce that 15,000 cases per year.

Mr. CREECH. I infer that you feel in the case of administrative board actions that individual situations should be on the same basis

with that of a court-martial where if an individual accepts nonjudicial punishment in article 15 he is not given a court-martial. If he requests a court-martial he is given it.

Do you feel with regard to administrative discharges that if the individual is acceptable to administrative board action he can be given a BCD but to be given a court-martial should be afforded?

Judge KILDAY. I think he should have the opportunity.

Mr. CREECH. Would you feel he should have this opportunity in all instances or would there be certain actions that you feel should be taken by administrative boards and not be the subject of court-martial such as those instances in which an individual is accused of poor performance such as being late for reveille consistently, certain AWOL's, minor infractions of rules and regulations but which over a period of time tend to indicate his unsuitability for military service.

Judge KILDAY. I don't mean in every instance you would have to have an option. I think the nature of the discharge would have to indicate the effect on that—whether it is an undesirable discharge—he would have to carry the rest of his life—I am not against the elimination of substandard people at all.

We have cases which I feel should have been handled administratively rather than sent to the court-martial.

When it comes to the character of the discharge given that is a different proposition.

Mr. CREECH. Sir, we have had mention this morning the Kitchen case which I believe was handed down—I think it was handed down early in 1962.

I believe—I am correct in saying that in that case there was command influence but the court found that possibility was not so great that it was a basis for reversing that decision.

Judge KILDAY. And we did reverse it.

Mr. CREECH. In the majority of cases which have come before the court involving command influence—has it been possible to make an adjudication that this was actually command influence or is the reversal predicated upon the opportunity for it, an indication that there might have been?

Judge KILDAY. The chief judge indicated that this is a matter gradually disappearing from the military. There are those on the court who were there prior to my coming and they have more experience than I have. I arrived after the number of cases has diminished to a great extent.

There will always be cases recurring no doubt.

It is 15 years since the code went into effect. You have few men in the service now who 15 years ago were at such ranks that they had any major concern for military discipline. They were company commanders or lower at that time. They have come up under this new system and you do have the resistance of those clinging to the status quo—these people have been raised under this code and command influence has diminished a great deal.

Judge Quinn or Judge Ferguson can give you more.

Senator ERVIN. I interpret your testimony to the effect that you are in agreement with what Judge Quinn has said about the handicap

which a man suffers throughout his life if he receives a discharge other than honorable.

Judge KILDAY. I agree thoroughly.

Senator ERVIN. And you are not averse to the proposition that some method of having judicial review of such discharges is desirable.

Judge KILDAY. I think there should be some review of it.

Senator ERVIN. I would like to ask whether or not you agree with me in the view that a great many people who have a discharge less than honorable accept such a discharge rather than undergo the possibility of court-martial?

Judge KILDAY. I am sure that happens in many instances.

Senator ERVIN. Do you agree with me that a very substantial percent of the cases where the unfitness of the man for further service by reason of his bad conduct or by reason of his general ineptitude—that in a great majority of those cases a man will accept an administrative discharge as in the nature of a favor to him?

Judge KILDAY. Yes, he wants out.

Senator ERVIN. So the chances are the number of men who would seek judicial review against the receipt of a discharge other than under honorable conditions would be comparatively minor?

Judge KILDAY. You are quite right.

Senator ERVIN. Don't you believe that that would be particularly true if the military required a condition precedent to the granting of such discharge—that a man be advised as to the possible consequences of such a discharge and advised of his legal rights and be given an opportunity for a hearing if he saw fit to have a hearing?

Judge KILDAY. Yes, I agree.

Senator ERVIN. I think you also agree with me in the proposition that no man has a vested right to remain in the military if he has shown unfitness for military service.

Judge KILDAY. If he is a misfit they should get rid of him.

Senator ERVIN. Do you agree with me there is no real reason to prevent the Court of Military Appeals from having judicial review. The right to consider the legality and propriety of administrative discharges under less than honorable conditions in restricted circumstances?

The Court of Military Appeals has the same feeling that the military has about the desirability of having fit men in the military service.

Judge Kilday, I think as a matter of fact we can anticipate that under the very precarious conditions the world has been in since the First World War, the Second World War, the Korean war and now Vietnam—the men serving on the Court of Military Appeals are men with military experience and are acquainted to some extent with the problems of the military.

Judge KILDAY. Quite likely.

Senator ERVIN. Do you have any questions?

No questions.

On behalf of the subcommittee I wish to repeat our appreciation of your prepared statement and your appearance here and your kindness in giving us the benefit of your experience and observations in this field.

Judge KILDAY. Thank you.

(The statement of Judge Paul J. Kilday referred to follows:)

STATEMENT OF HON. PAUL J. KILDAY, JUDGE, U.S. COURT OF MILITARY APPEALS

Mr. Chairman and members of the committee, May 5, 1965, was the 15th anniversary of the approval by the President of the Uniform Code of Military Justice and May 31, 1966, will be the 15th anniversary of the effective date of that act. The original judges of the U.S. Court of Military Appeals were appointed June 20, 1951. Therefore, the court will have been in existence 15 years in June 1966.

It is pertinent to observe that the code was preceded by a revision of the system of military justice of the Army. That revision was generally known as The Elston Act, being Public Law 759, 80th Congress (62 Stat. 627), approved June 24, 1948. The act took its name from the chairman of the Legal Subcommittee of the Committee on Armed Services of the House of Representatives, Hon. Charles H. Elston, a member of Congress from Ohio. I served as the ranking minority member of that subcommittee. It need only be observed that, while the Elston Act was based upon, and constituted an amendment to the existing Articles of War, in many respects it represented a radical departure from former provisions of both substantive law and procedure.

As I have indicated the Elston Act was followed within less than 2 years by the Uniform Code of Military Justice, which had for its stated purpose the "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." While I was not a member of the subcommittee which prepared the code, I was a member of the Committee on Armed Services which considered, in detail, the report of the subcommittee. (Hearings before House Committee on Armed Services, 81st Cong., 1st sess., on H.R. 4980, p. 1326 et seq.)

Both the Elston Act and the Uniform Code were inspired by and resulted from the many and bitter complaints, from those who had served in the armed services during World War II, against the manner in which military justice had been administered. These complaints gave rise to the consideration of these questions by a number of committees, commissions and boards, both officially appointed and privately convened. I need not go into detail with the committee as to the nature and specifics of those complaints. I do observe that many witnesses testified as to both bills and all details were well known to the congressional committees. It was the conscientious purpose of the committees to determine those complaints which represented legitimate shortcomings in the system of military justice and to take effective action to remedy the same.

For more than 4 years now, since September 25, 1961, I have served as a judge of the U.S. Court of Military Appeals. Thus, I have had the unique experience of evaluating the effectiveness of the action taken by Congress when viewed in the light of experience and the present state of military justice as revealed to me 17 years ago and, again, 15 years ago. It is with real gratification that I can report to you that the congressional enactment represents a job remarkably well done. When the provisions of the code, the Manual for Courts-Martial, and the decisions of the Court of Military Appeals are observed, and they are observed in the vast majority of instances, substantial justice is accomplished in a very high percentage of the cases; and the quality compares most favorably with that of civilian courts in the United States.

In the Michigan Law Review of November 1964 (vol. 63, no. 1), the following appears:

"* * * Courts-martial, unlike their civilian counterparts, are paternalistic and designed to deal with the internal affairs of the military when summary command discipline is inappropriate. The maximum limits on punishment, the stringent rules against self-incrimination, and the elaborate system of automatic and discretionary review found in military courts offer greater protection to a defendant before a court-martial than he would receive in civilian courts."

I challenge anyone to produce a comparable estimate of military justice in any publication of any law school of any major university prior to the adoption of the Uniform Code of Military Justice.

As recognized in the beginning, the code is not perfect and amendments and revisions, based upon 15 years of experience, are in order. After all, the Judiciary Act was adopted by the First Congress in 1789 and amendments are still

found to be necessary or desirable. Federal appellate courts are still revising lower court holdings of common law questions which existed in 1789.

Article 67(g) of the code recognized this necessity by providing that the court of military appeals and the Judge Advocates General of the armed forces shall meet annually to make a survey and report of the operation of the code "and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate."

I want to commend the committees for the searching and detailed examination they have made into the operation of military justice and to commend them upon the nature and the quality of the amendments proposed.

I shall not address myself to the individual bills, unless the committee should desire that I do so as to any designated proposal. I wish to be recorded as stating that I am in general agreement with the observations on each bill as expressed by Chief Judge Quinn in his testimony before the committee.

Senator ERVIN. Our next witness is Judge Homer Ferguson, U.S. Court of Military Appeals.

Judge Ferguson we are delighted to have you here with us.

STATEMENT OF JUDGE HOMER FERGUSON, U.S. COURT OF MILITARY APPEALS, WASHINGTON, D.C.

Judge FERGUSON. Thank you. I am glad to be here this morning and to hear testimony from previous witnesses and also the remarks of counsel and members of the committee.

I have, as the other two judges have indicated, filed a statement which I would be glad to answer any questions about which the committee or counsel may have.

Senator ERVIN. Let the record show that Judge Ferguson's statement which he prepared and submitted to the subcommittee will be presented in full in the record, at this point.

(The statement of Judge Ferguson referred to follows:)

STATEMENT OF HON. HOMER FERGUSON, ASSOCIATE JUDGE, U.S. COURT OF MILITARY APPEALS

Mr. Chairman and members of the committee, I appreciate the invitation of the subcommittee to make known my views on the suggested improvements in military justice matters pending before it. In so doing, I shall speak frankly of the matters which have come to my knowledge as a judge, which bear on the proposed legislation, leaving to the subcommittee its role of evaluating my testimony so that it may play its proper part. I think it foolish to say either that we cannot improve the code or that it is totally deficient. The truth lies somewhere between, and I hope my testimony will assist you in determining where it is.

I have read and studied the proposed bills amending the Uniform Code of Military Justice with much interest, in light of my experience during the past years as an associate judge of the U.S. Court of Military Appeals. I particularly applaud the attempt embodied therein to improve the stature and role of the law officer of general courts-martial. In my opinion, one of the most significant developments of the last 10 years in military justice was the institution by the Army and Navy of their law officer programs, with the removal of this trial judge from the supervision of the local staff judge advocate, who plays such an important role in the prosecution of the charges, and making him in truth an independent judicial officer, with full time to study, digest, and apply the increasing number of opinions interpreting the uniform code. I can safely say that no other single factor has served to reduce trial errors and improve courts-martial practice than this simple but effective plan. I urge its statutory implementation for all the Armed Forces, and I strongly recommend enactment of Senate bill 745.

Senate bill 746, in effect, reorganizes the Office of the Judge Advocate General of the Navy into a judge advocate general's corps in a manner similar to that of the Army. I do not have the technical expertise or experience to comment

on the desirability of such action. I do point out, however, that the Navy Judge Advocate General is also deeply committed in the administration of military justice in the Marine Corps. I am informed that the Marines have consistently followed the practice of assigning their law specialists to tours of duty in the line and later perhaps returning them to legal duties. This does not permit these officers to proceed normally with a legal career or to keep up with developments in the law so as to provide the desirable high level of performance necessary to the proper administration of military justice. Such is sometimes reflected in the Marine Corps cases which come before us, and I suggest that the committee will perhaps wish also to consider the needs of the Marine Corps when revamping the structure of the Navy Judge Advocate General's organization.

Senate bill 747 provides a new system of review for administrative discharges, as well as punitive discharges imposed by courts-martial, by a nine-man board under the Secretary of Defense and a similar three-man board under the Secretary of the Treasury.

Again, the court has had little experience with administrative discharges—the general and undesirable certificates—as such are not adjudged by courts-martial. However, at one time, their use in lieu of courts-martial proceedings was encouraged in the Air Force by a former judge advocate general, in order to escape the protections thrown around an accused by the Uniform Code. It is undeniable that, so far as society is concerned, the impact of a general or undesirable discharge is the same as that of a punitive discharge. In like manner, the latter punishment is so severe that it frequently marks the accused for the balance of his life, denies him job opportunities otherwise available, and, no matter how exemplary his subsequent conduct may be, bars almost every door to his future. The damage these discharges do fully justifies their review at a later time by a civilian board, with a view to mitigating the severity of the penalty after the passions surrounding a trial or board proceeding have subsided.

At the same time, it seems clearly more economical and just to have this board operate in the Defense Department as opposed to the three military departments. In that way, all cases will receive the same sort of treatment, without regard to individual service policies. Justice should not depend on whether a man was in the Army, Navy, or Air Force, but upon the merits of his petition for relief.

Senate bill 748 offers considerable improvement in the appellate administration of military justice by redesignating boards of review as intermediate appellate courts—which they are—placing the power of appointment thereto in the military Secretaries; providing for a civilian chief judge and a civilian member judge of each panel; setting definite terms for all member judges; and giving the panels the power to suspend sentences in whole or in part.

The boards of review do not presently have the power to suspend sentences. In accordance with the more advanced notions of appellate review of sentences, it seems desirable that this authority should also be conferred upon them. Frequently, a young man will be sentenced to a punitive discharge, and all indications are that he may be restorable, with the right to earn his honorable discharge by good conduct as a soldier. Yet, if the convening authority, who acts immediately after the trial, approves the sentence, the board is powerless to suspend it. Their only alternative is to disapprove it, and they may be reluctant to do so in face of his justly proven crimes. Having the power to suspend—which I consider intermediate between approval and disapproval—they, free from the influences below which so often dictate approval of a harsh penalty, can offer the man another chance to become a good citizen. If he does not behave, of course, the suspension may be vacated after hearing and notice under article 72, and the sentence placed in effect. In this connection, I wish to point out to the committee that I am not unaware of the Army's rehabilitation program at Leavenworth and the Amarillo project in the Air Force, but many accused, sentenced to punitive discharges and short terms of confinement, are not sent to these facilities and, hence, never get an opportunity for restoration. Thus, it is needful for the boards to have power to take action suspending the imposition of punishment in whole or in part. I so recommend.

With regard to the other amendments of article 66, I wholeheartedly believe they are justified and necessary to endow the boards of review with all the judicial character of intermediate appellate courts, which is now, and has always been, their function.

Several years ago, it came to our attention that chairmen of boards of review were writing efficiency reports on their fellow members, a practice which can

but lead to abuse. Again, I understand that this has been abandoned and, in the Army at least, a serious attempt has been made to organize the boards into a separate appellate judiciary, free from all connotations of control and influence from any source, and which works to increase public confidence in all stages of military justice. Last fall, however, it came to our attention that Air Force boards of review were required to submit their opinions—prior to publication or promulgation to counsel or the accused—to a senior officer who, acting on behalf of the Judge Advocate General, was empowered to edit them, point out corrections based on the record and the law, and, in general, supervise the board's opinions in almost every aspect. The Air Force insisted that, in the years during which this examination division existed, no attempt was made in any way to correct or change a single board of review opinion. We in fact found no prejudice to the accused in this particular case, and the Air Force, I understand, has since revised its procedure to permit only examination for correction of clerical mistakes. Nevertheless, there is a great potential for harm in any procedure which requires a supposedly independent judicial body to submit a copy of its opinion to the Judge Advocate General or his assistants in advance of the promulgation of that decision. Conceding the practice has never led to actual changes, it has the appearance of evil and one wonders the effect upon a board member of knowing his work is going to be so scrutinized in private prior to action being taken thereon. It at least impinges on freedom of judicial action, is unheard of in any other court system, and offers a sound basis for reorganizing the boards into a more independent body.

With particular reference to tenure for board members, I emphatically state my belief such is desirable. In one case which involved important board action, we found approximately a dozen members had participated in the review of the case, they being relieved from time to time for reassignment to other tasks or retirement, et cetera. A sound judiciary can never be developed unless there is some continuity of action in the same case by the same people. A judge cannot be made by an appointment. He must learn by sitting, reading records, and educating himself until he has attained the ability to balance the effect of errors, the appropriateness of sentences, and the myriad of other matters that go to make up appellate examination of trials below. He will never gain this without a definite tenure during which to serve, without fear of being removed on short notice and shipped elsewhere for some totally unrelated task.

In like manner, I do not see any basis for objecting to the use of civilian board members. From our scrutiny of the records, they have worked well in the Navy, although the other services have traditionally limited themselves to commissioned officers. Service interests and specialization is met by providing only one civilian judge for each panel, thus leavening the military approach with the more detached viewpoint of the outside bar. In connection with tenure for such members during good behavior, I might remind you that legislation to the same effect for this court passed the House last year, but was not considered by the Senate. I judge it both feasible and desirable to afford it not only to the court but to the civilian members of the board of review.

Finally, in the interests of economy and the ever proceeding concept of eliminating duplication of effort among the armed services, I suggest you may wish to consider combining the boards of review and placing them under the Department of Defense. All services could be represented by the various panels thereof, thus removing any difficulties afforded by technical matters peculiar to one armed force. At the same time, by being completely removed from the military departments, their independence as judical tribunals would be assured. Moreover, the triplication of administrative facilities to support three different groups of boards would be eliminated, and one might expect a more uniform interpretation of what is, after all, a uniform code, as well as the elimination of grave disparities in sentences for the same offense, depending upon the service of which the accused is a member.

Senate bill 749, amending article 37 of the code, 10 U.S. Code § 837, prohibits pretrial instruction of court members under the current Manual for Courts-Martial (paragraph 38), extends the prohibition against command control to staff officers, and seeks to protect defense counsel against reprisal by means of low efficiency reports.

As to pretrial instruction of court members, I have set forth my views at length in opinions which, unfortunately, were insufficiently persuasive to cause

such matters to be forbidden under the present law. Though the Army has since put out a Chief of Staff directive against these indoctrinations, it has been disregarded on occasion. For example, we now have at least two cases pending before the court on this subject. I heartily recommend enactment of this provision.

Concerning the extension of the strictures against command control to staff officers, I can honestly say that it is these overzealous individuals who are usually responsible for violations of article 37. Seldom does one see a case in which a military commander directly takes issue with a court-martial or attempts to interfere with it. Instead, we find in almost every instance a staff judge advocate tampering with the court in order to obtain a more favorable ratio of convictions and sentences. Case after case heard by the court indicates this, and I believe it imperative that the statute be amended expressly to reach the real source of trouble.

I equally favor express prohibition of unfavorable efficiency reports for defense counsel whose zeal in the performance of their duty earn the acrimony of their rating officer, but I believe the law should be further strengthened by its conversion to a punitive article and providing for the mandatory dismissal of any officer who attempts so to pervert justice, or, as was originally proposed under the code, constituting such command control an offense punishable in the Federal courts under title 18.

We became expressly aware of this matter in *United States* v. *Kitchens*, 12 USCMA 589, 31 CMR 175, where it appeared that the staff judge advocate retaliated against counsel's efforts to serve his client by giving him a totally unsatisfactory efficiency report. I am informed our opinion in that case, reversing it on other command control issues, led to an investigation which established the accuracy of defense counsel's averment that the bad reports resulted from his defense of his client. Yet, to my knowledge, no action was taken by the Army against the offending staff judge advocate.

Recently, we had another case, *United States* v. *Perry and Sparks*, in which a senior staff judge advocates similarly gave extremely bad efficiency reports to two young defense counsel and had both of them transferred, one actually being relieved from active duty. Upon this becoming known, the Secretary of the Army ordered these cases reviewed in another jurisdiction. They were set aside on the basis of other errors, but a lengthy investigation of the matter again came to naught, with no action, to my knowledge, being taken. On the retrial, the new defense counsel was intimidated by the same staff judge advocate and ended up with an equally bad efficiency report for defending his client with vigor. Yet, despite this repetitive violation, we are aware of nothing that has been done.

The situation creates quite a dilemma for military justice. If the defense counsel, in the best traditions of our bar, ignores the efforts to influence him and stands up and fights for his client, he gets a bad efficiency report which can absolutely ruin his military career. Yet, the court can do nothing, for, if the influence is ineffective, the accused has had his day in court and there is no basis for reversal. That is what happened in the *Perry* and *Sparks* case. If, on the other hand, counsel is in fact fearful for his career, we will hear nothing about it, for the record will be totally silent in the matter. The dice, therefore, are loaded in favor of the sycophant, and something should and must be done by the Congress. As I suggested above, the specific deterrent of a punitive article and mandatory dismissal from the service might have that effect, providing one can ever get a man who has violated the code in this manner brought to trial. To date, I understood there have been no such prosecutions. Thus, I suggest you may also wish to provide for civilian prosecution of this violation.

Senate bill 750 provides, inter alia, for legally trained counsel in all bad-conduct discharge cases. I very much favor this legislation. The public does not distinguish between dishonorable and bad-conduct discharges, nor between those awarded by a general court-martial or a special court-martial. Indeed, except in a relatively unimportant area, the Veterans' Administration makes no such distinctions in withholding veterans' benefits. The nonlawyers special court-martial cases we have received, all of which, at the appellate level, involve bad-conduct discharges, are frequently farcical. Where the penalty is so terrible and long lasting, the accused should receive the benefit of legally qualified counsel. The Air Force has recognized this by detailing lawyers to almost all bad-conduct discharge cases. The Army long ago forbade the appointment of court

reporters and preparation of verbatim records in special courts-martial, thereby prohibiting imposition of bad-conduct discharges except by general courts-martial. The Navy and Marine Corps should likewise be compelled to recognize what experience has taught the other services.

The provisions of Senate bill 750 regarding provision of counsel in administrative board hearings which consider the imposition of undesirable discharges is likewise commendable. As I have already noted, most of the Nation simply does not distinguish between an undesirable discharge and a punitive discharge. All have the effect of barring the individual concerned from most areas of employment and advancement. Steps should, therefore, be taken to insure that members of the service are given that due process of law in administrative proceedings which they would find in dealing with any other branch of the Government.

Senate bill 751 increases the time of petitioning for new trial from the present 1 year after the action of the convening authority to 2 years. Such is very necessary. A petition for new trial is an extraordinary remedy, designed to supplement and add to accused's normal appellate rights on special grounds. At the present time, appellate review is normally not completed by the time the 1-year period has expired. The remedy, therefore, frequently becomes meaningless. The Federal rules of criminal procedure, rule 33, authorize a period of 2 years for such petitions on newly discovered evidence in the Federal courts. The same period should be made applicable in courts-martial.

At the same time, I wish to call the committee's attention to a controversy which has swirled about the Court of Military Appeals almost since its inception. That is the question whether it, as an appellate court, has the authority to entertain a writ of error in the nature of coram nobis and correct certain fundamental injustices in a court-martial which either could not be or were not found by it in the normal course of review. The United States has consistently denied we had such authority, except for a recent instance in which the accused had sought such a writ from the local Federal courts. Then, the Government urged the case properly belonged to us on a similar writ. The local judge so ruled, in effect, but when the case came before us, the Government switched its position and argued we did not have the authority to entertain it. As this case is still sub judice, I will not comment further on it, but it indicates a problem which should be resolved and I think it could be most suitably ended by an additional amendment to article 66 of the code to provide expressly that:

"The Court of Military Appeals shall have power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required."

Senate bill 752 envisions the addition of a law officer to a special court-martial, with authority, as in the Federal courts, for the accused to waive trial by the court members and be tried by the law officer alone. In line with what I have said above concerning the imposition of bad-conduct discharges by special courts-martial and the serious nature of such a penalty, I believe such would be an advantage, if the bad-conduct discharge is to be authorized as a penalty. I suggest, however, that it is anomalous to permit an accused to be tried before a law officer alone in special courts-martial and not afford the same procedure for the military judge of a general court-martial, whose independence and capabilities the proposed bills otherwise reinforce. I believe the service representatives will bear me out in saying that the majority of general courts-martial now embrace guilty pleas made on pretrial deals with the convening authority for a limited sentence. Much time and effort is now lost by the court members having to stand idly by during the law officer's in-chambers examination of the plea and the court's subsequent automatic voting on findings and deliberations on the sentence. All this could be eliminated by trial before the law officer alone, with him fixing the sentence as in our civil courts. In addition, it would seem much more judicial to me to have pleas entered before him and sentences imposed on the basis of the recommendation of the prosecutor (but not governed by such recommendation) than to continue in effect the present pretrial agreement whereby the convening authority "contracts" with the accused in advance for a certain limit on the sentence. This latter "contract" has undoubtedly led to improvident pleas by accused who fear a greater sentence more than the opportunity to be heard on their innocence. With these extensions, I support the concept of the law officer being applied in special courts-martial. I also strongly recommend enactment of the amendments to article 41, permitting him

to rule finally on challenges. I suggest article 51 should also be amended to make final his rulings on mental competency to stand trial and the legal sufficiency of the evidence. These are questions for a judge, not the jury.

Senate bill 753 extends the appellate jurisdiction of the Court of Military Appeals to include appeals on legal issues from decisions of discharge review boards and boards on correction of military records regarding administrative discharges. If it were limited to due process questions, as is the case presently in the U.S. courts, I would have no objection to this enlargement of our jurisdiction. If not so limited, however, I believe we would be inundated with appeals to the detriment of our handling of the more serious court-martial questions. And, I wish to point out to the committee that legal issues seem rarely to be of import in these administrative proceedings, if the accused in fact has received a fair hearing. As I understand it, most of the controversy arises over the factual basis for an unsatisfactory discharge, particularly after the individual has been separated and finds how serious are the obstacles which he now faces. Moreover, I would remind the committee that the boards on correction of military records are empowered also to set aside court-martial convictions and sentences, even though approved by the court on appeal. If the court's jurisdiction is to be so extended, then I suggest that its decision should be made expressly final and binding on the correction boards in order to avoid any doubts about the final disposition of these matters.

Senate bills 754, 756, and 758 provide further safeguards in administrative discharge proceedings. For the reasons already stated, I favor their enactment.

Senate bill 755 prohibits any member of a board of review from rating the efficiency of another board member. The purpose of this legislation is obvious, and it shocks me to find that these rating procedures have been followed in judicial bodies, whose independence ought to be unquestioned. I recommend the speedy implementation of this legislation.

Senate bill 757 authorizes a pretrial conference by counsel and the accused with the law officer of a general court-martial, to settle issues, interlocutory motions, and other matters, including the providence of guilty pleas. If, as I have suggested above, the law officer, upon application of the accused, is allowed to try him and sentence him alone, much of the impact of this section would be reduced. Nevertheless, the section itself will be of the greatest assistance in the speedy disposition of military criminal trials, for records now reflect that days are sometimes lost by court members who must stand around and wait while an out-of-court hearing settles some complicated interlocutory problem. As the boards of review and court will review the decisions taken in such conferences as a part of the record, there is no danger of abbreviating the accused's rights; I recommend the enactment of this procedure.

Senate bill 759 eliminates the summary court-martial. In light of the greatly increased powers of commanding officers under article 15 of the code, 10 U.S. Code § 815, it has become useless, for the commander, particularly if he is of field grade, may himself impose practically the same punishment as a summary court. If I recall correctly, it was the intention of those who sought these increased powers for the commander to do away with the summary court-martial. I think this should now be done.

Senate bill 760 extends the present subpena powers of courts-martial to pretrial investigating officers and administrative discharge boards. The former have suffered for years from being unable to summon witnesses for a general court-martial preliminary hearing. I suspect the latter will seldom need to have civilian witnesses, as they are usually concerned with military fitness. In any event, however, the power should be there to be exercised in case of need. I favor the amendments.

Senate bill 761 extends the jurisdiction of U.S. district courts to violations of the code by persons who have been discharged from the service without trial therefor (and who, by virtue of such discharge, are no longer subject to military jurisdiction), while Senate bill 762 extends such jurisdiction to civilian offenders who were camp followers at the time of their alleged crimes.

All these persons are now people who cannot be punished by law, though they may be admittedly guilty of serious crimes. For the most part, this power vacuum has existed since the Supreme Court's decision that one must have a military status to be subject to trial by court-martial, which struck down several civilians' convictions on the basis that a trial by court-martial deprived them of the right to indictment by a grand jury and trial by a jury. The proposed legisla-

tion will fill this void, afford such defendants in the future their constitutional rights, and make it improbable that they will escape deserved punishment. I wholly favor the new legislation.

In sum, then, I generally support the bills before the committee with the additional amendments which I have suggested—particularly that strengthening the penalty attached to violations of article 37 and those increasing the power of the law officer of a general court-martial. I believe they will do much to improve the administration of military justice, both in peace and war, as, in fact, did the code in the Korean war. We no longer deal with what I've heard called the old Army or Navy, or Air Force, but with what are really young armed services, made up of the flower of our youth, who either volunteered or were conscripted to defend their country and the rights it represents. In doing so, every effort should be made to see that they do not lose those same rights because they have donned the uniform.

Thank you for the opportunity to present this statement. I would be happy to appear and offer any additional information you may desire.

Judge FERGUSON. Judge Quinn indicated that some of the members of the court may not agree with him on the one question of giving power to the Military Court of Appeals of jurisdiction over the undesirable discharges or discharges not brought by court-martial.

I share his view in relation to the question of the importance and the real stigma and real harm that such discharges are and have been causing and, as I think I indicated in my statement, if the questions that reach our court were limited to jurisdictional questions or constitutional questions that we could probably handle the cases as we are handling them now.

My only idea was that I would not think it was good for the court or good for either the military or our citizens, the people, if our court got behind in the decisions that it is required to render now under the law.

We are very fortunate, I think, that we are up-to-date and I think that speedy justice is a good thing if you are properly deciding the cases, giving them due consideration but most of these questions are of fact that would come up on these discharges. The questions of fact sometimes take a long time to get straightened out, and I just would think that if the fact-finding duty was given first to the board of review which will be renamed—I hope—indicating that they are courts and then some final review given to our court—we would not swamp the court in such a way as to interfere with the administration of justice.

Another subject that I might comment on is command control.

I think that the law should be improved on command control—that it doesn't apply only to the convening authority but that it ought to apply to the staff judge advocate or the judge advocate himself. It is a thing that is not easy to discover from the record as indicated by the questions counsel asked.

Command control is something that can happen but for the lawyer down below to be able to raise it sufficiently in the record to show that there has been a real command control is a difficult thing.

I share the view that there ought to be a penalty so that an officer could be directly disciplined for really exerting command control on the investigation of the court-martial or the lawyers in the case.

I think the Kitchen case was an example, and we have had cases since that that have disturbed me because of the nature of command control.

I hope that the committee and the Congress will deal with this question of command control.

Another question that comes up from time to time is the question of coram nobis, the right of this court to deal with the question, and giving the power to the court—definitely by congressional authority—to review its cases.

Now, the Government has indicated before the civilian court that it did apply in the military but before the Court of Military Appeals that it doesn't apply.

I think a definite statute would be good to settle this for all the courts now and for the military and probably among sime civilian lawyers.

It think that is a question that ought to receive consideration by the Congress.

Senator ERVIN. Judge, is your view with respect to the undesirability of vesting in the Court of Military Appeals the power to review administrative discharges under less than honorable conditions based upon the premise that the workload alone might be such as to impair the work of the court?

Judge FERGUSON. Yes; that is correct. That is the only reason.

If there could be some way to act on those cases first screened by say the board of review, or an equal lower judicial process and not put them immediately in the stream of the court—let's say of military justice which the Court of Military Appeals now has the duty to oversee.

Senator ERVIN. I certainly share your view that you have just expressed on that point.

It would seem to me that there should be a channel of review.

In other words, above the administrative level there should be a requirement that it is first passed upon by an intermediate board. In any event I believe having too many cases impairs the capacity of the court to maintain a high quality of judicial work.

This is not something we really have to have too much to do with because I think the majority of the men who are separated from the service by administrative discharges less than honorable are men willing to take their discharge and in fact have been dealt with kindly rather than unjustly.

I have been impressed as a member of the Senate Armed Services Committee and also as a member of the subcommittee dealing with these questions with the high caliber of men serving on the boards of review and the high caliber of military lawyers. I think a great majority of the cases where the appeal was taken from an administrative ruling would be handled in an adequate manner by the board sitting as a court of review.

I believe if Congress would adopt suggestions made by Judge Quinn that the Court of Military Appeals not be required to review all appeals that might come from the board to the court but have the power to determine as a prerequisite that reasonable grounds for review or good cause must be shown, to use Judge Quinn's expression, that the number of cases would be small as compared with the number of administrative discharges given.

I think as time went by less appeals will appear simply because the courts will hand down authoritative opinions which would be accepted

and followed by the boards and also those granting administrative judgments.

Judge FERGUSON. I may be wrong and I would hope that I am wrong about the number of cases that would come up—I do feel that the court now is examining all courts-martial properly and giving due consideration to many of the grave questions we have, many constitutional questions are presented from time to time.

But if the act requires the board of review—or whatever name they might give it—to make a finding of fact and a finding of law and then, in some way on good cause shown, it would come to the court by a proper screening, it would cut down the amount of work that the court might have to do. Also, the requirement that a lawyer must show good cause should be included and not like we do at the present time, merely say I appeal on the merits to justify the petition asking for appeal, even though the present rule of law is that he must show good cause.

The court has been very lenient along these lines and has looked at cases entirely rather than to take it just for granted that no cause exists if the man said I appeal on the merits or not cite any errors and merely file the petition.

I think some kind of factfinding which some States require when a judge passes upon a case could be used in this kind of a case.

Senator ERVIN. I certainly agree with you in the thought that persons are required to specify the basis on which the decision of review of the matter rests.

You cannot operate on any other basis. It would be impossible for the court to operate on any other basis.

Judge FERGUSON. I merely mention that Congress would want to deal with that kind of a problem.

I think generally the committee has done a fine job on bringing these bills to this action now before the committee. They are needed and it has been a real service and I hope that you can accomplish that service by getting it through Congress.

Senator ERVIN. I would certainly think a precedent established by one of our celebrated lawyers. Off the record.

Judge FERGUSON. I am a great believer in counsel. I think the duties of counsel require him to aid the court in every way he can so that the court is not just relying upon its own opinion but has the aid of counsel.

On the question of counsel I may say I am a great believer in the right of counsel for these men in the service. I think that before a man is disciplined, he ought to get counsel and I do not mean just an officer.

I mean a lawyer that has been admitted to a bar of repute who should be able to advice his client properly.

I also feel that same way on bad conduct discharges. Before a special court, a man should really have legal counsel before he gets a bad conduct discharge.

Senator ERVIN. That is a matter for Congress.

I would allow counsel to keep down the number of appeals.

I had the privilege of sitting on the appeals court in the State of which every one has a right to appeal as a matter of law and for the most part the lawyers were intellectually honest and I can say with a good deal of pride I think the court had the reputation of handling

down decisions soon after argument. I would say your court is pretty nearly in that class, too.

I would hope to see an act of Congress in which the Court of Military Appeals would not lose its capacity to do the high caliber of judicial work that it has been doing.

Senator THURMOND. Judge Ferguson, we are delighted to have you here. As I understand it, most of the members of the court are together on most of these bills.

Judge FERGUSON. That is correct.

Senator THURMOND. Are there any points of difference or any significance of what it means?

Judge FERGUSON. I cannot recall any except the question that I have expressed here on the right of appeal and I give some reasons here today.

If the protections are had and the court is not swamped, then I would share their view.

I think we generally agree on the various questions.

I think we are in agreement on the other matters.

I have seen a trial judge being swamped. I was a judge on the bench where the trial of cases were 45 months and 13 days behind and I have always considered that a real denial of justice in many cases.

These men in the military are not on bond. We must remember that and they are entitled to a speedy trial along the lines you provide in the code that the Government charges must file within a certain length of time. That is a good thing and you even require our court to pass upon a petition within 30 days after it is filed.

Sometimes in July and August that isn't a good thing but I think it is a good law. I merely mention even in July and August, we must keep within the 30 days and I am not objecting to that law at all but I say give leeway in the summer—it may be better—we are getting along and doing it anyway.

Senator THURMOND. Again, thank you. I want to express my appreciation for the high standard for work you and the other members of the court are doing.

Senator ERVIN. We certainly appreciate your appearance and your kindness in giving the subcommittee the benefit of your observations and experience in this highly important field.

Thank you.

Judge FERGUSON. I am very glad to have been able to appear.

Senator ERVIN. The subcommittee will stand recessed until 2:30.

(Thereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 2:30 p.m., Tuesday, March 1, 1966.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Col. Frederick B. Wiener, attorney at law, Washington, D.C.

Colonel Weiner.

Senator ERVIN. Colonel, we are glad to have you with us again. I remember very well a very provocative and very interesting and, I thought, very informative statement you made at the original hearing when we first started on this subject.

STATEMENT OF FREDERICK BERNAYS WIENER, COLONEL, U.S. ARMY RESERVE (RETIRED), ATTORNEY AT LAW, WASHINGTON, D.C.

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

I suppose I should say for the record that my name is Frederick Bernays Wiener. I am a member of the District of Columbia Bar, and a colonel of the U.S. Army Reserve, retired. As the chairman indicated, I testified here 4 years ago. I have submitted a written report on the 18 bills here and I very much appreciate the subcommittee's invitation.

(The statement referred to follows:)

STATEMENT BY FREDERICK BERNAYS WIENER ON S. 745 THROUGH S. 762, 89TH CONGRESS

As a matter of convenience, these 18 bills will be discussed under topical headings rather than seriatim.

I. JURISDICTION OVER CIVILIANS

A. Problem is to find a constitutional solution to deal with civilians accompanying the Armed Forces overseas who commit offenses as to which the United States rather than the receiving State either has primary jurisdiction, or in respect of which the receiving State is disinclined to take action. In general, the receiving State has no interest in trying such an offender when American property or American personnel are the victims of the offense.

B. It is necessary to distinguish between serious felony-type offenses, and minor infractions. Serious offenses must be tried in a United States civil court, minor infractions can either be dealt with administratively, by withdrawal of privileges or return to the United States, or by U.S. commissioners as petty offenses under the provisions of 18 U.S.C. §§ 3401–3402.

C. No constitutional obstacle is perceived with respect to trial in U.S. civil courts of criminal offenses committed by U.S. citizens abroad.

(1) The "where first found or brought" provision now in 18 U.S.C. § 3238 goes back at least to 1825, and indeed is specifically envisaged by the Constitution; article III, section 2 specifically provides that when a crime shall have been "not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

(2) The Supreme Court has expressly held that the question of the application of congressional legislation, "so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." *Blackmer* v. *United States*, 284 U.S. 421, 437. Accordingly, there have been sustained convictions for treason committed abroad (*Kawakita* v. *United States*, 343 U.S. 717; *Chandler* v. *United States*, 171 F. 2d 921, certiorari denied, 336 U.S. 918), for murder on an American ship 250 miles up the Congo River in Africa (*Flores* v. *United States*, 289, U.S. 94), for a conspiracy to defraud the United States entered into on a ship in a Brazilian harbor (*Bowman* v. *United States*, 260 U.S. 94), and for murder committed on an uninhabited guano island (*Jones* v. *United States*, 137 U.S. 202).

The basis of this jurisdiction is what Mr. Justice Holmes called "the old notion of personal sovereignty" (*American Banana Co.* v. *United States*, 213 U.S. 347, 356), on which, essentially, rests the special maritime and territorial jurisdiction defined in 18 U.S.C. § 7. England has long had such a jurisdiction; see *Regina* v. *Azzopardi*, 1 Car. & K. 203; 9 Geo. IV, c. 31, § 7; Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), § 9, which is still in force.

Before the consular jurisdiction was abolished in 1956 (act of Aug. 1, 1956, Public Law 856, 70 Stat. 773), it rested on this precise concept. See *In re Ross*, 140 U.S. 453, sustaining conviction by American consul in Japan of seaman on American ship in Japanese waters—a case which, however, would probably not be followed today insofar as it involves trial without a jury. See *Reid* v. *Covert*, 354 U.S. 1, 12, 64, 67.

D. Only proper footing for dealing with minor offenses that would not involve constitutional difficulties would be trial by U.S. commissioners under 18 U.S.C. 3401–3402. Such commissioners must be appointed by U.S. district court, and accused has option of trial in such court. Very doubtful from many aspects whether any military person could constitutionally function in such capacity. Solution would be to extend the jurisdiction of the nearest judicial district (nearest in the sense of most convenient air transportation), in the United States to include particular oversea theaters; e.g., District of Hawaii for the Far East, Eastern District of New York (in which Kennedy International Airport is located) for Europe. Compare 28 U.S.C. 91, providing that the District of Hawaii includes Wake, Palmyra, and many other noncontiguous Pacific islands.

Specific proposals

S. 761. This bill proposes to undo *Toth* v. *Quarles*, 350 U.S. 11, as article 3(a) of the UCMJ sought unsuccessfully to undo *United States* v. *Cooke*, 336 U.S. 210, which held that despite reenlistment a sailor could not be tried by court-martial in his second enlistment in respect of an offense committed in his first. (The statement in the supporting memorandum in respect of reenlistment fails to take the list cited case, that of Chief Hirshberg, into account.)

Plainly, S. 761 is desirable legislation; without it, persons committing serious offenses will regularly escape, not on the merits, but because there is no tribunal competent to try them.

The following revisions of S. 761 are suggested.

(*a*) The exception, "if (1) the offense is one for which such person could not be tried by court-martial without his consent if he were in a status subject to trial by court-martial," should be omitted, because contradictory; the proposal is by its terms limited to offenses punishable by 5 years' confinement or more, and those do not require consent. (For reasons set forth below, S. 758, which appears to require such consent, seems undesirable.)

(*b*) Where the offense for which trial is to be had under this proposal is also punishable by title 18—e.g., murder, theft of Government property—it seems preferable to proceed under that title rather than under the less familiar title 10; after all, this will be a trial in a U.S. district court. This will leave only serious military offenses, such as mutiny, misbehavior before the enemy, and the like punishable under title 10.

(*c*) Accordingly, it is suggested that S. 761 be redrawn to provide that where the offense for which the ex-serviceman is to be tried in a U.S. district court is one that is made punishable by title 18, he shall be prosecuted for violation of the appropriate provision of that title; and that where the offense is purely military, so that it is denounced only in title 10, the sentence to be imposed in the event of conviction shall not exceed the sentence that could have been imposed by a court-martial had the accused continued to remain in a status wherein he would have been triable by court-martial.

S. 762. This bill proposes to provide an American civil forum to try civilians who commit offenses while accompanying the Armed Forces abroad, and who cannot constitutionally be tried by court-martial.

The idea is admirable, but the bill as drafted uses a doubtful frame of reference, makes civilians punishable for offenses they are most unlikely to commit (e.g., art. 113, misbehavior of sentinel; art. 114, dueling), wholly fails to deal with either the homicides that brought on the jurisdictional litigation in the first place or the other serious felonies (arts. 118–130; murder, manslaughter, rape, larceny, robbery, etc.), and, by its incorporation by reference of article 134, UCMJ, raises an unnecessary constitutional question.

It is one thing to subject military persons to trial for "crimes and offenses not capital" (art. 134), on the view that "upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law." *Smith* v. *Whitney*, 116 U.S. 167, 178. It is quite another to put a civilian on trial in a U.S. district court on a charge of committing "crimes and offenses not capital."

It is accordingly suggested that S. 762 be entirely rewritten, substantially as follows:

(*a*) The special maritime and territorial jurisdiction of the United States (18 U.S.C. 7) should be expanded to cover areas where civilians accompany the Armed Forces of the United States.

(*b*) Such civilians, when they commit offenses punishable under title 18 while accompanying the Armed Forces overseas, shall be tried for such offenses in the district in which they are first found or brought.

(*c*) The only provisions of S. 762 as now drawn which should be retained are the last sentence of draft section 952(a)—no second trial where person has already been tried by foreign courts—and draft section 952(d), retaining concurrent military jurisdiction for war offenses.

This redraft, it is believed, will create no new problems, and will permit all civilians committing serious crimes abroad to be tried at home under familiar procedures.

Alternative suggestion.—Why not dispose of the entire problem of extraterritorial crime by American citizens in a single package? It can easily be done.

(*a*) Expand the special maritime and territorial jurisdiction of the United States (18 U.S.C. 7) to cover all areas where American citizens of every description are physically present, with suitable qualifying clauses to guard against offending foreign sensibilities, i.e., provisos stating that this jurisdiction to be exercised only if the foreign power having primary jurisdiction does not proceed.

(*b*) Such American civilians, which of course will include those having diplomatic immunity, may, if they commit offenses abroad that are punishable under title 18, be tried for such offenses in the U.S. district court for the district in which they are first found or brought.

(*c*) Foregoing provisions shall apply to persons who, subject to the uniform code at the time of committing a serious offense punishable thereunder by 5 years' confinement or more, have since such time become civilians. If their offense is covered by title 18, they shall be tried for violation of that title; if covered only by title 10 because essentially military in nature, then punishment on conviction in U.S. district court shall not exceed that which could have been adjudged had they still remained subject to uniform code.

(*d*) No second trial in U.S. district court where person has already been tried for same offense in substance either by (i) foreign tribunal or by (ii) courts of a State of the Union.

(*e*) Concurrent military jurisdiction for war offenses retained.

II. ELIMINATION PROVISIONS

Basically, the vice of current administrative elimination procedures is that they eliminate for misconduct with a concomitant stigma while evading the safeguards that should accompany elimination for that reason. Once consequence to the individual of an elimination for misconduct is kept in mind, it becomes absurd to prate, as Army officials so often do, that "this is administrative, not criminal."

But solution is not to encumber administrative procedures with a panoply of law officers, defense counsel, right of confrontation, and the like, it is to prohibit administrative elimination for misconduct. Moreover, the vice of the present officer elimination proceedings is not the lack of confrontation—every defense lawyer knows that a live defendant can prevail over a piece of paper—it is the vicious shift in the burden of proof.

Next, and this is a matter that must squarely be faced, any proposal to abolish elimination for misconduct invariably evokes the query, "Would you want your son to serve with homosexuals?" Since the only conceivable answer to that question is negative, elimination proceedings under chapters 360 and 860 of title 10 for "moral dereliction" are brought on the ground of "existence of homosexual tendencies."

It is difficult to envisage anyone supporting elimination of a serviceman on the ground that his conduct displays "existence of criminal tendencies"; all are agreed that he is to be tried for criminal acts alone. Why then not limit elimination of deviates to situations where they commit acts duly denounced by article 125?

For here, preeminently, is a situation where the accusation does duty for the proof, and where, in actual practice, the making of the accusation is equivalent to conviction. Shocking injustices have accordingly been committed, in many instances without a scintilla of proof. What Blacksone wrote two centuries ago is still fully applicable (4 Bl. Comm. *215): "But 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."

Yet in elimination proceedings under chapters 360 and 860, the respondent is necessarily required to prove the truth of the negative.

I therefore repeat, the only way to clean up this very messy area is to prohibit every form of elimination for misconduct except the proper one, viz, trial and conviction by general court-martial.

Specific bills will now be discussed, followed by additional proposals for legislation.

S. 747. Provides a board for correction of records at the Department of Defense level.

Desirable because of uniformity, and because it provides tenure. However, the first paragraph, new (a)(1), requires revision; the Coast Guard is at all times an armed force of the United States. 14 U.S.C. 1.

Questionable whether Retired Reserve officers should be rendered ineligible for membership, as they now appear to be; this may be an oversight.

S. 750. Section 2 provides for counsel at board proceedings where less than honorable discharge is to be given. (Sec. 1, dealing with bad-conduct discharges, is discussed below under military justice.)

This is precisely what is meant by the general comment above. It should not be necessary to have a lawyer defense counsel every time some draft board's mistake is sought to be eliminated for ineptitude.

S. 753. *Appellate review of elimination cases.*—Same comment. Most of the administrative separation cases that are properly disposed of by nonjudicial means are factual. What is there to review? Why bother the Court of Military Appeals with considering the degree of dumbness of Private Dumbjohn?

S. 754. Same comment; no administrative tribunal should have power to eliminate for misconduct to begin with. The principal safeguards that a person charged with misconduct needs are the burden of proof and the rules of evidence.

S. 756. Double jeopardy provision. This is long overdue, but it needs further prohibitions; there are three and possibly four situations, rather than simply the two now dealt with in the bill.

(1) Acquitted by court-martial, then haled before board; draft paragraph (d) covers this.

(2) Cleared by board, then tried by court-martial; this needs to be covered.

(3) Cleared by one board, then brought before another; draft paragraph (e) covers this.

Recommend a further provision, to prohibit use of a second sanity board in same case, where convening authority is dissatisfied with the first board's finding that accused was not legally responsible. See *United States* v. *Erb*, 12 USCMA 524, where, over Judge Ferguson's dissent, such a practice was approved. This is a decision that should be legislatively overruled.

S. 758. Right to trial by court-martial when administrative separation looms. Again, this approaches the matter from the wrong end. The solution is to prohibit elimination by administrative means for acts of misconduct.

Paragraph (b), waiver of the statute of limitations, should be stricken in any event. Such statutes reflect a recognition of the unreliability of memories; they benefit the community quite as much as the individual.

S. 760. Right of confrontation and compulsory process.

Once more, elaborate machinery is proposed when a simple prohibition would suffice.

The following substitute legislation is proposed:

First. The act of July 12, 1960, Public Law 86-616, 74 Stat. 386, should be specifically repealed in its entirety. This was the measure that first affirmatively provided for administrative elimination for misconduct, and that represents the first legislative shift of the burden of proof to the officer sought to be eliminated. The Senate committee held no hearings on it. It is vicious, indeed malignant, legislation; and it is plainly unconstitutional. In view of *Tot* v. *United States*, 319 U.S. 463, 467, and cases there cited; *United States* v. *Romano*, 382 U.S. 136, it creates an unconstitutional presumption; there is no rational connection between the fact proved—the accusation—and the fact presumed—the respondent's guilt of that accusation.

Second. Old chapters 359 and 859 of title 10 as they stood prior to 1960 should then be amended by specifically prohibiting elimination for acts of misconduct not evidenced either by trial by court-martial or an article 15 proceeding, and

by affirmatively stating that the burden of proving that the officer concerned should be eliminated rests on the service.

Third. The standards for types of discharges should be legislatively established. It is difficult to believe that the present proliferation, with honorable discharge, discharge under honorable conditions, general discharge, etc., etc., serves any truly useful purpose, and certainly the existence of these various varieties contains the seeds of great injustice.

Fourth. Some administrative flexibility must be maintained, in order to deal properly with situations that simply cannot be anticipated in advance; a striking example was the "discharge from draft," devised in 1918 after the Armistice caught some 60,000 drafted men in transit to training camps; its use was sustained in *Patterson* v. *Lamb*, 327 U.S. 539.

At the same time, it is equally imperative that provision be made that no discharge or separation effected administratively carry any stigma. After all, the scheme of the 1948 elimination process, old chapters 359 and 859 prior to 1960, was that anyone discharged for ineptitude or laziness would get an honorable discharge. Indeed, until 1960, numerous officers separated thereunder for acts of actual and serious misconduct likewise received honorable discharges.

There has been nothing dishonest or dishonorable about the service of a soldier who is unacceptably inept; he did the best he could, but his best was simply not good enough. His efficiency rating may properly reflect his inefficiency and thus carry a stigma; but his discharge should not stigmatize as less than honorable service that was simply substandard and involved no moral fault on his part.

III. MILITARY JUSTICE

A number of problem areas may be noted under the present heading.

First, as with the matter of eliminations, some of the remedies go primarily to symptoms and do not really reach causes. The cure for bad-conduct discharges adjudged on inadequate records after a trial by and before lay personnel is not to overload the special court-martial with the paraphernalia of a general court-martial, it is to provide that such discharges can be imposed only after trial by general court-martial.

Second, consideration should be given to abolishing the bad-conduct discharge altogether.

It was adopted from Navy practice by the Vanderbilt committee and was forced upon the other services by the Elston Act, in the view that a bad-conduct discharge did not carry the same stigma as a dishonorable discharge. In actual practice, i.e., an ex-serviceman with a bad-conduct discharge seeking employment, this is simply not so.

The Army got along for about 175 years without a BCD, and has never really felt the need for such a discharge. Contrawise, the Navy has had it for many decades, and in the Navy this seems in and of itself a reason to retain it. Compare 10 U.S.C. sections 5947, 6031(b), 6031(c).

But, whether or not abolished, the law should be amended to provide that only a general court-martial may adjudge a bad-conduct discharge.

Third, the Uniform Code of Military Justice is designed to discipline an organization of armed men so as to send them obediently to their death when this is what the Nations' safety demands. It cannot properly be equated with a code of criminal procedure for a civilian community, and this has been true since the beginning.

The first Mutiny Act of 1689 (1 W. & M., c. 5) recited in its preamble, "it being requisite" that "an exact discipline be observed, And that Soldiers who shall Mutiny * * * or shall desert * * * be brought to a more exemplary and speedy Punishment than the usual forms of Law will allow," for that reason first legalized trials by court-martial.

In this view it seems quite doctrinaire to abolish the summary court-martial with its limited punishing power simply because there is no exact equivalent in civilian life. Indeed, as will be shown, this particular abolition proposal quite fails to to take a very significant factor into account.

Now the several bills:

S. 745. Makes the Army's field judiciary system binding on all the services as a matter of law.

I have elsewhere indicated (Am. Bar Assn. Journal, November 1960) why in my view the field judiciary system marks a notable advance. The Navy has

adopted such a system, and the reasons advanced against it by the Air Force (1962 Hearings, pp. 134–135) fail to carry conviction.

It is suggested, however, that paragraph (d) of the new proposed draft article 26 be amended to read, "Duties of a nonjudicial nature may not be assigned to a military judge except by or with the approval of the appropriate Judge Advocate General." There appears no reason why a military judge who is not engaged in presiding at trials cannot perform nonjudicial work in time of peace if his Judge Advocate General does not object.

S. 746. Separate JAG corps for the Navy.

I have heard this matter discussed and argued over a period of at least 15 years, and in all that time I have yet to encounter a single valid argument against it.

It is never profitable to explore motives, but the lack of valid reasons against a separate Navy JAG corps certainly casts doubts on the good faith of the consistent opposition to this proposal over the years. The Navy will never attract first-rate law specialists in the quantities it needs under the UCMJ without a separate JAG corps and the personnel protections that the existence of such a corps provides.

I would be the last to expound the infallibility of the Uniform Code, but the services will have to live with it, the Navy along with the other three. The sooner the code is cheerfully accepted by all whom it governs, the sooner it is likely to be improved.

S. 748. More permanence for boards of review, now to be redesignated courts of military review.

If the present boards of review are to be retained, and in 1962 I expressed substantial doubt on that score, feeling that they furnished a maximum of procrastination with a minimum of genuine protection (1962 Hearings, p. 782), its membership should be given more permanence. But in my judgment S. 748 goes to far, in numerous respects:

(*a*) Draft article 66(b). A military judge who is a commissioned officer is effectually stripped of his military rank by draft article 66(f). Why should he then be debarred from becoming a chief judge?

Moreover, what is the officer's tenure on the board? Until retirement? Obviously, this should be a detail for a term of years, comparable to a normal tour of duty.

(*b*) It is not clear from draft article 66(d) whether a retired Reserve officer qualifies as a civilian. How a civilian without any military service whatever is going to acquire the "6 years' experience in the practice of military justice" required by draft article 66(b) poses a real problem; *quaere* whether any such can be found.

(*c*) Of course it is desirable to provide tenure for these judges, so that they will not be removed simply because a particular decision of theirs displeases the department concerned. But to give them life tenure (draft article 66(e)(2)) is really quite without justification.

Judges of the Tax Court hold office only for 12 years (26 U.S. Code, sec. 7443(e)), judges of the Court of Military Appeals for 15 (art. 67).

Suggest that a term of not less than 5 nor more than 10 years, with eligibility for reappointment, would be more appropriate.

This whole matter of qualifications for and tenure of the members badly needs rethinking.

S. 749. New version of article 37, forbidding command influence.

No objection is perceived, though I have an uncomfortable suspicion that the process of forbidding command influence in a hierarchial body is a little bit like the development of weapons and counterweapons: No matter how good a particular weapon, there will ultimately be developed an effective defense thereto, and no matter how effective any defense, there will ultimately be found a new weapon to overcome it.

S. 750. Section 1, no bad-conduct discharge except before an afforced special court-martial.

See preliminary comments: BCD's should be adjudged only by general courts-martial.

S. 757. Enlarge period for petition for new trial from 1 to 2 years.

Very desirable; for me the controlling consideration is the analogy of Rule 33, F.R. Crim. P.

S. 752. Law members for special courts-martial; waiver of trial by full court.

This could be considerably simplified once the bad-conduct discharge were withdrawn from the competence of special courts-martial. Suggest it is a mistake to render too complicated the formation and operation of a tribunal that deals with military misdemeanors.

S. 755. No member of a board of review to write efficiency reports on other members.

A reform long overdue.

S. 757. Pretrial conference authorized.

Accompanying memorandum makes a good case for this proposal.

S. 759. Abolition of summary court-martial.

Under the 1962 amendment to article 15 expanding nonjudicial punishment, 30 days' confinement and forfeiture of half of 1 month's pay for 2 months may be imposed, subject to appeal and review to a judge advocate or law specialist. (It is not clear whether the confinement and the full forfeiture may be combined without apportionment.) This compares with 30 days' confinement plus forfeiture of two-thirds of 1 month's pay as the maximum punishing power for summary courts-martial under article 20.

If this were the only consideration involved, the difference would not be worth discussing. But one extremely important factor has been quite overlooked.

In the Army and Air Force, a serviceman offered nonjudicial punishment can demand trial by court-martial. If the summary court were abolished, he would have to be tried by special court-martial, involving the time and attention of at least five officers, no matter how minor the offense or how low in grade the offender.

Not only does the proposal to abolish the summary court-martial ignore this vital factor, but the memorandum supporting it reflects no acquaintance whatever with the actual operation of such a tribunal, and adduces primarily theoretical considerations that, at the very least, verge upon the doctrinaire.

Moreover, by retaining the summary court-martial, there would be no need to designate the officer exercising that tribunal's probate jurisdiction (old AW 112, old AW 113; 10 United States Code secs. 4711, 4712, 9711, 9712) by the awkward title of "special investigating officer."

S. 760. Provision for compulsory process before article 32 investigating officers.

Suggest this feature be eliminated, otherwise every pretrial investigation will be ballooned out of all proportion, and every charge will have to be fully tried twice. After all, purpose of pretrail investigation was to sift out groundless accusations, not finally to determine guilt or innocence. In practice, much of today's article 32 investigation is primarily valuable for the opportunity of delaying tactics that it affords the accused.

Mr. WIENER. I think probably it will be more convenient if I divide up these 18 bills into 3 topics in which I have classed them in the statement:

First, jurisdiction over civilians; second, elimination, and third, military justice.

I also think it will be more helpful if I indicate the broad outlines rather than going into the details of draftmanship which do not lend themselves so well to oral presentation, and which I have, in any event, indicated in detail in the memorandum.

On the question of jurisdiction over civilians, we have three separate but related topics which in my judgment can be handled in one omnibus bill, very simply, very effectively. The three classes are these: the first is criminal jurisdiction over the proliferation of civilians who accompany our forces overseas in respect of offenses that the host country does not want to try. Because I think the committee can take it as a settled principle that if an American civilian overseas commits an offense against another American civilian or against an American military person or against the property of the United States, the foreign country is not interested. So that is the first group.

The second group has to deal with the recapture provision, where someone who is in the military service is discharged and after his discharge, it is ascertained that he has committed a serious offense that should not go unpunished. As the committee will recall, the Supreme Court denied that jurisdiction in the Hirshberg case,[1] whereupon Congress passed, enacted article 3(a) of the Uniform Code, and since I had won the Hirshberg case in the second circuit, which was the only court in which it was won by the Government, I recommended to the Congress article 3(a). When that was held unconstitutional, we have this problem. The Toth problem divides itself into two branches. If a person like Toth, while in the military status, has committed a serious felony, he in the same situation as an accompanying civilian, because by the time they catch up with him, he is a civilian again.

Then there is a second class of offense, the serious type of military offense, punishable by more than 5 years, which cannot go overlooked.

Finally, there is the third class of American civilian, the people in the embassies. Let us suppose we have two people in an embassy, two diplomats, and one of them is undiplomatic enough to push the other one against the sharp edge of a marble table and kill him; who can try him? He has diplomatic immunity. The host country generally is not interested. This was an unhappy circumstance in the American Embassy. They are not interested in that sort of thing. Who can try him?

Well, the answer is he can go free unless we waive diplomatic immunity and implore the host country to try him. Now, my proposal is a single bill to take care of all those situations. First of all, there is no constitutional difficulty connected with them, because the Supreme Court, in *United States* v. *Bowman*, 260 U.S. 94, and again in *Blackmer* v. *United States*, 284 U.S. 421, has said very plainly that the question is one of interpretation and not of power. Congress has the power to render criminal an offense committed by any American citizen anywhere in the world, and that power is not limited, as the Bowman language will show, to an offense against the operations of Government.

I want to emphasize that. There is no problem about the operations of Government. Blackmer interfered with the operations of Government, because when he was invited to testify before a committee of the Senate, he did not care to come. Bowman was concerned with a conspiracy to defraud the Government. I quote in part:

> We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress, as evinced by the description and nature of the crime, and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the antitrust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co.* v. *United Fruit Co.* 213 U.S. 347. That was a civil case; but, as the statute is criminal as well as civil, it presents an analogy. *United States* v. *Bowman*, 260 U.S. 94, 97–98.

[1] *U.S.* v. *Cooke*, 336 U.S. 210.

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook* v. *Tait*, 265 U.S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States* v. *Bowman*, 260 U.S. 94, 102. With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power. *American Banana Co.* v. *United Fruit Co.* 213 U.S. 347, 357; *United States* v. *Bowman*, 260 U.S. 94, *supra; Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 622. Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. Compare *Bartue & Duchess of Suffolk's Case*, 2 Dyer, 176b; *Knowles* v. *Luce*, F. Moore, 109. What in England was the prerogative of the sovereign in this respect pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States. * * * *Blackmer* v. *United States*, 284 U.S. 421, 436–438.

But in the Bowman case, the language is perfectly plain—and I shall not take the committee's time to read it; it is there in the report, the citation is in the record—it is perfectly plain that the Congress can make murder committed abroad punishable, just as it now makes murder committed on an American ship punishable. So that my proposal would be to take the definition of the special admiralty, special maritime and territorial jurisdiction of the United States, which is now in section 7 of title 18 of the United States Code, and expand that to make it applicable to American citizens anywhere in the world, with an appropriate saving clause for the sensibilities of the foreign countries. I mean after all, if an American commits a murder in a Paris nightclub, we are not going to deliver an ultimatum to General de Gaulle so that we can try that American in an American court. The only purpose of this expansion is to have a head of jurisdiction where the foreign country refuses to act, and as I have indicated in the memorandum, the British have exercised such a jurisdiction since about 1829. So that when any British subject anywhere in the world, commits a homicide, he is subject to trial in a British court.

As I say, this is not a contest with other foreign countries, this is simply a catchall so that the homicide will not go unpunished.

For place of trial, I would provide that this American committing the offense will be tried in the first district in which he is found or to which he is brought. That is a familiar provision, we have had it on the books for 140 years. There is no problem about that at all—Tokyo Rose, Paul Revere, the man who committed the murder 250 miles up the Congo River—they were all tried in the first district to which they were brought.

Then I would suggest that in drafting the bill, we go over all of the provisions of law that we want to have applicable to these people. That would certainly include the major felonies necessary. Since 1961, it has included the Espionage Act, because in the old section 791 of title 18, espionage was an offense limited to the special territorial and maritime jurisdiction.

Now, what that meant was that if a code clerk in an embassy committed espionage, we could not reach him because that was not part of the special territorial or maritime jurisdiction. So I think the thing to do is to run down the entire title 18 and see which of them should be applicable. Then we get to the Toth problem for the military offenses and there—before I get to that if we have these various provisions of title 18 applicable overseas, we have no difficulty overseas as the Supreme Court has twice said, once by Chief Justice Taft in the Bowman case, once by Chief Justice Hughes in the Blackmer case; it is only a matter of congressional intent. Congress says that these sections, naming them, shall have extraterritorial application. That means that if we get a chap like Toth, who murdered a Korean but was not discovered until he was discharged, he will be tried under the appropriate provision of title 18.

But then let us suppose the serious military offenses, have a list of those, and let those serious military offenses remain punishable. If the accused person has been discharged from the service, so that he is a civilian, he will be tried for violation of the appropriate provisions of the Uniform Code. And of course, these will only be very serious offenses and these offenses similarly will be subject to the maximum penalty that was in force at the time the offense was committed. I think there ought to be a guarantee against a second trial, either if the person has already been tried by a foreign country or by a State of the Union.

I do not know the exact status now of the Lanza doctrine,[1] which was that if you caught a bootlegger in the days of the experiment noble in purpose but unhappy in execution, he could be tried both for violating the State prohibition law and the national prohibition law. We should stop at one trial; that is enough. If the foreign country has tried him or a State of the Union has tried him, the Federal court should not try him again. And then, finally, retain the provision you now have to retain concurrent jurisdiction with the military tribunals as in the case of offenses against the laws of war, which do not depend on status.

Now, that basically supplements what I have said in the report about the pending bills and it seems to me that a bill along these lines would not only encounter no constitutional difficulty, but it would take care of a great deal of trouble that is apt to arise when you have misconduct by persons who have diplomatic immunity or who commit serious offenses in embassies. That is the way to handle it.

Now, Mr. Chairman, would it be more convenient if I went to the next section and let the questions wait?

Senator ERVIN. I think perhaps it would, Colonel. I would like to say at this time that your entire statement will be printed verbatim in

[1] *U.S.* v. *Lanza*, 260 U.S. 377.

the record, and you may make an extemporaneous statement. Some sagacious statements which you didn't repeat in your prepared text, but before you go to the next one I would like to state that I think you have given us the maximum light we have received on this question of the power of Congress to provide for the punishment of Americans who commit crimes. Many have testified as to the great and serious constitutional questions on that point.

You think that section 2 of article II of the Constitution certainly is broad enough to confer an unlimited power on Congress in this respect.

Mr. WIENER. I have been surprised, Mr. Chairman, by the constitutional doubts that have been raised, and to everyone who repeats that I always say, have you read the *Bowman* case, and have you read the *Blackmer* case. In general they haven't.

Senator ERVIN. I believe a lot of the uncertainty in this arises out of the fact that most all of the law training is in common law which is based fundamentally on the place of the crime, and in that respect is unlike the civil law, which deals with the nationality of the persons committing the crimes, and I want to thank you at this point on behalf of the committee for a very illuminating briefing that you have done on this particular question.

Mr. WIENER. Thank you, Mr. Chairman.

Senator ERVIN. It is a most intriguing question.

Mr. WIENER. I think it is clear from the *Blackmer* and *Bowman* cases that there is a personal jurisdiction on which Congress can legislate, and I know that when I argued the *Chandler* treason case in the First Circuit, one of the questions was could Chandler be tried for treason committed abroad, and the First Circuit—I had no doubt about it, and the First circuit had no doubt about it, and certiorari was denied,[1] and thereafter the Kawakita case [2] came before the court, and there was no question but what treason committed abroad was punishable.

Actually it goes all the way back to Thomas Jefferson, when in his notes on the law of treason it was perfectly clear to him at that time that treason was an extraterritorial as well as a territorial crime.[3]

I now come to the question of elimination. I am somewhat unhappy about the bills on this subject that have been introduced, because they seem to me to concentrate on symptoms rather than on causes, and because they don't distinguish between elimination for ineptitude and elimination for misconduct.

Now I think, and I speak very feelingly about this, because I have had some cases on it, and while my clients lost their several battles they did win the war and they got clean retirement, the basic reason why we are all disturbed about these elimination cases being that they permitted administrative elimination for misconduct, and under the present statute that basic fault is compounded, not so much perhaps by lack of confrontation, because as a defense lawyer I would much rather argue against a paper than against a live witness, but by the shift in the burden of proof, which requires these poor people to have to prove their innocence.

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[1] *Chandler* v. *U.S.*, 171 F. 2d 921, *cert. den.*, 336 U.S. 947.
[2] *Kawakita* v. *U.S.*, 343 U.S. 717.
[3] See reference at 58 Harv. L. Rev. 247, 248, 252–253.

Now it seems to me that the remedies proposed not only leave the causes of these difficulties undisturbed, but they make it too difficult for the services to rid themselves of the kooks and goofballs and the offbeat people and the lazy and inept.

Now in a nationwide draft, you are going to get some of those people, and you are going to get them in enlistment, and there ought to be some quick painless way of getting rid of these people. I remember very vividly right after Pearl Harbor a change in the Army regulation. The Army regulation used to be old section 8. To section 8 somebody meant he was inept, he was always the awkward man in the awkward squad, and you couldn't do anything about him, so you boarded him under section 8, and you could get rid of him.

Well, right after Pearl Harbor the feeling is, We are in a war and anybody who has a warm palpitating body and can lift a shovel or a rifle is going to stay in uniform, and we won't let them get out for ineptitude, and that stayed in effect either a year or a year and a half, because it was found it was too much of a waste of the energy of the able people to nurse these goofoffs along.

So there comes a point where you cannot afford to have those inept, lazy, incompetent people around. Now where that point would be depends on what the manpower needs are at the moment, but there is some point beyond which it isn't profitable to have them on the rolls any more.

Now I suggested the solution for this elimination dilemma is not to build up a panoply of procedure that hobbles normal administrative measures, in other words, not when the issue is how dumb is Private Dumbjohn, don't let him take that to the Court of Military Appeals.

The question isn't whether that court could handle such cases. I submit it is rather whether that court should handle those cases, and I don't think they should. But at the same time eliminate administrative elimination for misconduct.

That brings me to a very touchy subject, which I think we had better bring right out into the open, because I take it this is a discussion among adults, and that is the matter of homosexuals. Now there have been a lot of elimination proceedings in which the charge is "existence of homosexual tendencies," and then with the burden of proof the man has to prove that he doesn't have those tendencies, and as in one case in which I was counsel, he practically had to prove his prowess as a heterosexual athlete. You certainly wouldn't try anybody in U.S. district court or in the Circuit Court of East Overshoe County for "existence of criminal tendencies." You try them for criminal acts, and you try them with the burden of proof on the prosecution.

I suggest that when you are dealing with something like homosexuality that has been regarded as difficult to disprove ever since the days of Hale and Blackstone, that the way to do it is to punish acts and punish them with, as we have been accustomed under common law system for centuries to do it, with the burden of proof on those making the charge.

It seems to me therefore that if these guidelines are followed, many of the provisions in the pending bills might well be unnecessary, and I will leave the details there because they are in the statement. That will be in the hearings.

I would suggest as substantive legislation the following. I think the 1960 amendments to the elimination legislation should be repealed, and the older provisions reenacted; that is, those that were amended in 1960, reenacted with two provisos. First, that you cannot eliminate for misconduct and, second, that the burden of proof is with those seeking elimination.

I think if you have that, you will have no difficulty with the board procedure. You don't need the subpena power. You don't need a law member on the board. You don't need any of this elaborate panoply that has been provided in a very fine effort to stop the abuses, but which in my judgment doesn't properly analyze the causes.

And then the other point I suggest is this: The Congress, it might be well for Congress to indicate the kind of discharges that will be given, because otherwise you are always going to have a question of what kind of a discharge carries a stigma. For instance, what is the difference today between an honorable discharge and a discharge under honorable conditions. And then next comes the general discharge. And finally we wind up with a bad conduct discharge, and the dishonorable discharge.

It seems to me, and I realize the need for administrative flexibility, and I had that very vividly come to mind some 20 years ago when I was in the Solicitor General's Office. We had the case of Mr. Lamb.

Mr. Lamb was drafted on the 11th of November 1918, and for the benefit of some of the people in this room who were not in existence on that day, that was Armistice Day. And under the law he was subject to military law the minute he was ordered to report, but he never got beyond luncheon with his draft board, and then they canceled all draft calls and he got a dischrage from draft, for which there had been no provision at that time, because nobody envisaged an Armistice Day, and on the strength of that, he got a tax exemption in the State of Iowa.

Well, times got hard in Iowa, and they checked up on the exemptions and they found he didn't have an honorable discharge the way the State code said. He had only a discharge from draft. So they took away his exemption, whereupon he brought mandamus against the Secretary of War 25 years later to get an honorable discharge from the Army.

And for whatever illumination it sheds on the judicial mind, the court of appeals here in the District were willing to let him have it, and the Supreme Court reversed. They said he got a certificate. He got a discharge that accurately stated his service, discharge from draft. That is all he is entitled to. Reversed.[1]

Now there ought to be enough flexibility to take care of that kind of situation, but I suggest we are never going to be rid of this terrible business of what has a stigma and what has more of a stigma and what is a second, third, fourth, or fifth class of discharge which doesn't say dishonorable, unless Congress takes this present proliferation of discharges in hand and says there will be such-and-such discharges, and then if you are going to give a discharge with a stigma, do it by general court-martial.

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[1] *Patterson* v. *Lamb*, 329 U.S. 539.

That brings me to military justice. I submit the same gudieline. The way to protect the individual is not to afforce this special court-martial with a law member and specially trained counsel and this, that and the other thing. It is simply to say nobody is going to give a bad conduct discharge except a general court-martial, period, and that takes care of it.

And I must say I can not see that a bad conduct discharge is more desirable than a dishonorable discharge, and I would like to see somebody conduct a laboratory test or a survey and have two pairs of lads go around looking for jobs. One says, "I got a dishonorable discharge." Well, you know what kind of a job he is going to get. And then the other fellow says, "Yes, I am much better. Mine isn't dishonorable. Mine is bad conduct."

Well, he isn't going to get much of a job, either. I don't know whether we need it, but there again I think it is very plain that the way to solve the problem is to say if the services want a bad conduct discharge—and I am certainly not going to argue with Navy tradition, that they have had it since John Paul Jones and therefore the fleet will sink unless they continue to have it. If they want it, let them have it, but only a general court-martial should adjudge it.

Similarly, on the other hand I think it is a little doctrinaire to say we are going to abolish the summary court-martial because we have nothing really approaching it in civil life.

I will admit that there isn't much scope for the summary court-martial in view of the increased nonjudicial punishment that is now available through the amendment to article 15, that where the accused is permitted the right to refuse nonjudicial punishment, if you abolish the summary court, you have to set up a special court and that means five people to handle it. So I would say let's not go into that.

Now I have commented on the other bills. I think the field judiciary system is an admirable device. I think this is something that should be rammed down the throats of the Air Force, just as I think the separate JAG Corps has to be rammed down the throats of the Navy the way you give a little boy castor oil for his own good.

In 20 years' discussion, gentlemen of the committee, I have not yet heard a good reason against a separate JAG Corps for the Navy, and that leads me to believe there is some ulterior motive, and I don't want to review it now.

Now the only other thing that I haven't covered in detail in my statement, my written statement, concerning which I wouldn't want to take the time of this committee, is the matter of the bill that says no one shall—S. 755—the chairman of Boards of Review shall not submit efficiency reports on other members of his board.

Well, as I indicated in the statement, that is a reform long overdue. You can't have judicial independence. What kind of a court would the highest court of any jurisdiction be if the chief justice could write efficiency reports on the other members? You would have a one-man court, and this makes for one-man boards.

Now somewhere I read that the services feel that this impugns the military honor of board chairmen. Well, I say with all deference, or not much deference, that is nonsense. I don't pretend to be an expert on the Army regulations as they are today, but I knew them

pretty well 20 years ago during the war, and there used to be a provision in the efficiency report regulations of the Army that except the Chief of Chaplains and the Director of the Chaplains School, no chaplain will render a report on another chaplain.

Now I do not understand that this was considered to impugn the integrity or the objectivity of the Corps of Chaplains. It is simply that it was undesirable to have one man of the cloth pass on the efficiency of another, and I think it is the same principle, and with the permission of the committee, I will ask that this be quoted with the citation in the record.

(The document referred to follows:)

ARMY REGULATIONS 600–185, OCTOBER 13, 1942

4. *By whom rendered.*

* * * * * * *

b. Except the Chief of Chaplains and the Director of the Chaplains' School, no chaplain will render a report on another chaplain.

Mr. WIENER. I think, Mr. Chairman, that that together with what I have already submitted concludes my statement, and I am now ready for the bombardment.

Senator ERVIN. Colonel, you have made a very lucid statement. If I construe it right, you say that you think that the armed services should be afforded a method of getting rid of the inept by administrative proceedings which would be free from over-refinements of technicalities. Those are not your words.

Mr. WIENER. Well, which would be free from moral stigma and wouldn't clog up the business.

In other words, if somebody did the best he could, and that best wasn't good enough, there is no problem about it. And the history om class B proceedings, which I outlined in my statement 4 years ago, shows that something was necessary.

Now I still am of the opinion that no one has really decided whether elimination proceedings are still necessary in the Army or Air Force, and there is a bit of chronology there. The elimination proceedings which were title I of the Army and Air Force Vitalization and Retirement Equalization Law, Public Law 810 of 1948, this was introduced in 1947.

Well, in 1947 the quick wartime authority for getting rid of the "8 ball" and the drunks and most of the officers who were eliminated in 1941 under that quick procedure, and there weren't more than 200 of them, because I have checked that, they were the people who were never drunk enough to be tried by court-martial but always too drunk to be effective.

There were only about 200 of them, and that authority was about to expire, and the War Department said in 1947, "My God, we can't go back to section B, which just doesn't work, so we need something else," and this was introduced.

Well, between the time that it was introduced and in Congress, and the time that it passed in 1948, the Officer Personnel Act was passed, and that gave the Army for the first time promotion by selection in-

stead of the old promotion by senility. If the one ahead of you got old or cold, you got promoted.

Now do you need an elimination procedure for inept officers when you have a system of selection? The Navy has had selection since, I don't know, at least 1916, and they have never had elimination, because they eliminated by selection. So I don't know whether we need it.

I did find this in the review of a number of elimination cases that was in the record of the 1962 hearings, and I was assigned by the Army on one tour of duty to find out why so many of them didn't succeed. I think it could be laid down as a general proposition that if you had a war hero, Silver Star or better, you just couldn't eliminate him on ineptitude because he had been shot at and he was worthy of some consideration, and you had to wait until he was retired through the operation of the elimination system.

The same way in the old Army, if you had a noncommissioned officer of 15 years' service, unless you actually found him with his fingers in the till, you couldn't convict him by general court-martial. He was an old soldier. He was entitled to some consideration.

So I question, quite frankly I question whether, in view of this curious quirk of chronology, we still need officer elimination for any purpose, now that we have got promotion by selection and elimination for those who aren't promoted.

But assuming we do not it, it must be, in order to be fair, it must be limited to laziness, ineptitude, slovenliness, and it must be made clear by the Congress that where there is misconduct, that is to be dealt with by court-martial and only by court-martial, so that when the officers or enlisted man is separated with a stigma, that is the result of a judicial determination, because of course courts-martial are courts of the United States, and their judgments are entitled to the same respect as the judgments of other courts.

Senator ERVIN. Colonel, if I construe your testimony right, you feel that an honorable discharge is a mark of distinction, quite properly, and that there should be no laws adopted which would require or coerce the armed services in the granting of an honorable discharge to a man who is not entitled to that, merely for the purpose of getting rid of him.

Mr. WIENER. Well, I have always thought that there was a terrible inconsistency in the elimination provisions as they stood in the late fifties, when the regulations were changed, the law that you could get somebody up on a shocking act of misconduct, and if he wouldn't fight it, or even if he did he would get out with an honorable discharge.

I think it is undesirable to give an honorable discharge to somebody who has been convicted, found guilty of misconduct, but I would also say, let us not confuse the character of discharge, whether honorable or otherwise, with the character of the efficiency report, because the poor goof-off may be perfectly honorable. He just can't cut the mustard. There is nothing dishonorable about him. He is just stupid.

Senator ERVIN. In other words, you would have three categories, as I understand the discharges. In effect, one which would recognize honorable service by an honorable discharge; one which would provide a bad conduct or a dishonorable discharge can only be given for misconduct, and only after a court-martial.

Mr. WIENER. Yes, sir.

Senator ERVIN. And then you would put authority in the military to rid themselves of those who by reason of mental or physical ineptitude are unable to perform satisfactory service, and allow them to go out under some form of discharge which would not be associated with misconduct as these other discharges are now.

Mr. WIENER. Yes, that substantially is the system, and of course this is what they had back in 1918 when the discharge for draft had to be devised. They had the honorable discharge on white paper, the dishonorable on yellow paper, and then this general discharge on blue paper.

Senator ERVIN. Notwithstanding the fact that the statutes authorizing nonjudicial punishment have decreased the necessity for summary courts, you favor the retention of the summary court?

Mr. WIENER. Yes. I don't think there is much play, much scope for the summary court, but certainly if you have somebody who has the right under the statute to refuse nonjudicial punishment, why don't let's jump all the way up to special court-martial which takes at least five members. I mean the three members of the court and the trial counsel and defense counsel.

Senator ERVIN. There has been some objection voiced to summary courts because of the requirement that nobody connected with the court has to be a lawyer. I couldn't help but think in North Carolina we have a court called magistrate's court, and we even go so far as to have a statute that no practicing lawyer can be a magistrate.

Mr. WIENER. Mr. Chairman, when we are dealing with the summary court, we are down at the police court level, and I might say the lower half of the police court level.

I don't means invidiously lower half, but the less serious half. Now if these are justice court cases, except that the justices here have intelligence and they have experience, and why do you need a panoply of lawyers. Also during the war I was stationed for a year and a half at Trinidad. The simple cases in the magistrate's court were prosecuted either by officers of the police force or sometimes the simplest ones by sergeants, and just as the corpsman is perfectly adequate to lance a boil and put a bandage on, so the police sergeant is perfectly adequate to try this ordinary simple police court case.

I think the summary court, which has been in the service for many, many years, has a real utility, as you have indicated. We don't need it as much any more, because the spread between nonjudicial punishments under amended article 15 and the summary court is very slim indeed.

But suppose he refuses nonjudicial punishment? We need the summary court to avoid taking the simple police-court matter to a special court-martial.

Senator ERVIN. You agree with the proposal that no member of the board of review should write an efficiency report on the other members?

Mr. WIENER. Very strongly.

Senator ERVIN. There has been one argument made here to the effect that in some cases when an officer has served for a good period of time upon a board of review there is nobody who knows about his

efficiency or lack of efficiency except his fellow members. What do you have to say about that?

Mr. WIENER. Well, you have got the Judge Advocate General's office, which isn't like these large law factories where the partners have to be reintroduced to each other once a month at lunch.

The Judge Advocate General knows what is going on, and the chairman of the board is always free to say, "Colonel so-and-so comes in at 10:30, and I think he has three Martini lunches and he leaves at 2:30." You don't have to write an efficiency report.

I mean after all, the purpose of the prohibition is the same as the prohibition in the case of the chaplains. You preserve their judicial independence. It doesn't follow that they can neglect their work. It is simply that the pressure isn't on them.

You might say with equal force that nobody knows how the chaplain is doing. Well, the c.o. knows what the chaplain is doing, because he sees his work.

Senator ERVIN. Senator Thurmond.

Senator THURMOND. I have no questions.

Senator ERVIN. Of course, the court-martial has always proceeded on the theory that every member of the court should be independent. As I recall the procedure is you start voting with a junior member of the court.

Mr. WIENER. That is correct.

Senator ERVIN. And ascend according to seniority, in order that the junior member will not be influenced by any of the opinions expressed by the senior.

Mr. WIENER. That is correct, and in the manual that I knew best, which was the wartime 1928 Manual, in several places the manual specifically said the influence of rank will not be used to control voting.

On the other hand, we must realize that the Army is a hierarchical organization, and its purpose—it is not a deliberative body, and you couldn't run, with all deference, and I hope, Mr. Chairman, you will understand it, you couldn't run a successful Army the way you gentlemen run the U.S. Senate. I mean there has got to be someone who gives the orders.

I am not suggesting that the Army system would work in the Senate. All I suggest is the Senate system doesn't work in the Army. And in a hierarchical system, we are bound for that reason to have some modicum of decent command influence, and when you have got an ideal commander, then his example infects the rest, and when you have someone who is less than an ideal commander, you are going to have an outfit that is less than ideal, and in a sense this business of amending—is it article 37—about undue influence, improper command influence, I indicated that in my memorandum I thought it was like the eternal struggle between offense and defense in weaponry.

The moment you think you have got a good defense, a new weapon will be developed. It is impossible of course completely to get rid of command influence. After all, the purpose of discipline in the Army is different from the civilian community.

We are legislating for a different kind of social organism, if that isn't too sociological a bit of jargon. There is always going to be a certain degree of command influence.

But the question is what is improper command influence, and I have found that some of the worst instances of command influence are not the general haranguing the court-martial, but it is the staff judge advocate who has decided, after reviewing the charges, that the man is quilty, and he brings pressure to bear through the law member.

Of course in the Army that has been cut out. The field judiciary system has stopped that. That is one of the beauties of that system.

But it was my experience and my observation over many years that most of the command influence in the court-martial system emanates from the staff judge advocate, not as a puppet of the commander, but on his own, because he has made up his mind that somebody is guilty, and no one is going to prove him wrong.

Senator ERVIN. Mr. Creech.

Mr. CREECH. Thank you, sir.

Colonel Wiener, on page 2 of your statement, paragraph D, you suggest giving U.S. Commissioners jurisdiction over petty crimes, and you suggest extending the nearest geographical circuit to cover foreign areas.

Sir, by this do you mean that the Commissioner in that circuit would hold trial in the United States in that circuit?

Mr. WIENER. No. What I had in mind, the Commissioners have to be appointed by the district court under the statute, and I would have the Commissioner appointed by the nearest district court, and I suggested that for matters in Europe, he be appointed by the U.S. District Court for the Eastern District of New York, because that is where Kennedy International Airport is, and that is where most of these people will be brought.

But I would have a Commissioner sitting in Frankfurt or Wiesbaden or wherever, just as the Commissioner appointed by the U.S. District Court for the Eastern District of Virginia sits in the basement of the Pentagon and hits you for $2 or $5 or whatever it is when you are parked in a general's parking space.

Mr. CREECH. Do I infer then, sir, that you see no problem about a U.S. Commissioner exercising judicial powers in a foreign country?

Mr. WIENER. I would assume that this would be done by agreement. In other words, I wouldn't send a U.S. Commissioner into a touchy country.

But I think if you are dealing with reasonable and rational people, and you make representations through the foreign office, and you say, "Look, gentlemen, we thought we could do this under article 15 until some wisenheimer lawyer in Washington helped persuade the Supreme Court that there is no military jurisdiction, now would you object very seriously if for minor offenses we had somebody sitting in the kaserne who would take care of the people who commit offenses there?" And I am sure the answer would be why no, not at all.

Mr. CREECH. Assuming that the Commissioner can hold court on foreign soil, there seems to be another problem in that there is a right to appeal.

Mr. WIENER. Yes; I have that in mind.

Mr. CREECH. Would you care to comment on that, sir?

Mr. WIENER. Well, you send them back then to the U.S. District Court in Brooklyn. I saw in the advance sheets of the Fed. 2d within the last month a case in the Fourth Circuit where somebody had been

Mr. WIENER. Well, on what ground? I mean anybody can scream due process when you are carted off to jail. "No thief never felt the halter draw With good opinion of the law." But why would this be denial of due process?

Mr. CREECH. I think the witnesses who are going to appear later this afternoon are going to comment.

Mr. WIENER. I can't see that it is a denial of due process to be tried in the United States for an offense committed abroad which was denounced and on the statute books before the commission of the offense.

You would have to wipe out an awful lot of law and an awful lot of convictions to say that there was no jurisdiction over crimes committed outside the United States. In fact, anybody who thinks so could try to spring Mr. Chandler, Paul Revere, who is doing a life sentence for his radio broadcasting for the Nazis. He committed his offenses in Germany. He was tried in Massachusetts.

He had been indicted in the District of Columbia, but the plane couldn't get its landing gear down after they left Newfoundland, and so instead of getting into Bolling Field, they had only fuel enough to get to Westover, Springfield, so he was tried in Massachusetts, and that jurisdiction was upheld.

Mr. CREECH. Sir, I would like to move, if I may, to S. 753, where you discuss the appellate review of elimination cases. The subcommittee was told this morning by one of the judges of the Court of Military Appeals that legal issues seem rarely to be of import in these administrative proceedings if the accused in fact has received fair hearing.

As I understand it, most of the controversy arises over the factual basis for an unsatisfactory discharge, particularly after the individual has been separated and finds how serious are the obstacles which he now faces.

Mr. WIENER. That would not be generally true of the officer elimination cases. As you will see, Mr. Creech, if you refer back to that memorandum that is in the 1962 record on eliminations that were beaten at the top board level, no. The question of scope of misconduct, kind of misconduct, statute of limitations, every conceivable quantum of proof, every conceivable kind of legal issue, I think the member of the court whom you are quoting probably had in mind enlisted discharges, where the facts of misconduct were not in dispute.

Mr. CREECH. Sir, the subcommittee has received a great deal of testimony on command influence. Of course you have commented on it earlier here today, in which you indicate that one of the areas in which you had noticed or observed a man influenced has been the staff of the judge advocate.

The subcommittee has again been told this morning that in reviewing recent cases by the Court of Military Appeals, "We find in almost every instance a staff judge advocate tampering with the court in order to obtain a more favorable ratio of convictions and sentences. Case after case heard by the court indicates this, and I believe it imperative that the statute be amended expressly to reach the real source of trouble."

I wonder, sir, if you would care to expand, in view of this statement and the recommendations that the statute be amended expressly to reach the real source of trouble.

fined by the Commissioner for parking in the wrong place, and had been fined $25, and he took it on trial *de novo* to the district court, and then he was still mad, and he took it up to the court of appeals.[1] I mean, you can't prevent people from appealing.

But actually if somebody appealed from the Commissioner, all right, you ship him back to Brooklyn and you leave him there, and make that plain to him, and he probably won't persevere in his appeal. I assume the offense is sufficiently minor so that he is not getting away with anything.

Mr. CREECH. Sir, I noticed your discussion of S. 761, that you feel that it is desirable to proceed under title 18 rather than title 10, and you cite that title 10 is less familiar, presumably, to the district court judges.

Mr. WIENER. Yes.

Mr. CREECH. And then, sir, in discussing these two titles, I wonder what your view is with regard to where the punishment differs, when a man is being tried for an offense which he allegedly committed while in military service, which if he had been tried at that time he would have been subjected to court-martial, and that as a result that would have been under title 10, where the penalty or the punishment differs under title 18 from title 10.

Mr. WIENER. I think that in order to prevent any question of increase of punishment ex post facto, or anything like that, you would have to have a special provision that whenever in the situation the punishment under title 10 to which he is then subject is less than the punishment under title 18 to which he would have been subject if he had been a civilian at all times, then the lesser punishment shall apply.

I think that would undoubtedly be necessary, and if you had called my attention to that earlier, Mr. Creech, I would have suggested that as a proviso.

I think it is very necessary, because I think it is *Hopt* v. *Utah*,[2] an old Supreme Court case, says that when you increase the punishment, you are running into ex post facto. There is a line of cases. But at any rate, whether or not the doctrine is in good standing, let's not legislate in such a way even to raise the question.

Mr. CREECH. Colonel, with regard to S. 762, you have proposed that a more expansive bill, one that will cover all citizens and not just those accompanying the military as originally intended——

Mr. WIENER. Yes.

Mr. CREECH. In this section, sir, you have made it clear that you feel that this should be under title 18.

Mr. WIENER. Yes.

Mr. CREECH. Section 7, an expansion of the maritime section.

Mr. WIENER. Yes, because there you see you wouldn't have the problem raised in your last question of a possible lesser penalty under title 10, because these people by hypothesis would not be subject to title 10.

Mr. CREECH. Sir, the subcommittee has been told that such a trial would be a denial of due process. I presume that you do not agree with this.

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[1] *U.S.* v. *Murray*, 352 F. 2d 397.
[2] 110 U.S. 547.

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I wonder, sir, if you would care to expand, in view of this statement and the recommendations that the statute be amended expressly to reach the real source of trouble.

Mr. WIENER. Well, it is a little bit like some of the pre-*Mapp* v. *Ohio*[3] suggested remedies against unlawful searches and seizures.

You say you will prosecute. The thing to do is to prosecute the policeman. Don't exclude the evidence.

Well, how are you going to reach the staff judge advcoate by statute? If he doesn't have enough sense of the responsibilities of his position, if he doesn't have any more understanding of what a code of criminal justice is supposed to do, because after all the Uniform Code is a code of criminal procedure, criminal law, I don't see how you are going to reach him by statute.

I know in my own experience, I was defending an officer before a general court-martial at a neighboring post, and let me say at the outset I got him off. He said he wasn't guilty and the court said he wasn't guilty. And at the recesses I would see my opposition, the trial counsel, running into the staff judge advocate's office to learn how to deal with my objections.

Well, now, if there had been a conviction, what kind of a review would my hero have obtained? Not a very sympathetic one. But the only solution for that, Mr. Creech, is to do what the British have done, certainly in their army and air force, and that is to separate prosecution from review completely.

The British Army has a director of legal services and the Royal Air Force also has a director of legal services, and he passes on charges and he reviews them for sufficiency and he recommends prosecution, and then after the case is tried, the record goes to an entirely different officer, the Judge Advocate General.

If the situation is that bad, you would have to divide the two. But it would have to be pretty thoroughgoing. I mean after all, we have got a Judge Advocate General for each of the Services. You would have to split him up.

Unless you are prepared to go that far, and just separate review and sufficiency from prosecution and recommendation for trial, these little patchings here and there won't do it.

Senator THURMOND. Colonel Wiener, I just want to commend you for your interesting and impressive statement which you have made here today.

Mr. WIENER. Thank you very much, sir.

Senator ERVIN. It has been very helpful, Colonel, because you have given us some independent views, I mean some views which are divergent from those which have been expressed. You have made some very original suggestions that have been very helpful to the committee.

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

Senator ERVIN. We certainly appreciate the assistance you gave us, and also the assistance you first gave us when we started to investigate this field.

Mr. WIENER. You are very generous, Mr. Chairman.

Mr. CREECH. Mr. Chairman, the next witness is Father Joseph Snee, Society of Jesus, professor, Georgetown University Law School.

Father Snee.

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[3] 367 U.S. 643.

STATEMENT OF JOSEPH M. SNEE, S.J., PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Senator ERVIN. Father, I am delighted to welcome you to the subcommittee. I also wish to take this occasion to thank you for the interest which you have manifested in the operation of the Status of Forces Treaty and similar arrangements.

It happens I have been chairman of the subcommittee which reviews the actions taken under these treaties and similar arrangements, for some years, and also Senator Thurmond is a member of that subcommittee. I have appreciated very much your interest and your illuminating comments in that field of our military service.

Father SNEE. Thank you, Mr. Chairman. It is a great pleasure to be here. I am afraid you have given me a rather difficult row to hoe; following Fritz Wiener is not an easy task, as I am sure you realize.

For the record, my name is Father Joseph M. Snee. I am professor of law at Georgetown Law School, and a member of the bar of the District of Columbia.

Like Mr. Wiener, I will divide my remarks into three categories, first dealing with jurisdictional problems, the last two bills proposed, and touching very briefly upon the administrative eliminations and going then to the question of military justice.

I have not written a prepared statement, due partly to my own fault and partly to the press of other business. I thought, however, I might have a few comments and questions with regard to pending legislation which might be of some interests and possibly of some help to the committee, for whatever they may be worth.

The jurisdictional bills, S. 761 and S. 762, particularly the replacement of article 2(11) of the Uniform Code of Military Justice have me somewhat puzzled, S. 762 in particular, because I am not quite sure what it is intended to accomplish.

I gather from the memorandum which accompanied it that S. 762 is meant to fill up the jurisdictional gap left by the decision of the Supreme Court in *Reid* v. *Covert*, which was accomplished under very adept and expert prodding by the former witness, and S. 761 to fill up the jurisdictional gap left by the *Toth* decision.

Referring to S. 762, civilians overseas or their dependents or employees, I don't think that the present proposed bill fulfills the purpose for which it seems to be intended. I have been somewhat puzzled by it because it lists a number of articles of the code which would be applicable under this bill.

There are five relating to inchoate crimes (art. 77–81); article 82, solicitation of certain offenses such as desertion and mutiny; and then there is a rather weird assortment of articles involving such things as false official statements (arts. 107–111), misbehavior of sentinels (art. 113), and dueling (art. 114), which I had not realized was a major problem of our dependents overseas, and on riot and breach of the peace (art. 116).

Then we come to article 134, in which they take out the one phrase, "crimes and offenses not capital." I gather from the memorandum that what the draftsmen intended to include under this are title 18 offenses. Now if this is the intent, it certainly would be a major

change in the interpretation which has been given by the court to article 134.

Article 134, as it now is interpreted by the Court of Military Appeals and by the Manual for Courts-Martial, includes under the "crimes and offenses not capital" section those title 18 offenses which are of general application, such as treason, counterfeiting, and so forth, where the offense, no matter where committed, is regarded as being detrimental to the interests of the United States. It includes those title 18 offenses which are of limited application, only where the title 18 applies.

So in case of an offense of this kind, which would be applicable under the maritime jurisdiction of the United States if committed by a sailor, he could be tried either under title 18 or under article 134 as incorporating that part of title 18 otherwise applicable to him.

The same is true of the District of Columbia Code. If an offense is committed in the District of Columbia, then the sections of the District of Columbia Code are applicable under 134 but not otherwise.

It seems to me therefore that the proposed S. 762 would cover a very small area of criminal conduct, and would by no means reach the very type of offense which it is meant to reach; namely, to cover such cases as *Reid* v. *Covert* and the *Gruger* case, *Guagliardo* v. *Wilson*.

Secondly, in section (b) of proposed section 952 of title 10 (against double jeopardly), in providing this section shall not be applicable where an offense as already been tried or a similar offense has already been tried by a foreign country, there is a provision made that it must be a country with which the United States has a treaty or agreement. I don't understand the force of that provision.

First of all, we have no agreement right now with any country so far as I know, which after *Reid* v. *Covert* and companion cases, covers the trial of civilians. The Status of Forces Agreement in this regard is completely inapplicable.

The double jeopardy provision, it seems to me, shall be applicable whenever one of the civilians has been tried by a foreign country or by a State and should bar a subsequent trial by the United States under S. 762 or the other provisions not as a matter of constitutional right but as a matter of ordinary jurisprudence.

Also I am puzzled by the fact that this does not, as does the other companion article, S. 761, limit itself to serious crimes, such as those punishable by more than 5 years.

I am also troubled by the fact that there is no provision in either of these for the attendance of witnesses for the defense. Presumably the Government will supply or will make its best efforts to procure witnesses from the foreign country for the prosecution, although there is no compulsory process. There are certain ways of exercising influence with the foreign office of the other country through the ministry of justice, to see that their nationals cooperate in the prosecution of offenses.

I seems to me there should be some guarantee that the same methods will be used to secure the necessary witnesses for the defense. If Government witnesses will be transported in an Air Force plane to the United States for trial of these offenses, it seems to me the same facili-

ties should be offered to defense witnesses, and I would hope that any statute which would be enacted to cover this situation would provide explicitly for such cooperation by the Government in the supplying of defense witnesses.

Senator ERVIN. Do you think that that omission raises the question of due process? In other words, is it due process of law to try a man if he has no witnesses available and they can't be made available?

Father SNEE. Well, they cannot be made available, Senator, if the United States has no compulsory process. Justice Holmes met a similar situation once when he said the answer to the due process argument is the United States does all that it has to, when it does all that it can, and I would be satisfied if the United States made the same effort to get defense witnesses as it does to get prosecution witnesses. In this regard also, I would hope that the subpena power would be extended at least to cover nationals residing abroad, if their attendance is necessary at a trial in the United States.

The proposal of Mr. Wiener is somewhat similar to what I would propose in lieu of the present S. 762, which I do not recommend for passage in its present form, for the reasons I have suggested. I don't think it achieves its purpose.

Either take the title 18 offenses, which are of limited applicability, maritime jurisdiction, and make them expressly applicable to the Toth situation and to the Covert situation, or take the provisions in the District of Columbia Code and make them applicable to these two categories. I hadn't thought of the third category mentioned by Mr. Wiener; namely, the Embassy officials. I think it is a very significant contribution that he has made to the discussion in suggesting that.

I have some doubts, however, with due deference to a great constitutional authority with regard to the United States attempting to punish every crime committed by every American citizen or national overseas. I have no difficulty where the crime is of such nature that it affects the governmental operations of the United States.

I have no difficulty where the persons involved stand in peculiar relationship to the United States, such as Embassy personnel, military personnel, or persons accompanying them or working for the U.S. Government overseas, but if we extend it to the ordinary tourist and draw a statute so broadly worded that it could be extended to the ordinary tourist, I would have a question how that might fare with the Supreme Court of the United States, because the United States is a government of limited and delegated jurisdiction.

It is not in the same position as the ordinary sovereign state, which has all the criminal jurisdiction inherent in sovereignty. I think that might make a difference if we worded the statute so broadly that it went beyond the three classes of people we were trying to hit.

I have no doubt about the constitutionality, if the application is limited to those three classes. I would go along very much with Mr. Wiener in his suggestion of adopting title 18. Whether it is put in title 18 or title 10, I think is a question of draftsmanship more than anything else.

On one point I haven't read Mr. Wiener's memorandum but the suggestion was made, as I gathered from the discussion, that it would be possible to have a U.S. commissioner sitting in foreign countries

for the trial of petty offenses. From my own experience in this field, I would say it is absolutely impossible. I do not think that most foreign countries would agree to it at all.

I think probably one of the first to object would be our closest ally, Great Britain. There would be serious difficulty in Parliament, as the debates there revealed in 1952 strong opposition to the idea of allowing a foreign court-martial to sit on British soil at all.

I have in my office a copy of a memorandum from the Foreign Office of one Government with which we have an agreement to try our people by court-martial for offenses committed in that country. We sent a request, that is, letters rogatory, to a court of this country to get some depositions and this was forwarded to that Foreign Office and the Foreign Office said they did not recognize the right of any foreign government to conduct court on their soil and they had never understood that these trials to which they had consented would take place on their soil. They thought they would take place outside the country.

I am highly doubtful that most countries would agree to have any judicial officer of the United States, other than a court-martial sit there. The reason that the concession has been made for courts-martial is because these are regarded as being intimately connected with military operations which they are sharing with us; whereas if the Supreme Court of the United States, and therefore our Government, holds that the connection of these civilians with the military operations is so tenuous that it will not support military jurisdiction under our own law, why should it be the basis for special treatment of these civilians under the law of the foreign country?

Senator ERVIN. There would be a substantial surrender of sovereignty to permit a civilian court of the United States to try people for crimes committed, however bad they might be, on foreign soil.

Father SNEE. I think I need not remind the Senator of the comments which would be made on the floor of the Senate, if similar legislation were proposed in this country. We have a statute allowing courts-martial of friendly allied nations, but is is completely inactive now because for some unknown reason President Eisenhower revoked the Presidential order which made it applicable, I think, to Great Britain and Canada on the grounds that under the status of forces agreement it was no longer necessary.

I do think, however, that some legislation along the lines of S. 761 and S. 762 is vitally necessary because there are cases which the foreign country, the host country, is not going to want to try. They are not particularly interested, and yet we have a vital interest in trying them.

I am thinking of such situations as the Wilson case which took place in Berlin a few years ago. Wilson was a Department of the Army civilian who was charged with homosexual indecent acts with young enlisted men and teenage sons of Army personnel, obviously a rather explosive situation from both the disciplinary and morale viewpoint. And the Germans were not particularly interested in trying him. They take this type of offense a little more lightly than we do, and no German personnel were involved and yet we were interested.

It seems there should be some way whereby we can reach out and get at this type of situation. I don't think a statute of this kind would

be very often used but it should be there to be used when the occasion arises to make it necessary.

With regard to administrative discharges, I touch very briefly on that because it is an area on which I am not too cognizant. I agree completely with Mr. Wiener. I think one of the greatest difficulties today has been the lumping of misconduct and inaptitude together as grounds for administrative charges, and I am very concerned about something that he put his finger upon, the question of homosexuality as a basis for these discharges, not overt acts which could be tried by a court-martial, although sometimes these are present and they still take an easier way out by way of the administrative discharge rather than a court-martial.

I might also mention that a good deal of this is being done under the influence of service psychiatrists who say it is a sickness, let's not prosecute, let's just board him out. But the quantum of proof is less. The burden of proof is different.

An overt act is not required. A tendency as found by psychiatrists, is found to be sufficient and the man is given an undesirable discharge and in many ways an undesirable discharge is far worse in civilian life than a BCD is, in many ways.

A fellow who was in the First World War, an employer, says, "I know how boys cut up. I can see how you got a bad conduct discharge, but an undesirable discharge, that is completely different. The employer will say, "We don't want you." Whereas he might be willing to overlook a BCD.

Secondly, an undesirable discharge today, because of this practice, no matter what the person has been discharged for—it might have been because he is mentally deficient—just a nit-wit, carries with it the suspicion of homosexuality, almost invariably. This question arises when a person has an undesirable discharge. So I would suggest that, with the elaborate mechanism having been set up in the proposed legislation, I would go along with Mr. Wiener and say, if misconduct is involved, use the court-martial and I would also try to do something about the question of homosexual tendencies as a basis for administrative discharge.

Senator ERVIN. Father, the evidence indicates that the field that gives more pause to the military than any other one thing is this. In the first place, when you try a man for a tendency, of course, as you point out, you have no corpus delicti. Then on the other hand, homosexuality is an offense which is committed in secret and it is very difficult to secure evidence. Even those who would stand up very strongly for the right of a man to be confronted by his accuser and be accorded all protection of due process, seem to lose some of their fervor for constitutional principles of that character when it comes to homosexuality. They point out that to compel the other man to associate with people concerning whom such suspicions are entertained, has a bad effect on the morale of the other people who are not defendants. It is certainly a very troublesome area.

Father SNEE. Yes, and as you say, it is a highly delicate situation, but it is one that has to be faced squarely, I think; and I don't think it has been so faced by the services to date.

Going to the area of military justice——

Senator THURMOND. At that point, Father, how many types of discharge do you feel should be used? I believe the previous witness, Colonel Wiener, suggested maybe an honorable discharge, a dishonorable discharge, and then a release. I don't believe he designated that by a particular name.

Father SNEE. Well, I would be inclined to go a bit beyond that, Senator. An honorable discharge for those whom we wish to honor for their services; a general discharge for those whom we wish to let out with sort of a neutral feeling—the "We-are-both-glad-to-be-rid-of-each-other" type of situation.

And then the punitive discharge, I would have too, a dishonorable discharge, where moral turpitude is involved, or a very serious offense against military discipline, and a bad conduct discharge for less serious offenses, or offenses for which there is no moral turpitude.

Senator THURMOND. So you would have about four?

Father SNEE. About four.

Senator ERVIN. And you would use the general discharge to release from service those who are inept, either physical or mentally, to perform the duties in the Army services, notwithstanding the fact that they might be willing but they are just not capable?

Father SNEE. Yes, Mr. Chairman. They are just let out and we are not taking this occasion to honor them.

Senator ERVIN. Certainly it is a bad reflection on the state of the morale on the forces, as well as a grave injustice for men who have served well in the Armed Forces, to see honorable discharges granted to those whose services have not been of substantial value to the country.

Senator THURMOND. Then where would you place the homosexual, in what category?

Father SNEE. If he has committed an overt act, I think he should be tried for it. If he is not going to be tried for one reason or another——

Senator THURMOND. If he is cleared of the charges—suppose there is not enough to try him? You have a strong suspicion. You have evidence from various sources about homosexuality. He is an undesirable and you want to get rid of him. Where will you place him?

Father SNEE. I would give him the general discharge.

Senator ERVIN. Bad conduct would only be found by a court-martial?

Father SNEE. By a court-martial.

Senator THURMOND. The same as a dishonorable discharge?

Father SNEE. Yes, sir. And I don't think either one of those should be given, or any discharge which carries a stigma, and certainly an undesirable discharge does—I don't think any of those should be given until the man has had his day in court, whether it is a civil type proceeding or a criminal type of proceeding. He should have his day in court.

Senator THURMOND. Thank you.

Father SNEE. With regard to the suggestion made on military justice, I was very happy to see what was proposed for the conversion of the boards of review into courts. This is something which is long overdue and I would say, as a principle, in dealing with military

justice, the more we can elevate the position of the so-called law officer and of the board of review to the status of true courts and true judges, the healthier atmosphere we will have for the administration of military justice.

I have one or two questions with regard to S. 748, which would revise article 66 of the Uniform Code and one is in section (a). It is stated that these are courts of record and—in my view this would make applicable to the courts of military review the provisions of the all-writs section of title 28 of the United States Code, section 1651, which says that the Supreme Court and all courts established by act of Congress have the power to issue all writs customary at law, and I wonder if it would be the intent of the Congress in passing this particular bill, to confer that power upon a court of military review.

I see no reason why it should not be so conferred. I think the Court of Military Appeals has this power.

As a matter of fact, I had occasion a couple of years ago, to threaten to file a petition for a writ of mandamus in the Court of Military Appeals to force a board of review to release a record to counsel in the case. It was settled out of court.

Also in section (e) (2) it is stated that civilians will serve during good behavior. Now this is language taken, of course, from article III of the Constitution where it refers to life tenure of Federal judges. I wonder if it is the intent of that section, or if it would be the intent of the committee in its proposed legislation, which would give life tenure to civilians on the courts of military review, or whether the meaning is that they would serve during good behavior until the time of their ordinary retirement or mandatory retirement under the civil service statutes. That is something which perhaps should be clarified.

Also, on a question of rules of procedure, two points. That is in section (k). With regard to the rules drawn up by the chief judges of the courts of military review, I would give the power of approval, not to the Chief Judge of the Court of Military Appeals, but to the Court of Military Appeals itself, the three judges, and I would give them, not only the power to approve, but the power to modify these rules. In other words, it is not a package deal which they must either accept or reject.

The two most vital and, to my mind, significant proposals made in this mass of proposed legislation are contained in S. 759 with regard to the summary court-martial and in S. 752, with regard to trial by the law officer or military judge.

I am very much in favor of abolishing the summary court-martial. It seems to me an officer sitting under command of a superior officer, who has brought charges against a soldier before this officer, sits there as an alter ego of the CO, whether we like it or not. I see no difference between having him try the case or having the CO himself try the case. In practical effect, I think this is the case.

It differs, of course, from article 15 punishment in that it is a conviction of a criminal offense which results from the action of a summary court, which is not the case where punishment is imposed under article 15.

With regard to military justice, I don't think that you will find anywhere in the world a fairer kind of justice than that which is proposed in the statute for the general court-martial where it is fairly

administered. It combines the very best elements, to my mind, of both the common and the civil law.

But as we go down the echelon, the judicial structure of military justice to the special court and to the summary court, I would be less ready to make a statement of that kind. I think if you looked at the Court of Military Appeals opinions, you will find a large number of difficulties that they have had with special courts-martial and, of course, summaries never get to them.

In this regard, there are one or two comments I would make. First of all, assuming we are going to abolish the summary court, I would suggest the code should be modified in a very essential respect and that is the determination of the court to be employed would follow from the nature of the crime and the punishment imposable, as it does, for instance, in the District of Columbia.

The U.S. attorney does not decide whether to send a case to district court or to the court of general sessions on the ground that he wants a greater or lesser punishment imposable. He looks at the punishment imposable under the statute and that determines which court it is sent to.

Now when a commanding officer in two cases, which are similar in nature, sends one to a summary court and the other to a general court, the general court knows in advance the punishment that the commanding officer thinks appropriate in that case. It is a complete tipping of his hand, and indication by the fact that he sent it to a general court rather than the special, that he thinks the accused should get the maximum penalty.

I think the offenses under the code should be classified according to the punishment imposable, and that should determine automatically which court they go to, saving the possibility, in some cases, of either reducing the charges or by way of exception, sending the case, an offense or an alleged offense, which could carry a major punishment, to the minor court, the special court, because of special circumstances.

I would like also to see, and I think we are going to see it, every special court presided over by a military judge or a law officer.

I don't think it would be good at this particular point to try to make that mandatory, but once the statute makes it possible, as this proposed legislation does, to have a law officer or military judge sit with the special court, I think it would very rapidly, particularly in the Army and in the Air Force, become standard procedure. But if we try to make it mandatory, I am afraid we would have a good deal of opposition from the Navy in that regard.

Going from that to one other point, S. 752, trial by the law officer, might be called a waiver of the court, anologous to waiver of jury in civilian courts. The proposed legislation provides that a waiver may be withdrawn at any time by the accused if it is before trial, but once trial has begun, then it may be withdrawn only with the consent of the trial counsel and with the consent of the Government.

It seems to me that should be a two-way street. First of all, I think that, as in the Federal system, a waiver of the court-martial should require the consent both of the accused and of the Government and withdrawal of the waiver should require the consent of both.

I have various other comments on several of the statutes which are more or less of a techanical nature, and I will get those typed out and see that they do get somewhat belatedly to counsel.

What I have said on the question of the type of offense determining the court, I think is something very essential. The elimination of a summary court, I think, is essential to building up a really civilized system of military justice in our Armed Forces. All of the statutes here which are proposed, I think, head in the right direction.

My difficulties with them are principally technical and in the case of S. 762, I just don't think it accomplishes the purpose which it is intended to accomplish.

Senator THURMOND. What do you have in mind in place of a summary court, or have you already mentioned that?

Father SNEE. Senator, I would take the summary court jurisdiction and send most of it to the special court where you have three people at least. There is a certain safety in numbers. Three may be a little bit more independent of command influence than one is.

Some of the present jurisdiction I would push back into article 15 and increase the possibilities of confinement, or what I might call quasi confinement, detention under article 15. By that I mean an enlisted man, for instance, going about his work during the day and when evening comes, he goes back to the guard house. At least he doesn't go out with the boys in the evening.

It smacks a bit of paternalism, but we have to remember that as a result of article 15 punishment, there is no stigma of a criminal conviction attached, and many of these people feel they are locked up anyway during the whole of their term of enlistment, and I don't think this is too great a departure from accepted norms of punishment.

There is one point, however, with regard to article 15 I would like to mention here and that is the fact that a commanding officer, sometimes rather junior in grade, has the power to impose a reduction in grade as a punishment, nonjudicial punishment, and this is an action which can entail the loss of thousands and thousands of dollars to the accused in reduced pay and sometimes in reduced retirement pay. I am not sure that this is a power which should be put in nonjudicial hands. That, I think, concludes the comments that I had to make.

Senator ERVIN. Father Snee, I wish to thank you for some very helpful suggestions which you have made.

Father SNEE. Thank you for the opportunity of coming, sir.

Senator THURMOND. I wish to express my appreciation to you.

Father SNEE. Thank you, sir.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Edward Cogen, accompanied by Mr. Lawrence Speiser, director, Washington office of the American Civil Liberties Union.

STATEMENT OF EDWARD S. COGEN, ACCOMPANIED BY LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. COGEN. Mr. Chairman, for the record, my name is Edward S. Cogen. I am a member of the New York and the District of Columbia bars. From the period 1961–64, I served on active duty with the U.S. Air Force as a judge advocate.

Mr. Speiser is director of the Washington office of the American Civil Liberties Union. On behalf of the ACLU, we certainly appre-

ciate the opportunity to be here today to discuss this matter with you.

Senator ERVIN. We wish to thank you gentlement for making your appearance on behalf of the American Civil Liberties Union.

Mr. Speiser is an old friend of the committee. He has been here on several occasions and has been very helpful to us, not only with respect to this proposed legislation but in a number of other areas.

Mr. SPEISER. Thank you, Mr. Chairman.

Mr. COGEN. Sir, since we have already submitted our prepared remarks, I will try to be brief and just summarize the position that we have set forth.

Senator ERVIN. Let the record show that the prepared remarks will be printed at this point in full in the body of the record.

(The prepared statement follows:)

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS AND A SPECIAL SUBCOMMITTEE OF THE SENATE COMMITTEE ON ARMED SERVICES BY EDWARD S. COGEN AND LAWRENCE SPEISER

LEGISLATIVE PROGRAM DESIGNED TO SAFEGUARD CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

I am Edward S. Cogen, a member of the New York and District of Columbia bars, and a former Air Force judge advocate. Mr. Speiser is director of the Washington office of the American Civil Liberties Union. We appear today as spokesmen for the ACLU.

The American Civil Liberties Union has traditionally been concerned that all persons be accorded the fullest measure of due process when brought before judicial or administrative tribunals. We therefore endorse the goals of this subcommittee and support generally its proposed legislative program. However, we feel that some of the proposals do not go far enough toward achieving fulfillment of these goals and accordingly recommend certain revisions.

Preliminarily, we note that some of the proposals prepared by your subcommittee—and some of the revisions which we shall advance—undoubtedly will dictate the greater utilization of legally trained personnel. To those who would oppose the proposals or revisions on the ground that the judge advocate components of the various armed services are inadequately staffed to meet this demand, we would suggest two answers. First, more efficient allocation of existing manpower resources would considerably expand the availability of legally trained personnel. Thus, judge advocates who presently are required by many commanders to perform totally unskilled jobs, such as the taking of inventories, assignments as club officers or duty officers, and the like, could be freed from such tasks, and their time could more appropriately be spent in the performance of legal duties. Second, because current DOD manning requirements have been fully satisfied, many young attorneys are denied appointments as judge advocates and are instead called to active duty in nonlegal capacities. Accordingly, a large reserve of potential military attorneys remains untapped because of the Defense Department's own personnel policies.

Thus, it is our view that there is a sufficient source of legally qualified persons to implement any legislation designed to safeguard the constitutional rights of military personnel.

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S. 745

The union endorses the establishment for all services of independent field judiciaries, who will preside as law officers of all general courts-martial. Unquestionably, the system has worked well where used, and the enactment of this proposal will go a long way toward improving the quality of military justice.

We would suggest, however, that consideration be given to establishing one unified field judiciary as a corps or agency independent of the four services.

Not only should this encourage a more efficient utilization of judicial officers, but most important, it would insure the independence of the field judiciary and enhance the likelihood that the law will be uniformly applied throughout the Armed Forces.

S. 746, S. 747 AND S. 748

The ACLU supports the proposals that will (a) establish a Navy judge advocate corps, (b) create a single board for the correction of military records, composed entirely of civilians with authority to correct findings and sentences of any court-martial not reviewed by a board of review, and (c) change the structure and designation of existing boards of review by establishing instead an intermediate appellate tribunal within each Armed Force and authorizing the appointment to such court of military and civilian judges.

The establishment of a Navy JAG has been advocated by bar groups for some time and is not opposed by the Department of Defense. The two other proposals should encourage the independence of the respective appellate body and are, we think, improvements over the present arrangements. But this committee may wish to consider the desirability of abolishing the existing discharge review boards and merging their functions with the proposed new correction board.

For the same reasons that we urge a field judiciary independent of each of the branches of the service, we would suggest that the military members of the new intermediate appellate tribunal be assigned to an agency directly under the Secretary of Defense.

S. 749

We wholeheartedly support the bill providing additional safeguards against the possibility of command influence in courts-martial, prohibiting the consideration or evaluation of the performance or conduct of military personnel when they are acting as court members, and the extension of these protections and prohibitions to administrative boards.

We submit, however, that the bill's failure to prohibit a commander from seeking to influence the determination of article 32 investigating officers is unfortunate. For just as the independence and integrity of a civilian grand jury is essential to due process, so too, must the military's grand jury counterpart be immune from undue influence.

S. 750

Subject to the following reservations, we endorse the proposal that will expand the right to counsel and entitle a person, except in time of war, to legally qualified counsel in any judicial or administrative proceeding authorized to issue a discharge under less than honorable conditions.

But we would go even further and require that a defendant in any court-martial proceeding (except, perhaps, in time of war) be provided with the services of an attorney. Not only is a court-martial conviction a criminal conviction that remains with a defendant the rest of his life, but the sentences that may be imposed (short of a punitive discharge), such as confinement at hard labor for 6 months, forfeiture of two-thirds of one's pay and reduction to the lowest enlisted grade, are sufficiently severe to justify the required presence of a legally trained defense counsel.

Similarly, in administrative proceedings, we believe that no discharge other than an honorable discharge should be issued without the respondent having been represented by an attorney. General discharges, though given under "honorable conditions," are notoriously debilitating to the person who receives one. The Department of the Air Force itself acknowledges that a "general discharge has been found to be a definite disadvantage to an airman seeking civilian employment." (AFR 39–10, para. 8a (Mar. 17, 1959)). Since the issues raised in administrative discharge proceedings are frequently of a complex and legal nature, and since a general discharge can be a serious handicap to a discharged serviceman, we fail to see any justification for failing to prohibit the issuance of such discharge save to a person who has been represented by legally trained counsel.

S. 751

The ACLU endorses the proposal to extend from 1 to 2 years the time for petitioning for a new trial and to expand the remedy to include any conviction by court-martial. The extension of time will bring the military practice into con-

ably in streamlining procedures and assuring defendant of a speedy and fair trial. We also hope that similar procedures will be established for special courts-martial, if S. 752 is enacted. The union also believes that the authority of all law officers to make final rulings should be expanded to bring military practice more into conformity with Federal civilian practice.

S. 758 AND S. 759

The ACLU supports the bill prohibiting the administrative discharge (for misconduct) of servicemen who instead request trial by court-martial, and the bill abolishing the summary courts-martial. S. 758 will prevent the services from bypassing the constitutional safeguards built into the Uniform Code, at least when the serviceman desires these protections. And in light of the recent expansion of article 15's scope, the latter bill, eliminating a judicial anachronism, is most needed.

S. 760

We endorse the proposed authorization of administrative discharge boards, discharge review boards and article 32 investigating officers, to compel the attendance of witnesses by subpena. We trust, of course, that the procedure subsequently to be defined will adequately insure that respondents before such boards, and the accused in the case article 32 investigations, will also be able to have their witnesses subpenaed.

S. 761 AND S. 762

The ACLU appreciates the committee's concern with filling the jurisdictional hiatus created by *Toth* v. *Quarles*, 350 U.S. 11 (1955), *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), and related cases. We are, nonetheless, opposed to these bills authorizing trials in a Federal district court of persons who, though no longer in service, committed certain offenses for which they never stood trial, and civilians who commit crimes while accompanying the Armed Forces overseas.

In the event these proposals are enacted, they will permit a person who is accused of commiting an offense to be tried thousands of miles from the scene of the alleged offense. Insurmountable problems relating to the defense's investigation of the facts, preparation of the case and securing the attendance of essential witnesses still overseas, would be created. Few accused persons would be able to bear the expenses called for in such a proceeding. "Due process," in these cases, would be almost a meaningless phrase.

It is true, as we have said, that there now is a jurisdictional hiatus. But how compelling is the need to fill the breach? How many persons would this legislation in reality affect? And isn't the wisest course to permit the courts of the foreign jurisdiction to handle the matters that fall without courts-martial jurisdiction?

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Finally, the American Civil Liberties Union suggests to the committee that it consider the advisability of legislation in three additional areas of military due process. First, we ask you to review the need for a bill that would make it unlawful for anyone subject to the Uniform Code to violate, under color of law, another person's civil rights. Specifically, we are concerned that the present code fails to make practices such as the coercion of a confession or an unlawful search and seizure the proper subject of a court-martial prosecution.

Second, we would suggest the need for a bill that would permit the U.S. Supreme Court to review decisions of the Court of Military Appeals in situations similar to those in which it may exercise jurisdiction over cases coming from the Federal courts of appeal. This proposal, we note, is intended in no way to imply our criticism of COMA. Rather, we hope that such a bill would help to eliminate the likelihood of unresolved conflicting rulings in cases relating to the constitutional rights of military personnel. See, e.g., *United States* v. *Culp*, 14 USMCA 199, 33 CRM 411 (1963) (wherein COMA held that servicemen were not entitled to the services of trained legal counsel in special courts-martial), and *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965) (in which the U.S. District Court in Salt Lake City ruled the other way).

formity with the Federal rules of criminal procedure; the expansion of the remedy will entitle any convicted person, and not just those who receive the most severe sentences, to petition for a new trial on the grounds of fraud or newly discovered evidence.

S. 752

We support the committee's recommendations that would authorize the appointment of law officers to special courts-martial and permit the defendant to waive trial by the full court in favor of trial by the law officer. Presumably, the law officer of special courts will have at least the same authority as is now possessed by the law officer of general courts. Under existing law persons skilled in the law do not preside over any special courts, and there is no provision in military jurisprudence analogous to that permitting the waiver of a jury in Federal courts. We suggest, however, that in the case of a capital offense, the accused should not be permitted to waive trial by the full court.

In addition, we endorse (with one reservation) the proposal that would require, except in time of war, that a law officer be appointed to certain special courts-martial. However, as we noted with reference to S. 750, we cannot concur in the recommendation insofar as it withholds this protection from courts-martial that may issue less than a punitive discharge. The severity of the other forms of available punishment dictate, in our view, that the safeguards inherent in the presence of a knowledgeable and impartial judge be extended to all courts-martial proceedings.

S. 753

The union supports your proposal to open the Court of Military Appeals to the review of the legal issues involved in administrative actions pending before boards of review untrained in the law. We would hope, however, that if jurisdiction ultimately were vested exclusively in the court and at the same time withdrawn from the district courts, provision would be made to protect the status of the respondent pending resolution of his appeal. For the granting of "retroactive" relief to a successful appellant would be meaningless if, during the pendency of the appeal, he had been discharged and unable to obtain other employment.

S. 754

We generally endorse the recommendation requiring the assignment of legal advisers to administrative boards that are authorized to issue less than general discharges. This is far better than allowing these boards to operate free of any legal supervision. But our reservations about the issuance of general discharge certificates to respondents who were not afforded legal counsel (see discussion under S. 750, supra) applies with equal force here. It is our judgment that boards should be authorized to issue only honorable discharges unless a legal adviser (and defense counsel) participated in the proceeding.

S. 756

This bill, prohibiting the reduction in grade or administrative discharge under other than honorable conditions of defendants who have already been tried by a court-martial and acquitted for the same alleged misconduct, is supported by us. It is needed to prevent the undue harassment, by repeated trials or hearings of the same issues, of a member of the Armed Forces. However, we must again demur to that part of the proposal that would permit the issuance of a general discharge under the foregoing circumstances. For the discharge clearly would be "for the convenience of the Government," and no penalty ought to be attached to the issuance thereof.

We would suggest, too, that a trial and acquittal in a State court of competent jurisdiction be made a bar to the reduction in rank or less than honorable discharge of a serviceman. (Some authority for this proposition, and a hint at the possible direction the Federal courts will follow on this issue, appears in recent decisions. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); *Malloy* v. *Hogan*, 378 U.S. 1 (1964)).

S. 757

We endorse the proposal providing for pretrial conferences between the attorneys and the law officer of general courts-martial. This should aid consider-

ably in streamlining procedures and assuring defendant of a speedy and fair trial. We also hope that similar procedures will be established for special courts-martial, if S. 752 is enacted. The union also believes that the authority of all law officers to make final rulings should be expanded to bring military practice more into conformity with Federal civilian practice.

S. 758 AND S. 759

The ACLU supports the bill prohibiting the administrative discharge (for misconduct) of servicemen who instead request trial by court-martial, and the bill abolishing the summary courts-martial. S. 758 will prevent the services from bypassing the constitutional safeguards built into the Uniform Code, at least when the serviceman desires these protections. And in light of the recent expansion of article 15's scope, the latter bill, eliminating a judicial anachronism, is most needed.

S. 760

We endorse the proposed authorization of administrative discharge boards, discharge review boards and article 32 investigating officers, to compel the attendance of witnesses by subpena. We trust, of course, that the procedure subsequently to be defined will adequately insure that respondents before such boards, and the accused in the case article 32 investigations, will also be able to have their witnesses subpenaed.

S. 761 AND S. 762

The ACLU appreciates the committee's concern with filling the jurisdictional hiatus created by *Toth* v. *Quarles*, 350 U.S. 11 (1955), *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), and related cases. We are, nonetheless, opposed to these bills authorizing trials in a Federal district court of persons who, though no longer in service, committed certain offenses for which they never stood trial, and civilians who commit crimes while accompanying the Armed Forces overseas.

In the event these proposals are enacted, they will permit a person who is accused of commiting an offense to be tried thousands of miles from the scene of the alleged offense. Insurmountable problems relating to the defense's investigation of the facts, preparation of the case and securing the attendance of essential witnesses still overseas, would be created. Few accused persons would be able to bear the expenses called for in such a proceeding. "Due process," in these cases, would be almost a meaningless phrase.

It is true, as we have said, that there now is a jurisdictional hiatus. But how compelling is the need to fill the breach? How many persons would this legislation in reality affect? And isn't the wisest course to permit the courts of the foreign jurisdiction to handle the matters that fall without courts-martial jurisdiction?

* * * * * * *

Finally, the American Civil Liberties Union suggests to the committee that it consider the advisability of legislation in three additional areas of military due process. First, we ask you to review the need for a bill that would make it unlawful for anyone subject to the Uniform Code to violate, under color of law, another person's civil rights. Specifically, we are concerned that the present code fails to make practices such as the coercion of a confession or an unlawful search and seizure the proper subject of a court-martial prosecution.

Second, we would suggest the need for a bill that would permit the U.S. Supreme Court to review decisions of the Court of Military Appeals in situations similar to those in which it may exercise jurisdiction over cases coming from the Federal courts of appeal. This proposal, we note, is intended in no way to imply our criticism of COMA. Rather, we hope that such a bill would help to eliminate the likelihood of unresolved conflicting rulings in cases relating to the constitutional rights of military personnel. See, e.g., *United States* v. *Culp*, 14 USMCA 199, 33 CRM 411 (1963) (wherein COMA held that servicemen were not entitled to the services of trained legal counsel in special courts-martial), and *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965) (in which the U.S. District Court in Salt Lake City ruled the other way).

Third, it would seem desirable to require that persons appointed in article 32 investigating officers be legally trained. Not only would this tend to assure the accused of greater compliance with his constitutional rights, but would most assuredly eliminate much duplication of effort. For unsound rulings at the investigation stage will require either corrective action by higher authorities or lead to a trial that might not otherwise have been necessary.

Mr. COGEN. Preliminarily I would note two items. First, my personal experience in the Air Force (which included over 200 courts-martial and administrative proceedings of one sort or another, plus the sitting as summary court officer), point out, at least to me, that the reforms which this committee has proposed are long overdue. I would consider none of them unnecessary under the circumstances.

Second, we recognize that enactment of many of these proposals will require the increased utilization of attorneys in the armed services. Perhaps the proposals might well be opposed on the ground that there are not enough lawyers in the military to adequately meet these needs. But I would suggest two points in answer to this objection.

First, the attorneys who are already in uniform can to a very great degree be more efficiently used. At present they are performing nonlegal, and in some cases what might be considered denigrating tasks. These could be eliminated, allowing the attorney to devote their full time to the performance of legal responsibilities.

Second, there are many young attorneys who are graduating from law school now who seek to serve in the Armed Forces as judge advocates. Many of these young lawyers are being turned away because the Department of Defense does not, at this point, have a need for as many as are applying.

I think that this factor suggests that there is a large resource which is presently untapped. Many of these young lawyers, incidentally, are being forced, by being drafted, to perform nonlegal duties in the armed services. So we say there is a large body of attorneys from which talents may be drawn to perform the tasks which this committee is recommending.

Turning now to the bills which have been proposed, the ACLU endorses the establishment for all services of independent field judiciaries. We would suggest, however, that one unified field judiciary be created as a corps or an agency independent of the individual branches of the service.

We feel that this would result, first, in more efficient utilization of the field judiciary personnel. They could be assigned where the need is the greatest. It would insure the independence of the field judiciary, and we feel further that it would increase the likelihood that the law would be uniformly applied throughout the branches of the service.

We also support the bills 746, 747, and 748. With respect to 746, we have no exceptions or difficulties with the bill as it is drafted.

With respect to 747, you might wish to consider the desirability of abolishing the existing discharge review boards and merging their functions with those of the proposed new correction boards. We feel that perhaps there might be some duplication of effort at this point, and that all of these functions might more properly be centered in one correction board.

With respect to 748, and for the same reason that we urge that the field judiciary be independent of the branches of the service, we would

suggest that the military members of the new intermediate appellate tribunal be assigned to an agency directly under the Secretary of Defense. We wholeheartedly support 749 which would provide additional safeguards against the possibility of command influence in courts, and would extend these protections to administrative boards.

Again, my own personal experience, I find that these are most sorely needed.

We would go further than the bill and prohibit a commander from seeking to influence the determination of article 32 investigating officers. We feel that this protection, the protection against command influence, ought to be extended to the very earliest moment; that is, when the article 32 investigation is started.

Senate bill S. 750 would entitle a person, except in time of war, to legally qualified counsel in any administrative or judicial proceeding authorized to issue a discharge under less than honorable conditions. Although we approve of the general thrust of this bill, we do have certain reservations.

First, we would go even further and require that a defendant in any court-martial proceeding be provided with the services of an attorney. Court-martial convictions are convictions of record. They remain with the defendant for the rest of his life. Whenever he fills out a form asking, "have you ever been convicted of a crime," he must answer "Yes."

We also feel that the sentences that are imposed short of a punitive discharge are sufficiently severe to dictate the required presence of a legally trained person to insure that the rights of the accused are adequately protected.

In administrative proceedings we believe that no discharge other than an honorable discharge should be issued without the respondent having been represented by an attorney. The general discharge is admittedly and notoriously debilitating to any person who tries to seek civilian employment.

In addition, it has been my experience that there are in many cases, involving both officers and enlisted personnel issues of law that arise which require the assistance of a legally trained person to adequately represent the respondent in these proceedings. And we would suggest also that the exception "in time of war," should apply only to combat areas. It would seem that at stateside installations, even during wartime, there is very little reason why an accused in a court-martial, or a respondent before a board, ought not to have the protection of counsel, and why this would not be practically feasible.

With respect to S. 751, sir, the ACLU endorses this proposal without reservation. We endorse the proposed S. 752 which would authorize the appointment of law officers to special courts, and permit the defendant to waive trial by the full court in favor of trial by the law officer.

With regard to the waiver provision, we would suggest, however, that where the accused is charged with a capital offense, he not be permitted to waive trial by the full court.

We would endorse generally the proposal that would require the law officer to be appointed to certain special courts, but we cannot concur in the recommendation insofar as it withholds this protection in the case of courts that may issue less than a punitive discharge.

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Our position in this situation is the same as it was with regard to S. 750—that the convictions that are handed down by these courts are matters of record the rest of the individual's life, and the penalties are sufficiently severe to justify the presence of a legally trained person to supervise the entire proceedings.

I can recall several instances where court proceedings suffered for lack of a law officer. In one of these I was arguing res gestae exception to the hearsay rule to a president who was not a legally trained individual. It took the better part of a half hour for defense and trial counsel to make the explanation. I am convinced to this day that the president of the court still didn't understand what we were talking about.

Again, we would make the same note with the exception "in time of war." We feel that this should apply solely to combat areas.

We support the Senate bill 753, but we would make the one observation that if jurisdiction ultimately were to be vested exclusively in a court of military appeals and at the same time withdraw from the district courts, provision should be made to protect the status of respondents pending the resolution of their appeals.

We generally would endorse Senate bill 754 which would require the assignment of legal advisers to administrative boards that are authorized to issue less than general discharges. But it is our judgment that boards should be authorized to issue only honorable discharges, those discharges that do not connote anything improper, unless a legal adviser and defense counsel have participated in the proceedings.

We support Senate bill 756, but we would again demur to that part of the proposal that would permit the issuance of a general discharge under the circumstances described. Since the discharge in that case would most clearly be for the convenience of the Government, we do not feel that any penalty ought to be attached to the issuance of such a discharge.

We would suggest also that the trial and acquittal in a State court be made a bar to the reduction in rank or less than honorable discharge of a serviceman.

We endorse the proposal that would provide for pretrial conferences between the attorneys and the law officer of general courts, and would hope that if S. 752 were enacted, a similar procedure would be established for special courts. The committee might also wish to consider expanding the authority of all law officers to make final rulings which would bring military practice into conformity with the practice that now obtains in the Federal civilian courts.

We support without reservation bills 758, 759, and 760.

With respect to abolishing summary courts, it is our view that this reform is urgently needed. It is, in essence, a justice of the peace type court and it is subject to gross abuses. There are instances I recall where I was sitting as summary court and was criticized for decisions which the commanding officer found to be unsatisfactory. I think that one way of eliminating this abuse is to eliminate the summary court.

With regard to S. 761 and S. 762, Mr. Speiser has been advised that the American Civil Liberties Union's National Board would wish to take a somewhat different position than that set forth in our prepared

testimony, and this change can be explained by Mr. Speiser in a few moments.

Nonetheless, it remains our personal view that S. 761 and S. 762 ought not to be adopted. If enacted, these bills would permit a person who is accused of committing an offense to be tried thousands of miles from the scene of the alleged offense. This might result in insurmountable problems relating to the investigation of the case, to the preparation of the case, and to securing the attendance of the essential witnesses. It would seem that under these circumstances the concept of due process might indeed become meaningless to an individual who was subjected to the provisions of this bill.

We raise the question, also, how really compelling is the need to fill the hiatus that is created by the cases to which these bills are directed. How many persons are, in fact, affected by this legislation? We would suggest that perhaps the wisest course might be to permit the courts of the foreign jurisdiction to handle the matters that fall without the jurisdiction of the military court.

Finally, we would suggest to the committee that three additional areas of military justice might properly deserve this committee's attention. First, review of the need for a bill that would make it unlawful for anyone subject to the Uniform Code to violate, under color of law, another person's civil rights. Specifically, we are concerned with instances such as the coercion of concessions, unlawful searches, and the like. At present there is nothing in the code to discourage individuals who are conducting such searches, or such interrogations, from continuing to do so.

Secondly, we suggest that a bill permitting the U.S. Supreme Court to review certain decisions of the Court of Military Appeals might be desirable.

This is not in any way intended as a criticism of the court, but rather it is an attempt to reconcile what may be conflicting decisions coming out of the courts. We feel that this might help to resolve that problem.

Finally, it would seem desirable to require that persons appointed as article 32 investigating officers be legally trained. Not only would this tend to assure the accused of compliance with his rights, but we feel it would eliminate much duplication of effort caused by unsound rulings at the investigation stage.

Thank you, sir. That concludes our prepared remarks.

Mr. SPEISER. I would like to add an addendum.

Mr. Cogen stated that subsequent to the preparation of the testimony which was delivered to the committee at the time the hearing was originally scheduled, there were two issues which were presented to our national board on S. 761 and S. 762, and the general counsel of the Civil Liberties Union, Osmond Fraenkel and Edward Ennis prepared a memorandum which I submit now as the statement of the national board of the ACLU with regard to S. 761 and S. 762.

It is relatively short so I will read it in its entirety.

The statement prepared by Messrs. Cogen and Speiser which was circulated on February 9, 1966, was objected to by the due process committee on the ground that the hiatus referred to in the statement should be corrected but that the accused person should be given an option to be tried in this country or at the

place where the crime was alleged to have been committed. Our views are that there should be a distinction between the case of the ex-serviceman which was considered in *Toth* v. *Quarles*, 350 U.S. 11, and the person who was always a civilian, which situation was discussed in *Kinsella* v. *Singleton*, 361 U.S. 234.

With reference to the ex-serviceman, there may well be justification for his trial by American authority. While the *Toth* case indicates that this cannot be constitutionally done by court-martial, the court clearly intimated that Congress could give jurisdiction to a Federal court. In this respect the situation would not be unlike that which covers a crime committed on the high seas (see 18 U.S.C. 3238). With respect to him, we believe that the suggestion of the Due Process Committee has merit and that he should be permitted to move for a change of venue if the courts in which the prosecution was instigated found that it would be in the interest of justice to do so. It might well be, of course, that all the available witnesses were in this country so that it would defeat the interest of justice to have the trial take place where the act occurred. For that reason we do not think there should be an absolute right of choice.

In the case of a civilian accompanying a serviceman, we think other considerations apply. We doubt very much whether Congress could constitutionally confer jurisdiction over an offense committed by such a person in a foreign country in a court of the United States merely because a person happened to be the wife or other member of the soldier's household. Jurisdiction over such a person could apparently be invoked only where the offense is against the sovereignty of the United States, not where it is an ordinary crime. See *Rocha* v. *United States*, 288 F. 2d 545.

In dealing with the ordinary crime, it seems to us that there is not truly a hiatus such as in the case of the ex-serviceman who could have been prosecuted by court-martial had the prosecution been instituted while he was still in service. We think that in the case of the civilian only the foreign country would have jurisdiction. If there are any agreements with foreign countries excluding from the jurisdiction of those countries persons of this character, it may be that such agreements should be revised.

Senator ERVIN. I am very much interested in the due process question. I would just like to say that in the first session of this Congress they passed a bill which if I considered did not violate the due process clause; certainly did violate fundamental principle of justice. I refer to the provisions of the voting rights bill which first condemned localities and States and subdivisions of States without a judicial trial, and then nailed shut all of the courthouse doors in the country except for the district courts of the District of Columbia.

To my mind, it is an affront to justice to close the courthouse doors in a locality and put a man in a position where he has to bring witnesses 1,000 miles to testify. As the bill orginally came in, he couldn't even get compulsory process for attendance because, under the existing statutes, compulsory process can only issue a distance of 200 miles from where the courts are.

Now, I am very much interested in your observations on that point because it would seem you are getting awfully close to violating due process of law when you say that a person can be tried at a locality or under circumstances where he is denied any power, really, to obtain the presence of witnesses.

Mr. COGEN. Of course, one of the problems that we were concerned with is that offenses which are alleged to have taken place overseas need not involve persons who are subject to compulsory process in the U.S. courts.

Now, if you have foreign nationals who are witnesses to an occurrence, from what I understand, there is no way to compel their attendance here in the United States for a trial of the offense to which they are alleged to be a witness.

We have had no difficulty in seeing the power of Congress to legislate in this field. This is not our concern.

Our problem comes in the safeguards which will be set up to insure that an individual who is brought to trial will have access to all needed witnesses, and whose preparation of the case will not be impeded. This is a problem. It is one which we felt that the bills, as submitted, didn't adequately handle, and we raised the problem noting that there is potential due process difficulties.

Senator ERVIN. I would take it that the board of the American Civil Liberties Union feels that the Congress didn't have the power to pass a law to try in the United States persons, Americans generally, who committed offenses abroad, where the offense is not directed against any function of the American Government.

For example, if an American tourist in Paris killed a Frenchman, the board takes the position that it would be beyond the power of the Congress of the United States to make that tourist answerable in the district court of the United States for that offense?

Mr. SPEISER. That is right. And even an American who killed an American in Paris.

Senator ERVIN. Yes.

Mr. SPEISER. Although another witness has stated that foreign countries are generally not interested in criminally prosecuting Americans who commit crimes against Americans overseas, I don't know whether that is true or not.

This is one of the questions that we have raised, that part of the congressional interest in the so-called hiatus, both for the serviceman and the civilian personnel, is raised, I suppose, on the basis of procedural symmetry, that there is an area which can be breeched by the American Government. But the question is, "To what extent is there an actual hiatus?" To what extent is there a problem here before you legislate in this field, in which there are tremendous pragmatic difficulties in the due process area?

Although in a prosecution, for example, the U.S. Government has relatively unlimited funds at its disposal, compare the defendant's position. Presumably the Government cannot use compulsory process to bring prosecution witnesses over from a foreign country to the United States, but it can, by the offer of funds, attract those individuals to come over. There is no concurrent commitment on the part of the U.S. Government that it would at all be interested in providing similar benefits for defense witnesses. Without compulsory process, there is a tremendous problem that cannot be ignored.

Senator ERVIN. As I mentioned some time ago, I am the chairman of the Subcommittee on the Operation of the Status of Forces Treaty. We have taken a considerable amount of testimony before that subcommittee, which indicates that where an American civilian accompanying the Armed Forces abroad commits an offense against another American such as assault and battery, stealing the property of another American, the foreign governments show very little interest in those cases, and decline to prosecute them in the courts in those countries. As a consequence, a great many civilians go untried by justice in cases of that kind.

The foreign governments take the position that they have no interest in taking any action in an offense by one American against an-

other. Where and American civilian commits an offense against one of the nationals of the host country, the situation is otherwise. We introduced evidence in the early stages of these hearings that there are a number of offenses committed by American civilians within the Armed Forces and it is beyond the power of our country to do anything about it.

That makes this question as to what the Congress has to legislate in this field a very interesting question to the committee.

Mr. SPEISER. One of the staff members just handed me the graph which indicates a sizable number—

Senator ERVIN. Yes.

Mr. SPEISER. There may very well be a Hobson's choice here, Mr. Chairman, that often exists by reason of the fact that we do have a Constitution, that all of the procedural constitutional provisions make it more difficult and in some cases impossible to convict people who are guilty of crimes, not alone overseas but also in this country.

This is a price that we have agreed to pay, the contract under which we created this country, and this is often raised in arguments in courts, and I just came from one this morning where they had police interrogation cases being argued in the Supreme Court. It was argued that if a certain tack is taken by the Court in deciding these five cases before the Court, that guilty people are going to go free. And this may very well be the effect. One of the things that was brought out was, however, that no one really knows whether this will have that effect or not. If that is the case, this is one of the prices that we pay for the constitutional freedoms that we have in our Constitution.

Senator ERVIN. I think that most of us go along with the proposition that it is far better for the guilty to escape than for the innocent to be punished.

Mr. SPEISER. Yes, or to have a person tried unfairly.

Senator ERVIN. That is right, and when you try a person unfairly, you always endanger the innocent.

Mr. SPEISER. That is right, which is the reason we set up our constitutional safeguards, to prevent innocent people from being convicted.

This may not be a completely satisfactory answer to those who feel that here there are instances which indicate that people have committed crimes and that they are untouched.

I might suggest that perhaps we have a similar problem in this country to some extent as well. We are all aware of the fact that crimes have been committed and that people who have committed them have not been punished, for one reason or another, I am not suggesting that this is only true at one region of the country as compared to another, but I suggest that there is a problem here as well.

Senator ERVIN. There are some problems which a satisfactory solution is very difficult if not impossible.

Mr. SPEISER. If the solutions were simple, they would have been arrived at and implemented long ago.

Senator ERVIN. You have to balance opposing considerations. Sometimes it is difficult to tell which consideration outweighs the other.

Mr. CREECH. I wonder if you would care to comment upon Father Snee's position that only serious crime should be covered, that petty crimes should not be covered, and that therefore it would be desirable to have the same stipulation in S. 762 that there is in S. 761, that would cover only offenses punishable by confinement of 5 years or more.

Mr. SPEISER. I don't think that resolves the problem. It seems to me that if you have due process problems, they go clear across the board, whether for the so-called minor offenses or for the more serious offenses, and unless you resolve those due process problems about how you get witnesses, how a defendant defends himself, whether a defense attorney will have an opportunity to go over and make the kind of personal observation that the Government can and does make in instances of that kind, I think it makes little sense to restrict it to the more serious crimes. I think the danger of denial of due process is greater in the more serious crimes.

Mr. CREECH. You, I believe, have indicated that you feel there is a distinction between a former serviceman and the civilian, and of course the legislation as proposed was drawn of course to cover those civilians accompanying military personnel either as employees or as dependents.

The suggestion has been made to the subcommittee, as you know, that this legislation should be expanded to cover all people. Father Snee indicated that he felt there was no problem where there is a peculiar relationship between the individual and the Federal Government, such as people who are employed by the Government, those in the Foreign Service, but the defector was a question as to how far the Government might go with regard to tourists, and he would recommend treating the two separately.

Would you care to comment upon that?

Mr. SPEISER. Well, as I recall, and I hate to disagree with Colonel Wiener on this, in the cases he was citing, the consideration there was that they were offenses against the United States in essence. For the United States to exert jurisdiction over any civilian for any kind of crime, for example, a traffic offense in France, I think does raise a serious constitutional question. It is the United States that is being affected, which is I think the issue that was involved, in most of the cases, and therefore it could assert its jurisdiction.

Now the shipboard cases are unique in that it doesn't really matter as far as the due process question is concerned where they occurred. They are on board the ship. All of the people are there. They can all be brought back to the United States. The ship can be brought back. There is no real problem there as to whether it is at a certain latitude and longitude as compared to whether it is sitting in a berth in a harbor.

I think that we can and we do provide for trials here in the United States for shipboard maritime offenses with no difficulty, and I don't think there are any due process problems.

But it seems to me that when you get outside of that limited kind of geographical area, and you are talking about crimes that are committed on land, then you do have that kind of problem, I don't think that you can talk about restricting or expanding either crimes or the

civilians who are encompassed by this proposal unless you resolve the due process problems that arise such as first, the difficulty of defense, the question of the power to subpena witnesses on the defendant's behalf, the costs of this, whether the defense attorney is going to have available the same kind of investigative facilities as the Government. All of these questions have to be answered I think before we can blindly make this kind of determination.

Senator ERVIN. And I believe that the Constitution vests this in the maritime courts of jurisdiction.

Mr. SPEISER. Yes.

Senator ERVIN. And my recollection is that under the old cases dealing with that subject, ships carrying the American flag are deemed to be part of the territory of the United States.

Mr. SPEISER. Yes, you can use this fiction if you like, but I think the practical answer is just as good as saying this is U.S. territory. But the practical answer is that it is a limited kind of area. You can bring the whole thing back to the United States. Everybody is there on it, and there is no problem. But you don't have that when you are talking about crimes on foreign lands.

Mr. CREECH. And of course you differentiate between acts against other individuals and of course crimes against the United States.

Mr. SPEISER. Yes.

Mr. CREECH. I would like to ask you gentlemen if you would please comment upon Colonel Wiener's proposal that it would be a good idea to have the commissioner system.

Now granted the subcommittee has received testimony from Father Snee that it would be very difficult to obtain permission from foreign governments to have judicial proceedings on their soil, but Colonel Wiener pointed out that he felt that if the commissioner jurisdiction were established, that it would have to be on the basis of negotiation with the foreign government. The host country would have to agree to their being there.

Now if these negotiations could be undertaken, if the host countries did not receive any objection to the commissioners being on their soil, would this overcome your objection that the individual would be denied due process?

Mr. SPEISER. No. I testified a short while ago before the Improvement in the Administration of the Judiciary Machinery Subcommittee on the U.S. commissioner system. To be consistent, I must oppose the suggestion.

One of the points that I made was that it is absolutely essential that an individual should have a free choice in deciding whether to have a trial before the U.S. commissioner, which in effect waives a jury trial, for example, but should have a right to have a trial by a district court if he so chooses.

Now the effect of having U.S. commissioners over there and district courts over here is that it really does not give the individual a fair choice. He is going to make a choice on the basis of inconvenience—that is more convenient to have the matter handled overseas rather than get his full due process rights, if that is what he really wants, back in the United States.

This doesn't seem to me to be a fair choice, and I think that it is essential as far as continuation of the U.S. commissioner system is

concerned, that an individual has a fair choice as to whether he wants to have a summary kind of proceeding before a U.S. commissioner, or the choice of a trial in the U.S. district court. He doesn't have that if you are talking about the inconvenience of thousands of miles intervening.

Mr. COGEN. Of course it does meet our objection with respect to availability of witnesses and the like, but it creates other problems.

Mr. CREECH. And of course would only be applicable to petty crimes.

Mr. SPEISER. Yes, that is right.

Mr. CREECH. And it has been pointed out of course, the individual, if he requested trial by jury, would of course have to be tried in the district court.

Earlier at the earlier sessions of the hearings, not today, it was suggested that perhaps one of the difficulties, one of the constitutional difficulties with regard to due process could be overcome by having a district court judge sit aboard ship beyond the 3-mile limit offshore, and hear these cases. Now I wonder if you would care to comment upon this proposal.

Mr. COGEN. With all the other accoutrements that go with district courts?

Mr. CREECH. Presumably, yes.

Mr. COGEN. It is an interesting proposal.

Mr. SPEISER. There is a problem of about whether you will run out of men for jury duty and where you are going to get them.

Mr. COGEN. We were stating our personal views here apart from the ACLU National Board. Assuming that it would function as a district court with all the trappings of the district court, including a jury and the like, I think that this would certainly meet any objections. I don't know whether it could be done.

Mr. SPEISER. I might suggest there might be a problem with a sequestered jury panel for a fairly lengthy period of time, being on board ship and unable to get off, and that they are going to be tied up about 3 miles outside a port. And this may very well operate to the detriment of a defendant whom they might hold responsible for their custodial situation.

(Discussion off the record.)

Mr. CREECH. I just wanted to inquire if your research, if in your research you had found cases in which convictions had been upheld where citizens were tried and convicted in the United States for crimes committed overseas which were not committed aboard ship, or which were not crimes against the U.S. Government.

Mr. SPEISER. I have not. It has been a number of years ago since I researched this. I had a criminal case in California arising from an incident in Hong Kong, and I did research it then.

My research then indicated that only the offenses against the sovereignty of the United States were the one in which it was permissible to try defendants in this country for acts committed overseas. I have not researched the problem since then.

Mr. CREECH. Have you, sir?

Mr. COGEN. No.

Senator ERVIN. I might call attention to the case *Jones* v. *United States*. The conviction was upheld for murder committed on a guano island.

Mr. SPEISER. Yes, I noticed that in Colonel Wiener's testimony. The rationale I would find in that, that the island is as close to being a ship as any piece of land could be.

Senator ERVIN. Yes, it might be. I don't recall reading that case. I simply recall the rationale of it.

Mr. SPEISER. But that again is a limited kind of situation. I think what we are usually talking about is a crime occuring where there is an operating society.

Senator ERVIN. Yes, another country.

Mr. SPEISER. Yes, where there are courts and the operation of a police force, that is right.

Mr. CREECH. I would presume that on this island there were no courts and perhaps the ships do exercise jurisdiction over them.

Mr. SPEISER. I think that was the case.

Mr. CREECH. That is the only case that Colonel Wiener cited that is not either connected with the offense against the U.S. Government or aboard ship.

I have no further questions.

Senator THURMOND. No questions.

Senator ERVIN. On behalf of the subcommittee I wish to thank both of you gentlemen for making your appearance here, and giving us the benefit of your consideration of these bills, and for the suggestions you have made in reference to them.

Counsel has called my attention to the fact that we have a regularly scheduled meeting of the Judiciary Committee, and since this meeting is being held by one of the subcommittees of the judiciary along with one of the subcommittees of the Senate Armed Services, I presume the wisest thing would be to postpone the hearing of the next witness until 2 o'clock tomorrow afternoon. I hope you will be back with us.

(Whereupon, at 5:10 p.m., the subcommittee recessed, to reconvene at 2 p.m., Wednesday, March 2, 1966.)

MILITARY JUSTICE

WEDNESDAY, MARCH 2, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND
SPECIAL SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:10 p.m., in room 212, Old Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin and Thurmond.

Senator ERVIN. The subcommittee will come to order. Counsel, call the first witness.

Mr. CREECH. Mr. Chairman, the first witness is Brig. Gen. William W. Berg, Deputy Assistant Secretary of Defense. General Berg.

Senator ERVIN. I just want to say there is no antagonism that puts us as far apart as the length of this table. General, we are delighted to have you with us.

STATEMENT OF BRIG. GEN. WILLIAM W. BERG, DEPUTY ASSISTANT SECRETARY OF DEFENSE (MILITARY PERSONNEL POLICY), OASD (M3), ACCOMPANIED BY BRIG. GEN. KENNETH J. HODSON, ASSISTANT JUDGE ADVOCATE GENERAL FOR MILITARY JUSTICE, DEPARTMENT OF THE ARMY; MAJ. GEN. ROBERT W. MANSS, THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE; REAR ADM. WILFRED A. HEARN, JUDGE ADVOCATE GENERAL OF THE NAVY; COL. R. B. NEVILLE, HEADQUARTERS, U.S. MARINE CORPS; CAPT. J. C. ELIOT, U.S. NAVY, ASSISTANT CHIEF OF NAVAL PERSONNEL FOR PERFORMANCE; AND JAMES P. GOODE, DEPUTY FOR MANPOWER, PERSONNEL, AND ORGANIZATION, OFFICE, SECRETARY OF THE AIR FORCE

General BERG. Thank you, Mr. Chairman. I have a prepared statement, and if I may I would like to run through it. It is not particularly long.

Senator ERVIN. That will be fine.

General BERG. All right, sir.

Mr. Chairman and members of the committee: I am Brig. Gen. William W. Berg, Deputy Assistant Secretary of Defense for Military Personnel Policy. I welcome the opportunity to appear before you today. I will address my remarks to those bills, or parts thereof,

which are concerned with administrative discharges and the review of discharges. These are Senate bills numbered 747, 750, 754, 756, 758, and 760.

As previous witnesses have stressed, there is and should continue to be a clear separation in the statutes between (1) those provisions which establish the military judicial system and (2) the laws pertaining to administrative procedures. There are also distinctions which should be kept in mind in discussing the administrative discharge procedures and the mechanisms for postdischarge review. In essence, administrative discharge procedures provide an orderly method to determine whether an individual is fitted to continue in the service, and, if warranted, to cause the termination of his service. The discharge review boards are established by law to review and change where warranted the character of a discharge issued by reason either of administrative action or by the punitive action of a court-martial inferior to a general court-martial. The boards for the correction of military records, in contrast, were established by Congress to grant effective relief in cases in which an error or injustice exists in the individual records, whether or not the error caused a discharge or separation. Their authority extends to relief of the effects of the error or injustice as well as to removal from the record. Although the three departmental correction boards consider many cases involving discharges, both their purpose and their actual practice are far broader.

Before proceeding with the specific legislative proposals I would like to emphasize the concern of the Department of Defense for the essential rights of its personnel. As a matter of interest, the Department of Defense directive which prescribes the standards and procedures governing administrative discharge actions was revised and reissued on December 20, 1965. The current version of that directive is the culmination of a study of the policies and procedures governing administrative discharge which was undertaken as an outgrowth of the hearings conducted by this committee in 1962. Many of the new safeguards included in the directive had been instituted in practice by the military departments in a cumulative process that began with those hearings.

The legislative proposals which we are supporting today, together with the current departmental directive and practices are, we believe, adequate to safeguard the rights of these individuals.

Turning now to the specific legislative proposals, section 2 of S. 750 would provide that a respondent before an administrative board may not be given a discharge under conditions other than honorable unless he is afforded an opportunity to appear and present evidence in his own behalf and to be represented by legally qualified counsel. The Department of Defense concurs in the primary purpose of the bill.

I would like to bring to the attention of the committee the fact that the recently issued Department of Defense directive on administrative discharges stipulates that the respondent has the right to be represented by counsel qualified within the meaning of article 27(b)(1) of the Uniform Code of Military Justice, unless appropriate authority certifies in the permanent record the nonavailability of a counsel so qualified and sets forth the qualifications of the actual counsel. The respondent may if he desires employ civilian counsel at his own expense.

Section 2 of S. 750 does present certain difficulties with respect to those individuals who are in civilian confinement and those who are absent without authority for prolonged periods. The conduct of these individuals, under standards normally applicable, may warrant a discharge under conditions other than honorable, yet circumstances preclude their appearance before a board. Thus, these individuals would either have to be retained on the rolls of the services or be discharged under honorable conditions. In view of this it is recommended that section 2 of the bill be revised to exclude members of the Armed Forces who are unavailable to appear because of absence resulting from their own misconduct. It is also recommended that section 2 extend to the respondent the right to be represented by civilian counsel if he chooses. It is further recommended that the exceptions provided in S. 750 be broadened to make the exceptions applicable in a national emergency hereafter declared by the President or the Congress as well as in time of war. A substitute bill, submitted by the Department of Defense, contains these recommended changes to S. 750 and also recommends that administrative board procedures be incorporated elsewhere in title 10, United States Code rather than in the Uniform Code of Military Justice.

Like S. 750, S. 754 provides that no person may be discharged from the Armed Forces under conditions other than honorable unless he has been accorded a hearing before a board of officers. It also requires that a law officer be detailed to this board and that a legally qualified counsel be made available to the respondent. As stated before in my comments concerning S. 750 the Department of Defense is in complete accord with the proposition that members who may be subject to discharge under circumstances which could result in an undesirable discharge have the right to a hearing by an administrative board and to be represented by qualified legal counsel. The respondent in such cases is already essentially entitled to these rights by the recently amended administrative discharge procedures of the Department of Defense. The difficulties concerning applicability of section 2 of S. 750 to members who are unavailable to appear because of absence resulting from their own misconduct are also true of S. 754. Similarly, our objections to the inclusion of administrative board procedures in the Uniform Code of Military Justice apply as well to S. 754.

However, the Department of Defense is opposed to that portion of S. 754 requiring the detail of a law officer to administrative boards. The Department believes that the provision for a qualified counsel to assist the respondent as provided in S. 750 and S. 754 affords adequate protection of the essential rights of the individual service member. While in some cases it might be desirable in the interest of the Government to provide legal assistance to the board, we do not believe that a mandate to this effect would enhance the protection of the individual's rights. The experience of the military departments has been that the number of cases involving complicated legal issues is relatively small. The provision of legal competence when required can be most economically accomplished on a case-by-case basis.

If, however, the committee concludes that a law officer is required as an additional safeguard, it is desired to point out that this would

increase considerably the number of qualified legal officers needed by the services. Apart from the incerase in manpower spaces entailed by the legislative proposals under consideration, it is pointed out that the services would be faced with the practical problem of recruiting the additional numbers of qualified lawyers.

S. 756 addresses itself to the question of double jeopardy in the case of personnel under consideration for administrative discharge. Specifically, S. 756 would preclude discharge of a service member under other than honorable conditions for an offense for which he has been acquitted by court-martial or for which he cannot be tried by reason of subsection (c) of article 44, Uniform Code of Military Justice. By way of explanation, subsection (c) of article 44 relates to a court-martial proceeding for an offense which is dismissed or terminated for failure of available evidence or witnesses without any fault of the accused. Subsection (a) of article 44 bars a subsequent trial for the same offense.

The bill would also preclude a second administrative board from findings or recommendations less favorable to an individual than a previous board when the evidence before the second or subsequent board is substantially the same as the evidence that was before the previous board.

The Department of Defense agrees with the substance of this bill and has included appropriate prohibitions in the administrative discharge directive. However, it is recommended that the bill be revised to enable the military services to discharge individuals under other than honorable conditions if an acquittal or equivalent disposition is based on a legal technicality not going to the merits. It is also recommended that the word "substantially" be stricken from section (e) (2) of the proposed bill as that term is vague and subject to various interpretations.

This bill should make it clear that the authority of a Secretary of a military department to release a Reserve officer from active duty, to demote a Regular officer from a temporary grade to a permanent grade, or to discharge an enlisted member for the convenience of the Government would not be impaired. If the bill is considered for enactment it is recommended that it be included in a more appropriate chapter of title 10, United States Code than as an amendment to the Uniform Code of Military Justice.

S. 758 would permit a member of an armed force to demand trial by court-martial in any case in which action is proposed to administratively discharge or separate him under conditions other than honorable on grounds of alleged misconduct. The typical administrative discharge action in which a service member may be issued a discharge under other than honorable conditions for misconduct is one where the member has a record of misconduct over a period of time for which he has received article 15 punishment and/or court-martial convictions. In such cases punitive action has been taken on these specific offenses and there remains no offense for which the respondent may be tried. Yet in these instances the member's record of frequent involvement in misconduct has demonstrated his unfitness for service. If it determined that he should be discharged, the military departments should be able properly to characterize his service as undesirable.

In a few cases there may be one heinous offense, such as child molestation or sodomy which, under the rules governing a trial by court-martial or for policy reasons based on social considerations, could not be successfully prosecuted. In such a case the military services could not, under this bill, conduct an administrative discharge proceeding and, if warranted, discharge the individual under other than honorable conditions. The retention of such an individual in the service or his receipt of a discharge under honorable conditions would, we believe, be deterimental to the morale of the military community. The Department of Defense opposes S. 758 because the Government has a vital interest in accomplishing early separation of individuals in the classes described above, with an appropriate discharge.

I would like, at this time, to add a few brief comments on S. 747 which was discussed several months ago by General Hodson. As you may recall, S. 747 would establish an independent, centralized correction board to review and correct the military records of members of the Armed Forces and would authorize that board to review and modify court-martial sentences.

It might be well at this time to review the purpose for which the boards for the correction of military records were established. In the broadest sense the Congress authorized the Secretaries of the military departments acting through boards of civilian employees to correct any military record when considered necessary to correct an error or remove an injustice. The types of cases which are considered by these boards involve a wide range of alleged errors and injustices. At one end of the spectrum there are minor administrative matters in which the claimed error or injustice is acknowledged by the military department but there is no adequate remedy other than through the operation of the correction board. At the other extreme lie those cases involving the alleged denial of essential rights through unwarranted discharge action. Cases involving discharges comprise not more than 25 percent of the total workload of the boards. The remainder of the workload consists of cases involving rules and regulations which are peculiar to the individual services.

The Department of Defense believes that the present departmental boards are functioning effectively. With minor exceptions, existing variations are attributable to essential service differences. Undesirable variations can be substantially eliminated through a comparative review of the results of the operations of the several boards and, when appropriate, the development of common guidelines.

We further believe that separate departmental boards actually function better as an arm of the departmental Secretary because they are closer to the problems which they are called upon to consider and are knowledgeable about their respective customs, rules, and regulations. The basic laws which prescribe the organization and functions of the Department of Defense and the military departments vest the service secretaries with the responsibility for the administration, welfare, and effectiveness of the individual services. The maintenance of separate departmental boards is compatible with this basic organizational concept.

For these reasons the Department of Defense opposes the establishment of a single autonomous board for the correction of military

records. We do not believe that it would measurably improve the operation of the current boards. However, we concur in the need for vigilance to insure substantial uniformity of treatment. While we believe current differences are minimal, we accept the responsibility to insure that standards are in fact comparable.

I would now like to turn to S. 760 which among other things would authorize the subpena power for administrative discharge boards, discharge review boards, and the boards for the correction of military records.

The Department of Defense does not oppose enactment of this bill insofar as it may apply to administrative discharge board proceedings. As this committee recognized in developing S. 760, the Department of Defense will need to limit the availability of this power by Executive order to those cases where there is a showing of the necessity for the witness' presence in order to prevent respondents from blocking prompt action by unreasonable requests for witnesses. The bill should, however, authorize the taking of depositions in administrative discharge cases.

The Department of Defense opposes extension of the subpena power to the discharge review boards and the boards for the correction of military records. The discharge review boards and the boards for the correction of military records of the military departments are unanimous in agreeing that the subpena power is unnecessary and would unduly complicate proceedings before those boards.

If this bill is enacted it should not be included in the Uniform Code of Military Justice, but in a more appropriate section of title 10, United States Code.

Mr. Chairman, this concludes my comments on the legislative proposals in the administrative area. In closing I want to emphasize that we are in agreement with the broad objectives of the legislation as proposed by the various bills under consideration—namely, to insure that the essential rights of our citizens are protected while in the military service of the Nation.

On the other hand, we have charged our military commanders with grave responsibilities. We must insure that they have the means to fulfill those responsibilities. We must not burden them with the unfit, the incompetent, and the unqualified. Once individuals have been so identified it is imperative that they be eliminated from the services as expeditiously as is practicable. Their presence within any unit is harmful to morale, undermines discipline, and reduces operational effectiveness. I would again like to emphasize the importance of a clear distinction between criminal proceedings and the administrative authority and responsibilities of the Secretary of Defense and the Secretares of the military departments.

It is the considered opinion of the Department of Defense that enactment of the legislation proposed by your committee, modified as recommended, together with the provisions of the administrative instructions issued by the Secretary of Defense and the military departments will protect the individual rights of servicemen without impairing the military effectiveness of the Armed Forces.

Mr. Charman, this concludes my statement.

Senator ERVIN. Thank you, General.

Mr. CREECH. General, I note that you say that you want to emphasize that you are in agreement with the broad objectives of the legislation as proposed by the various bills under consideration. I wonder, sir, in view of the fact that the Department of Defense issued its directive No. 1332.14, which I believe goes into effect the 20th of this month, would you perceive any objection to enacting into law the provisions of that directive?

General BERG. I believe this is one of the questions that was attached to the letter sent to us recently. We anticipated providing the committee a coordinated reply.

But I think I could properly state the feelings of the Department of Defense in saying that if it is the desire of the committee to enact that into law, we would have no objection to it, because we don't intend to modify it downward.

I would point out that at one point in time we operated without an overall Department of Defense directive; that we issued one in 1959, and this one we now revised in 1965. All moved in the general direction of increasing the protection of the rights of the individual. However, if it is the feeling of the committee that putting this into law would be the appropriate thing to do, we would have no objection.

Mr. CREECH. General, I notice under the provisions of this directive, where you are concerned with discharges authorized for unfitness, you indicate that here there is involvement of a discreditable nature with civil authorities, sexual perversion, drug addiction, failure to pay debts, failure to support dependents, unsanitary habits.

I would like to ask, sir, in this regard, these individuals who are found to be unfit for these reasons, if they could not in each of these instances be removed from service by court-martial. Isn't there provision in the uniform code which would cover each of those situations?

General BERG. I don't know whether there is a provision to cover each one of them, but I am sure that there are probably articles of the UCMJ which would cover the great majority of them.

Mr. CREECH. Yes. I mean by the code plus of course the Manual for Court-Martial. If you would like, sir, we can take them separately, if you would like to discuss them individually.

General BERG. Subject to reviewing each specifically, I would be willing to stand on my answer that there probably are articles which would cover most of them.

Mr. CREECH. Yes. Well now, since there are provisions within the code and the manual for eliminating these people from the service why is it that you prefer to do it by administrative action rather than by court-martial?

General BERG. I think, if I understood what you said correctly, you said something that I don't think I would agree with. You said that there is a specific article which would authorize us to try a man in order to discharge him. I wouldn't agree to that as necessarily true, because in many cases the specific offenses we are talking about here wouldn't necessarily carry with them the authority to give the man a discharge.

Mr. CREECH. Which ones would not, sir, under fitness? Which ones of these would not be covered, would not be a basis for discharge?

General BERG. I would like General Hodson to answer that.

General HODSON. I am Brig. Gen. Kenneth J. Hodson, Assistant Judge Advocate General for Military Justice, Department of the Army.

I would like to clarify the question, Mr. Creech.

Are you starting at No. 1 under unfitness now?

Mr. CREECH. I am under "I" on page 9.

General HODSON. And we start with "frequent involvement of a discreditable nature with civil or military authorities."

Mr. CREECH. Yes, sir.

General HODSON. There is a possibility that the specific involvements might constitute offenses which could be tried by a court-martial, but there would be no certainty that the punishment authorized upon conviction would involve a discharge. I believe you asked General Berg if he would give an example of a case which would not involve a discharge?

Mr. CREECH. Yes.

General HODSON. For example, a conviction of drunk in public does not authorize a discharge.

Mr. CREECH. Now by the same token this would not be a basis for discharge, would it, an administrative discharge?

General HODSON. No. It would take perhaps two or three incidents of that type before it might be considered for administrative discharge.

Mr. CREECH. Then by the same token even if there were two or three, then he would be covered also by court-martial, wouldn't he?

General HODSON. Well, it all depends, Mr. Creech, on whether we follow the provisions of the Manual for Courts-Martial.

The manual provides that at the time information concerning the suspected offense comes to the attention of the convening authority, or to the commanding officer rather, he will take appropriate action to dispose of it. So if you had a case involving we will say drunk in public, and the civil authorities did not exercise jurisdiction, he might dispose of that under article 15.

We discourage stacking up offenses say over a period of 2 to 3 years with a view to combining enough offenses so that we can get him a punitive discharge. As a matter of fact, one thing that discourages that is the right to speedy trial. Another thing that discourages it is the statute of limitations. So that when we have an offense, we dispose of it as an individual offense.

Mr. CREECH. By the same token, General, if these offenses were over an extended period of time, you couldn't very well use them for administrative action, could you? You can't go back beyond the current enlistment, can you?

General HODSON. That is correct, for the most part in determining whether he should be separated.

Mr. CREECH. Well now, sir, couldn't you——

General HODSON. I am sorry, let me correct that. In determining whether he should be separated, you may consider his entire military record. In determining the characterization of the discharge, you would consider only the military record he has made during his current enlistment.

Mr. CREECH. Does this differ with regard to whether it is a court-martial or an administrative board action? Would there not be the same criterion?

General HODSON. In am not certain I understand your question.

Mr. CREECH. I mean in arriving at a decision as to whether a man would be discharged, and the type of discharge he would receive, would it make any difference to you whether he was being administratively discharged or whether he was being court-martialed?

General HODSON. Are you suggesting some type of punitive article where you try him by court-martial for having committed some offenses of which he has already been convicted?

Mr. CREECH. No. I am thinking of article 134. Where you say, they are not specifically mentioned in this chapter:

"* * * all disorders and neglects to the prejudice of good order and discipline in the armed services, all conduct of a nature to bring discredit upon the armed services, and crimes and offenses * * * of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial according to the nature and degree of the offense, and shall be punished at the discretion of that court" (10 U.S.C. 934).

General HODSON. I am still not certain whether I understand your question. But it appears to me that you are suggesting that the man who has been convicted by court-martial of drunkenness, and we will say 4 or 5 months later he has been convicted of disorderly conduct, and a few months later he has been convicted of some other similar offense—that you are suggesting, Mr. Creech, that we then could try him by court-martial for having been convicted of three offenses?

Mr. CREECH. Now, I wouldn't say that, General, but you do have under 127c(B) of the manual, you do have there the situation in which there is frequent involvement, isn't that true, and you do have there the authority to——

General HODSON. Where is this now?

Mr. CREECH. In your manual, in the court-martial manual. This article 127c, subsection (b).

General HODSON. Are you referring to paragraph 127c?

Mr. CREECH. I am referring to this paragraph.

General HODSON. Of the manual for courts-martial?

Mr. CREECH. Yes, sir. I am sorry I don't have a copy for you, but would you care to check that and to submit your answer?

General HODSON. I am not certain whether I understand your question yet, but it is true that in paragraph 127c, a man who has two prior convictions by court-martial may under certain circumstances thereafter, if he is tried and convicted, be sentenced to a bad conduct discharge by an appropriate court.

Mr. CREECH. Yes.

General HODSON. Is that what you are referring to?

Mr. CREECH. Yes, where there is frequent involvement.

General HODSON. Well, it is actually tied down a little tighter than that, Mr. Creech. It is limited to proof of two prior convictions in the current enlistment of the enlisted man, that are admissible before court-martial.

Let us assume that a soldier is tried for a third offense by court-martial, and is convicted. Upon producing evidence of the two admissible

prior convictions, he then may be subject to be given a bad conduct discharge, if the case is before the proper tribunal. In other words, a summary court-martial, or an Army special, could not give him a bad conduct discharge.

Mr. CREECH. No, but of course if you wanted to consider him for this type of discharge, then of course you wouldn't place him before a summary court-martial?

General HODSON. This is correct.

Mr. CREECH. And certainly the convening authority takes that into consideration, and takes the type of offense into consideration. So if you have a man who is frequently involved in trouble, then you do have a basis presently for getting rid of him by court-martial, isn't that correct? And of course the President at any time can change this by Executive order, isn't that correct?

General HODSON. That is correct. He can change the punishment.

Mr. CREECH. Yes, and by the same token, if the Secretary felt that this were desirable, he could make representations asking that it be changed presumably, and would do so, I would presume?

General HODSON. This is normally the way this is handled, yes, sir.

Mr. CREECH. Yes, sir.

General HODSON. A request for a change in the Table of Maximum Punishments is processed from the Department of Defense. But it may be that your conclusion that there is always a solution by way of trial by court-martial is not completely correct. It may be that he is convicted once by court-martial and twice by civil courts. When he is tried by a civilian court, we do not again try him by a court-martial as a general rule.

In other words, the policy I am sure in all three services if that if he is convicted by civilian authorities, we do not again subject him to trial by court-martial. Likewise he may be involved in several offenses for which he has been convicted by a civilian court at Fort Bragg, a foreign court in Japan, and then perhaps he has had one prior conviction by court-martial.

Well, at this time he doesn't qualify as having had two prior convictions within paragraph 127c of the manual. That requires two prior convictions by court-martial.

Yet would say this would be frequent involvement of a discreditable nature with civil or military authorities. In this particular kind of a case it might be more appropriate to bring him before an administrative board which could consider his conviction by the Japanese court, his conviction by the civilian court at Fayetteville, and the prior conviction by court-martial, and assess the character of his service because of that frequent involvement, whereas a court-martial could not do it, or might not be able to do it.

Mr. CREECH. Sir, wouldn't the court-martial have that authority under article 134, the one that I just read to you a few minutes ago?

General HODSON. There is no way in which we could try—well, I would have to give you a long detailed explanation of this—but generally speaking if we will use the example which I just gave you——

Mr. CREECH. Yes.

General HODSON. The provisions of the status of forces agreement as Senator Ervin is well aware, generally contain a provision that if

the person is tried by a foreign court, he will not be tried again for the same offense by a military court sitting in that country. So that would prohibit our trying him for the offense of which he was convicted by Japanese court.

We have a policy against trying him again for an offense of which he is convicted by a civilian court in the United States. We would not try him for that one. And we can not try him again for an offense of which he was convicted by court-martial.

There is no offense of frequent involvement with the civilian authorities, even under article 134. Frequent involvement of a discreditable nature is not an offense under article 134. It would be void for vagueness, for failure to allege an offense in the specification. The man couldn't defend against it. It would be too vague.

Mr. CREECH. You have not had cases of that sort tried under article 134?

General HODSON. We, to my knowledge, have never tried a man for frequent involvement of a discreditable nature with a military or civilian authority.

Admiral HEARN. May I interject. In 1952 when I was the district legal officer for the 14th Naval District, we had an enlisted man who accumulated over a reasonably short period of time, I will say, some 20 to 30 traffic violations in the city of Honolulu, for each of which he was fined, and he paid his fine.

But his conduct in my opinion showed an utter disrespect and disregard for the rules and regulations of the city, and he was bringing discredit upon the service. So we preferred charges against him on that ground under article 134. And the court dismissed the charge on the grounds that it did not constitute an offense under the code. Does that answer your question?

Mr. CREECH. Well, it answers the question that you can bring such an action under article 134. Now whether or not you can convict I don't know. You cited the case in which you weren't successful.

Admiral HEARN. Not successfully, that is my point.

General HODSON. I would stake my reputation, for whatever it is worth, on the fact that that is not an offense under the Uniform Code of Military Justice.

Mr. CREECH. Admiral, it is very interesting that the services would have such divergent views, because apparently the Navy felt that it would be, and the Army would hold that it wouldn't. Does the Air Force have a different policy, General?

General MANSS. I am Maj. Gen. Robert W. Manss, Judge Advocate General, U.S. Air Force.

I concur wholeheartedly with everything that General Hodson has said. In my opinion frequent involvement with the civilian authorities, no matter how many times a member was convicted, would not constitute an offense under the code.

To my knowledge, we have never had occasion in the Air Force, now I can't vouch that we haven't because I am not familiar of course with all of the thousands of summary and special courts, but in my opinion General Hodson is 100 percent correct.

Mr. CREECH. Now when we talk about 127c subsection (B), Admiral Hearn, was this also a basis for the prosecution in that case?

Admiral HEARN. Oh no, no. I can concur with both the Generals in saying that I found no precedent for it, but I felt that that was a violation, and I was in hopes that we could get the question reviewed in Washington. As I say, the case was dismissed by the court. I know of no other effort that has ever been made to charge a person under 134 under similar circumstances.

Mr. CREECH. Sir, to your knowledge has there been under 127c subsection (B) pertaining to frequent involvement?

Admiral HEARN. Not that I am aware of, but I think we should emphasize the statement that General Hodson made, that frequent involvement in a civilian court does not bring into play 127c(B). It is only prior convictions by military courts that bring that section into operation.

General MANSS. Mr. Creech, may I add one thing in connection with that point. 127c(B) only applies as evidence in helping the court arrive at a sentence. It can not form the substance of the basic charge.

In other words, it is not a habitual criminal statute. It is only admissible after findings on an entirely different charge. He might have two convictions, but then you have to have a third charge which is the subject matter of the current case. You can't just charge him with having been convicted twice before, as a basis for the specifications.

Mr. CREECH. Yes, sir; but it would be considered by the court in arriving at the type of discharge.

General MANSS. That is right, but as Admiral Hearn has pointed out, civil convictions don't count. Plus the fact that you are faced with a proposition, too, that you may not in any given case want to base this just on two convictions, because here again the court must consider that they are relatively minor. As General Hodson pointed out before, there is no guarantee that the court will impose a discharge as part of the sentence.

Mr. CREECH. General Berg, in view of this testimony, would you feel that there should be a repeated offender article in the Uniform Code?

General BERG. I would defer to General Hodson on that.

General HODSON. I have this answer, which is only my personal answer because we have not studied this, but I would see no reason for a habitual offender statute which is applicable to the military.

As you perhaps know, Mr. Creech, the habitual offender statutes which we normally find in State jurisdictions are aimed at professional criminals, the repeated offender who is a major criminal. I think we will all agree that in the military certainly in time of peace, in time of an emergency, and perhaps even in time of war there are very few, if any, professional criminals. So we would have no need for the usual type of habitual criminal statute.

In other words, those statutes are really aimed at organized crime. We have no such thing as organized crime, as that term is commonly understood, in the military services.

Mr. CREECH. General Berg, then would you care to move on to any of the other types of crimes which could not be tried by court-martial? Are there any others which are enumerated here, for which an individual might receive an undesirable discharge, being unfit, that would not be the basis for court-martial, under the directive, sir?

General HODSON. Have we disposed of item 1?

Mr. CREECH. I think so, sir. Yes, let's move on.

General HODSON. Let's move on to item 2. Sexual perversion itself is not an offense under the Military Code, but specific acts of sexual perversion might be.

Mr. CREECH. Isn't that covered under article 125?

General HODSON. What I am getting at, Mr. Creech, you don't charge a person with being wrongfully and unlawfully a sexual pervert. You have to find a specific act of misconduct.

Mr. CREECH. Yes, but sodomy, for instance, is——

General HODSON. All right, that is what I am talking about. In other words, sexual perversion is a generic term which covers this entire field, and the generic term is not the specific offense which you have to charge and have to prove in order to maintain a prosecution. So you have to go to the specific act.

Mr. CREECH. Don't you have to go to the specific act even in administrative action? You can't be so vague just to say sexual perversion.

General HODSON. What I am trying to do is pass the generic description of these categories, in order to get over to the specific categories. Maybe I am not clear, but I just wanted to make it clear that there is no such thing as an offense such as sexual perversion under the——

Mr. CREECH. It says here sexual perversion including but not limited to, and then it, of course, lists some six items here. Is there any one of these for which an individual could not be court-martialed?

General HODSON. I believe a person could probably be court-martialed for all of the items listed except item 6, which refers to other indecent acts or offenses, and I could not answer your question without knowing what those other indecent acts or offenses are.

Mr. CREECH. Of course, I can't either because we don't know what they are. I presume that this was sort of a catchall in case something had been overlooked.

General HODSON. I assume it is something similar to the ones listed previously.

Mr. CREECH. Yes, but the others, those which can be identified with certainty would be the basis for a court-martial, would they not, sir?

General HODSON. They would be a basis for charging an offense under the Uniform Code. Now, may we move to item 3?

Mr. CREECH. Yes, sir.

General HODSON. Drug addiction, as you know, is not an offense. I believe the civilian courts have arrived at this point also. Habituation——

Mr. CREECH. Well now, wouldn't that come under article 134 though again.

General HODSON. You mean you charge a man with being a drug addict?

Mr. CREECH. No, conduct which would bring discredit upon the Armed Forces prejudicial to the good order and discipline.

General HODSON. I shall try to explain article 134 as nearly as I can. Article 134 has been described by some people who are not familiar with the Uniform Code of Military Justice as a catchall article under which you can try anybody for anything. That is abso-

lutely not true. You must describe and define and specify a particular act of misconduct, and you can not just try everybody for everything that is not liked by a particular commander.

Mr. CREECH. No, but would you not feel, sir, that drug addiction would be to the type that is of good order and discipline of the armed services?

General HODSON. Well, in the area of drug addiction, I am reluctant to express an opinion because I am in agreement with the trend in the civilian courts, to wit, that drug addiction is not an offense.

I believe this has become to be recognized as good law in the civilian courts. I believe it is good law in the military courts, because drug addiction, Mr. Creech, as you probably know, invariably involves the question of whether the person has sufficient control of his mental faculties to resist using drugs.

Mr. CREECH. Then it is your view, sir, that——

General HODSON. So it is invariably tied in with a medical problem, and the question of whether the man is mentally responsible for his acts. So charging a man with just being a drug addict I think would be a fruitless prosecution under the Uniform Code.

Mr. CREECH. It is your view he could not be prosecuted then under article 134?

General HODSON. That he could not?

Mr. CREECH. That he could not be. That would be your position, that he could not be?

General HODSON. Not just for an offense of wrongful addiction to drugs, not for the offense of wrongful habituation. I suppose that is habitual use of drugs.

Mr. CREECH. I would presume so.

General HODSON. So those two I think we should cut out as being possible offenses under the Uniform Code. Now there are offenses of unauthorized use of possession of narcotics.

Mr. CREECH. Well now, if a man is a drug addict or if he has the habit, he is using narcotics presumably.

General HODSON. Inferentially, yes.

Mr. CREECH. Otherwise he couldn't very well be addicted to them.

General HODSON. That is a fair inference.

Mr. CREECH. And presumably no one, no medical authority is going to authorize sufficient use of narcotics to cause one to become an addict, presumably.

General HODSON. Yes, but occasionally we discover that a man is a drug addict when he is not in possession of any drugs.

We discover this because he is apprehended for an offense, we will say an offense of speeding, and he is placed in the detention room temporarily. While there he begins to show withdrawal symptoms and he is immediately taken to the hospital. Every doctor on that staff will certify that this man is a drug addict, and yet he had no drugs in his possession and they have no specific evidence that he used drugs.

The doctors will say he must have used drugs, but we don't have admissible evidence in a criminal trial to prove that he used drugs. We can bring doctors in who will say that he is a drug addict.

Mr. CREECH. Drug addicts then are not subject to prosecution by court-martial in the military service.

General HODSON. Well, indirectly they could be in the sense that if the doctors were in agreement that this man was mentally responsible for his act, then I would assume that you could possibly try this man for unfitting himself for military duty through the use of drugs. But in the case of the true drug addict, it will be a pretty rare situation in which the doctors will say that he is mentally responsible for his act.

Mr. CREECH. General, in a situation in which you find that a man is suffering from withdrawal, because he has been placed in a place where he doesn't have access to narcotics and he is under your observation, is that individual then given administration board action?

General HODSON. It depends on the action of the hospital or of the doctors. He may be discharged through medical channels. It depends on their findings really, because I believe I can speak certainly for the Army, we consider this to be a medical problem at this point.

Mr. CREECH. What type of discharge would be receive if he was subjected to an administrative board proceeding?

General HODSON. Well, if the doctors found that he was mentally responsible, then there would be a possibility of an undesirable discharge by administrative board proceedings.

Mr. CREECH. Now in such a case as that, if the individual requested a court-martial on these charges——

General HODSON. What would the charge be?

Mr. CREECH. The charge that he was using narcotics I presume, that you would say—you would have to charge him with something.

General HODSON. There wouldn't be any offense necessarily that we could try him for by court-martial. If we found him in possession of unauthorized narcotics, or if we could prove that he used unauthorized narcotics at a specific time and place, then we might be able to try him for those offenses.

Mr. CREECH. Well, in the absence of any proof other than the statement of the doctor, in other words, the board actually would predicate it entirely upon the statement of the medical authorities, is that correct?

Senator ERVIN. I think you are failing to distinguish here between court-martial offenses and administrative matters.

The directive of December 20, 1965, states in substance on page 9, and I refer to subsection 2 of section I, that if a person is found to be a drug addict, normally he would be given an undesirable discharge in an administrative proceeding, unless there are some unusual circumstances.

General HODSON. Unless he is found to lack mental responsibility, in which case, as I said, I think we would consider him a mental case rather than an administrative board case.

Senator ERVIN. Of course, gentlemen, if you will excuse me, if you take the notion that a drug addict is a mental case rather than an offender, this arises out of the fact that we are saying he obeys an irresistible impulse when he resorts to addiction.

General HODSON. That is correct, Mr. Chairman.

Senator ERVIN. And it would seem to me that a man couldn't be classified as an addict very well, unless he had reached that stage. Now there may be voluntary addicts but they are very unsual. I think most addicts are involuntary.

General HODSON. By the time they become an addict, I believe that that is correct. You can generally classify them as involuntary users.

Senator ERVIN. It says here in effect under the directive that unless the particular circumstances in a given case warrant a general or honorable discharge, then a discharge by reason of unfitness because of drug addiction will be an undesirable discharge.

General HODSON. The area of drug addiction is a very difficult area, because it starts out usually as being a medical problem. In these cases, we give the medical officers the first opportunity to examine the man, to give him appropriate treatment, and to determine whether he should be discharged for disability or whether he should be discharged through medical channels.

If they have treated him and they have concluded that he was only using drugs, we will say temporarily for a week or so, or however long the period might be, and that he was mentally responsible for his actions, he might be brought before an administrative board, and he might receive an undesirable discharge.

The evidence would not be limited, however, just to the testimony of the medical officer, not necessarily. The evidence would probably include evidence from witnesses in his own organization as to his inability to perform duty on occasions when he was under the influence of drugs, and there would be other corroborating evidence.

Mr. CREECH. General, that is the line of questioning I wanted to ask. An administrative board action I gather from what you said, that you rely primarily upon the representations of the medical staff. My question is this.

Is this individual given a medical discharge, and if the doctors at the hospital find that he is a drug addict, and this is something that he cannot control, if this is a situation in which he cannot control his actions, he is not mentally responsible for his conduct, if they reach this determination, does he then receive a discharge which might be any one of these things, undesirable, or if the circumstances warrant it, it might be a higher-type discharge, or would he be given a type of medical discharge?

General HODSON. That question is very difficult to answer because the cases fill a complete spectrum. In one case he might receive an undesirable discharge, and at the other end, if the medical officers found that he was mentally irresponsible, he might receive an honorable discharge. It is just difficult to answer without knowing the specific facts of the case you have in mind.

Even then I could only conjecture what might happen to him. But if he is considered to be not mentally responsible for his actions, he would normally be a medical problem, because this would be an illness.

Mr. CREECH. I was basing this, General, on your representations that drug addicts are mental cases, or rather are medical cases.

General HODSON. They might be.

Mr. CREECH. And shouldn't be treated as criminals.

General HODSON. I would say in every case involving a drug addict, the man at least starts out in the hospital with treatment, and if he is a medical case, then he would be discharged through medical channels. If he is discharged through medical channels, the chances are that he would receive an honorable discharge.

It is a question of whether we have an illness which should be treated by the medical officers, or whether we have what we call misconduct, which is not for treatment by the medical officers, and the medical officers say it is not for treatment by them.

Mr. CREECH. In arriving at his responsibility for his action, would you apply the standard of responsibility concerning competence to stand trial?

General HODSON. Generally speaking it would be about the same. There may be a variance in the specific rules laid down in this regard, but it would be about the same.

Mr. CREECH. Then if a man is competent to stand trial, what is the reason that there is objection to giving a man a court-martial if he requests one, in a situation in which he might receive an undesirable discharge?

General HODSON. You mean if we could prove an offense?

Mr. CREECH. Yes.

General HODSON. A triable offense?

Mr. CREECH. If you don't have a triable offense, he still, though, would be liable for an undesirable discharge. I mean there is a possibility under this directive, there is a possibility that he could receive an undesirable discharge, under this directive, isn't that correct, sir, even though you might not have the basis for bringing an action against him which would be triable in a court-martial, by a court-martial?

General HODSON. That is correct. His conduct in the use of drugs might be such that we might not have a triable offense, in that we might not be able to prove specific time and place when he used narcotics.

But as I said, we would have evidence that he has been using narcotics. We don't know exactly when he used them or where he used them and might not even be able to identify the particular narcotic that he used. But we do have substantial evidence that he is a habitual narcotics user. In that case he could end up with an undesirable discharge by administrative board action.

Mr. CREECH. Would you care, sir, to move on to the others? Are there any others which you feel would not lend themselves to court-martial?

General HODSON. Are we under item 3 yet or have we finished that?

Mr. CREECH. I would suggest that we move on, because it seems to me that all of these——

General HODSON. They involve the same problem.

Mr. CREECH. They involve the same problem.

General HODSON. Yes. Well, under item 4 is listed an established pattern for shirking. In my opinion there is no such offense under the Uniform Code of Military Justice, in so many words. There would be offenses that would go to show this, such as failure to report for duty and such as going from the place of duty before being relieved of duty.

Mr. CREECH. How about willful disobeying a lawful command? I mean when someone is shirking, isn't he usually shirking something that he is instructed to do?

General HODSON. Sometimes.

Mr. CREECH. If you want to establish that he is in fact shirking, then you can give him a lawful order to do something, and if he doesn't do it, that pretty well establishes the fact that he is shirking, isn't that correct?

General HODSON. Well, what you are suggesting we normally try to discourage. We try to discourage our commanders—and this is part of leadership training—from laying a trap for a soldier by giving him an order in order to increase the punishment or an order to create an offense where there wasn't an offense before. We would prefer to see our commanders use positive leadership attributes rather than to carry a copy of the uniform code around in their pockets.

Senator ERVIN. I think shirking might be what we call goldbricking, isn't it?

General HODSON. That is correct. Shirking sometimes comes into play where a mission is given to a platoon, "Now I want the platoon to do this. Go out here and establish this," and so forth. And one man in the platoon shirks. He ducks out. He has not been given an individual order, so he has not violated an order. The entire platoon was given the order, and that is generally how the shirking comes about.

Mr. CREECH. When you say an established pattern for shirking in this type of situation, when a board action is taken, are times and places specified? If his commanding officer, the one who is supervising him, hasn't given him any order, then how did he know——

General HODSON. Well, as I say, some of the offenses that are triable under this would be a failure to report for the properly appointed place of duty. For example, if the order was that the first platoon of which he is a member is to proceed to a certain place, and he fails to go, he could be charged and tried for failure to repair to the properly appointed place of duty.

Likewise perhaps he did go to the place of duty, and as soon as things quieted down he slipped away. In that case he could be charged and tried for the offense of leaving the properly appointed place of duty.

But those are very minor offenses, for which minor punishment is authorized. Usually it is an administrative admonition or it is article 15 punishment if they become repeaters.

The way you normally would establish item 4 in an administrative proceeding would be to bring in administrative admonitions, article 15 punishment over a period of time, showing that this man is just never where he is supposed to be at the time he is supposed to be there, and he has not only done it once but he has done it many times. This might thereby establish this pattern of shirking.

Mr. CREECH. Well, now, again if you have this type of situation, would this be what you would have in mind under 127c(B)?

General HODSON. We would normally not use or avail ourselves of the provisions of 127c(B) in this kind of a case, for the very reason I mentioned. These offenses, or rather the offenses that you can carve out of shirking are very, very minor offenses normally handled at the very most by article 15. It would be very rare that you would try a man by summary court unless he refused to accept article 15 for this type of an offense, because the punishment is so minor.

Mr. CREECH. General, where you are considering giving a man a discharge, or whether he is coming before a board when he can receive an undesirable discharge for an established pattern of shirking, if he requests a court-martial would he be given one?

General HODSON. At the present time no, as a general rule. His company commander might get mad at him and give him one, but he might——

Mr. CREECH. You say he might get mad at him and give him one. I don't see how he could come off any worse if he is going before a board that can give him an undesirable discharge.

General HODSON. Well, as I think I pointed out at prior hearings, if the administrative discharge laws are tightened up to the point where it makes it almost impossible to give a man anything but an honorable discharge, I indicated to the committee that I felt that some commanders would seek the court-martial route in order to insure that a man whose service has been very poor, who had been substandard, would not receive an honorable discharge.

In other words, I am suggesting that if you tighten up administrative discharge procedures, so that they become almost unworkable except to give a man an honorable discharge, commanders might try a man by summary court for failing to report to the properly appointed place of duty, and 1 week later try him by summary court for going from the properly appointed place of duty, and 2 weeks later recommend trial by special court for failing to report to the properly appointed place of duty, in which case you could invoke paragraph 127(c), and the court could conceivably give him a bad conduct discharge.

We discourage this at the present time, because we encourage the use of article 15 for such offenses. The result is we would never get prior convictions, because article 15 punishment is not a prior conviction within 127(c).

Mr. CREECH. There is nothing to keep, of course, an individual from receiving article 15 punishment for shirking. But here what we are talking about under the directive is a situation in which an individual is being considered for discharge by a basis of a board action.

General HODSON. Yes.

Mr. CREECH. And here the board is in a position to give him an undersirable discharge which the subcommittee has been told in some instances the layman considers to be even more disastrous to a man going into civilian life than a bad conduct discharge.

I just wondered if you feel that this is something that cannot be handled by court-martial. Do you feel that there is no way to handle a pattern for shirking except by administrative action?

General HODSON. I feel that that is the most appropriate method of handling that kind of a case.

Mr. CREECH. You feel it is most apropriate. Would you feel that it could not be handled by court-martial?

General HODSON. Well, I would have to change my complete concept of military justice in order to arrive at that conclusion, because my concept of military justice is that you use the appropriate tribunal for the punishment of offenses which require punishment by court, and I do not feel, in view of the liberal provisions of article 15 for

punishment, that a man who fails to report to the properly appointed place of duty should end up with three court-martial convictions in order to avoid an administrative board.

That doesn't make good sense to me either from the standpoint of economy, from the standpoint of efficiency, or from the standpoint of this man's return to civilian life, because I think three convictions plus a punitive discharge, is worse than an administrative discharge and would be so considered even in the minds of those witnesses who said that they thought that a bad conduct discharge is not as bad as an administrative discharge. I believe even those witnesses would agree that three convictions by court, plus a punitive discharge, is worse than an administrative discharge.

Mr. CREECH. General, how did you handle such things as patterns for shirking before you had the administrative boards and before you had the administrative procedures?

General HODSON. Well, that was some time following the Civil War.

Mr. CREECH. You mean you have used these administrative board proceedings since World War I?

General HODSON. Well, Colonel Winthrop in Military Law and Precedent as I recall—and that book was published about 1895—refers to the discharge under other than honorable conditions for this type of behavior. How long that had existed before he wrote his book I don't know, but he mentioned it. So I assume that it was in existence let's say before the Spanish-American War, and I don't know how they handled it before that time.

Mr. CREECH. During your tenure in military service, sir, you have never known this to be handled by court-martial?

General HODSON. No, sir. I have only been in the service about 25 years, but we have always handled cases of this type by administrative action as being the most appropriate way to handle it, because otherwise it looks like you are stacking the deck against a man when you try him by court-martial two or three times, in order to get prior convictions, so that when he is convicted another time he may be given a punitive discharge. This offends my sense of justice, and I think it is a misuse of the court-martial system.

Mr. CREECH. All right, sir, would you indicate or care to address yourself then to the others which are enumerated here?

General HODSON. Item 5 is an established pattern showing dishonorable failure to pay just debts. Occasionally we do try people for this offense by court-martial.

Offenses of this type usually do not result in a punitive discharge, because the court-martial is just reluctant to impose a punitive discharge for we will say one offense or maybe two offenses of failure to pay debts. Here we go back to item 1, frequent involvement.

In item 5 we say an established pattern. So the established pattern is the pattern that this man may have built up over several years of failure to pay debts, and it would not be appropriate, as I indicated earlier, to stack up all of these possible court-martial offenses over a period of a couple of years with a view to trying them all at once with the hope that you would end up with a punitive discharge.

So generally speaking this one, which as I say usually covers a rather sizable period of time, is more appropriately handled by administrative board action than it is by a court-martial.

Mr. CREECH. When you speak of over a period of time, you mean the man has continued over a period of time not to pay his debts, not that there is one complaint and then several years later another complaint, something of that sort?

General HODSON. I am sorry, I didn't hear you.

Mr. CREECH. When you speak of an established pattern, do you mean a continuing situation of refusing to pay debts? You don't mean one situation now and several years later another situation, something of that sort?

General HODSON. Generally it is somewhat of a continuing nature. I would suppost that the typical case involves a man who buys an automobile on time at Fort Bragg and then moves to Fort Lewis, and his wife buys an electric washing machine and an electric dryer, and they then go to Fort Ord and they pick up a television set and all of it is on time, and while this may have been only within a period of a couple of years, it eventually all comes home at once, and he discovers he can't pay any of them off.

That is really a case—perhaps I have described a case which we call financial irresponsibility—in which case we probably wouldn't give him an undesirable discharge anyway. He just mismanaged his finances. So maybe the typical case where we might give him an undesirable discharge almost amounts to fraud or comes pretty close to it.

Senator ERVIN. General, it seems to me these words would mean that a man so repeats his failures to pay his debts as to manifest that he has little or no sense of obligation.

General HODSON. Right.

Senator ERVIN. As to paying his debts.

General HODSON. That is right.

Senator ERVIN. It has got to be a habitual thing.

General HODSON. It almost amounts to fraud or an intent not to pay.

Mr. CREECH. And this would not be predicated upon one complaint.

General HODSON. No.

Mr. CREECH. How about with regard to item 6, sir, showing dishonorable failure to contribute adequate support to dependents, or failure to comply with various court orders?

General HODSON. Well, the question originally or the question that I am supposed to be answering is a question of whether you try these people by court-martial.

Mr. CREECH. Yes.

General HODSON. It would be a very, very rare case where we would try a man by court-martial for this kind of a situation.

Mr. CREECH. But could you?

General HODSON. It is possible, and I would not know the number of cases that might be tried in a given year, but that would be very, very small, because most of the cases involve an extended argument between the husband and wife, and, under our rules, he either has to admit this or we have to have proof by an order of the court.

By this time we have received many, many letters we will say from his wife, which we have had to answer. So actually our problem there is that we don't think his misconduct is so great. He is guilty of misconduct, that is true, but we don't think this is so great.

Why we want to separate him from the Army is because it is such a cost in terms of man-hours answering all of the letters that we have

received, so that it makes for a more efficient Army if we can separate him.

So then you go to the next step—if we agree that we should separate him in order to conserve man-hours—then the next step is how do you characterize his discharge. This depends of course on the circumstances of the case. Again if you have a kind of dishonorable type of behavior towards his wife and his children, it generally will end up in an undesirable discharge.

Mr. CREECH. Would board action ever be initiated while the man's counsel was attempting to negotiate with the wife's counsel or while there were any negotiations in progress?

General HODSON. No. The man's legal obligation has to be established by an agreement or by an order of the court, and if the wife writes the letter or the attorney for the wife, which is usual, writes the letter to the Army, complaining about the fact that a soldier is not carrying out the provisions of the court order, we present that to the soldier through command channels, and in effect ask him what is he going to do about it.

If his contention is that he wasn't properly represented at the hearing, that this court order should be set aside, and so on, we suggest to him that the thing for him to do is to retain an attorney and go back to the court and get the order changed.

Now if he does not do this, and an extended period of time passes with the court order still in existence and it appears to us that he should comply with the order of this court, he no longer has a reasonable excuse as far as we are concerned. If we continue to get the letters from the attorney and from the wife, we will consider him, or a commander may consider him, for an administrative discharge.

But while there is a negotiation going on, or if there is any possibility that he has a case and he might go back to the court and reopen the case and perhaps get a more favorable order, we don't take any action, if what he appears to be doing appears to be reasonable.

Mr. CREECH. Well now, this type of administrative discharge, would it be less than a general?

General HODSON. It might possibly be, yes. I don't know how to answer that question, Mr. Creech.

I would say that he could end up with an undesirable discharge, but I would say that it would probably be quite rare in my judgment.

Mr. CREECH. Well then, General, would you perceive objection to an individual having a trial by court-martial, when the service proposes to give him administrative discharge less than a general?

General HODSON. Well, the problem we have here, as I indicated earlier, the problem here is that this man is costing us a lot of man-hours in answering correspondence and in counseling, and it finally gets to the point where we think he should comply with the court order, but he does not comply with the court order to support his dependents, and so therefore we arrive at the conclusion that in order to conserve manpower, we had better discharge this man.

I don't think at that time that we should consider trying him by court-martial. I think it will be a rather rare case when this man does get an undesirable discharge. It will have to be peculiarly dishonorable conduct on his part before a board would probably recommend an undesirable discharge.

But I would say this in conclusion: That although there is the possibility of trying this man by court-martial, that the most appropriate way to dispose of the ordinary case that falls into this category would be administration action. I would say also that if the respondent in such a case is represented by legal counsel, as is contemplated, I see no reason why this is not a fair disposition of the problem.

Mr. CREECH. I would assume for what you have just said, sir, that this would be your response to the question of why not give the choice of court-martial or a board action to a serviceman when the case is one that could be tried under the code? That is the case of misconduct?

General HODSON. I am sorry, I did not get the first part of your question.

Mr. CREECH. You have indicated you feel that it is best to handle these matters by board action. You have indicated why you feel that it is.

My question is why not give the choice of the court-martial or board to a serviceman when the case is one that could be tried under the code, that is cases of misconduct? Now my question, sir, the answer that you have just given, would that be your answer to that, that these board actions are more appropriate?

General HODSON. I think they are not only more appropriate, but as I say, if the respondent is represented by legal counsel, I believe that these procedings are completely fair.

Take the case of a dishonorable failure to contribute adequate support. He might get out with an administrative discharge, and it might be general, it might be honorable.

If he is tried by a court-martial and he is discharged, of course it would either have to be a bad conduct discharge or a dishonorable discharge.

Now I think that the average legal counsel in looking the situation over, if the case is triable by court-martial, would probably advise his client that administrative proceedings would be better because there is a chance to get an honorable discharge.

Now on the other side of the coin, they might be able to get a finding of not guilty by court-martial. So you have lots of factors involved here with respect to what is best from the viewpoint of the respondent.

Mr. CREECH. Yes.

General HODSON. And I don't know how you can answer that at this particular meeting today, because each one of those is going to depend on its own particular facts.

Mr. CREECH. Yes.

General HODSON. One thing I would like to ask though is this. If the respondent is given the choice of demanding trial by court-martial, who would certify to the respondent that this is a case which could be tried by court-martial? Would he decide that it could be, or could the Government, which is normally the prosecutor, decide that this is a case which we can try by court-martial? In other words, someone will have to make that decision.

Mr. CREECH. Well, the code makes that decision, doesn't it?

General HODSON. No, the code does not make that decision. It merely proscribes certain conduct.

Mr. CREECH. Yes. So if a man is being charged with violation or for misconduct that comes within the code, then he could, under the terms of S. 758, he could elect to be tried by court-martial after he had consulted with legal counsel.

Rather he would have the right to consult with legal counsel before exercising that election. But obviously it would have to be an offense which would be under the code.

General HODSON. The one thing that I have a haunting feeling about is that there may be a feeling on the part of this committee or you, Mr. Creech, that almost anything that a man does in the military service is triable by court-martial, and that is not true.

We have strict rules with respect to proof, with respect to alleging offenses and with respect to what kind of conduct constitutes an offense, and every peccadillo that we can think of here in this room is not necessarily triable by court-martial.

As you well know, the standards of proof, the requirement for specificness in the specification, the requirement that the offense shall be properly alleged are the same as those that are required in the Federal courts, and every little thing is not necessarily an offense.

Mr. CREECH. But here you are talking about evidentiary——

General HODSON. And the fact of article 134 doesn't change that picture a bit.

Mr. CREECH. You are talking about evidentiary matters rather than the offense, aren't you, General?

General HODSON. No, I am not.

Mr. CREECH. Do you mean to say that there are offenses that a man can commit, grave offenses, serious offenses, which could result in his receiving a punitive discharge, and yet they are not covered in the uniform code?

General HODSON. Well, the Court of Military Appeals on a great many occasions—certainly on a number of occasions—has come out with the conclusion that one type act or another is not an offense under the Uniform Code of Military Justice, averting to certain conduct which all of the services from time to time have thought was misconduct. I will just give you one example.

We thought, and we had thought for years, that for an officer to write bad checks and to do so negligently was an offense, because we felt that a commissioned officer should be held to a high standard of conduct. When he writes bad checks and his defense is that he was negligent in failing to know how much he had in the bank, originally we thought this was an offense.

The Court of Military Appeals disagreed, so that an officer may now negligently write bad checks and not commit an offense.

Mr. CREECH. But General, we know of course, I realize of course that there are situations like that. We realize of course in the case of the assassination of President Kennedy that there was no statute concerning the assassination of a President; that there are things that come to our minds from time to time, and very peculiar situations.

But in the normal course of events, I would assume that the uniform code has been drafted to take care of offenses which may be committed by service personnel, and that if there are vacuums within the law, and of course we know the courts have told us certain areas in

which the military tribunals do not have jurisdiction, and these are of course the subject of some of the bills which are before the subcommittee at this time, but these are rather unusual circumstances, aren't they?

Certainly even in civilian life we know that there are situations in which people can commit acts which we all agree are illegal, but yet they might have been overlooked in the codification of the law. There might not be any statute which is violated. But these situations would be very unique, wouldn't they, where they are not normal situations within the military service?

General HODSON. Well, I might answer this by saying that they are more normal in 1965 than they were in 1951 when the code came into being.

Mr. CREECH. If there are areas which you find are not covered by the code, you would make representations, would you not, to have the code expanded to include them?

General HODSON. Well, generally speaking I think—again this is only personal observation—we cover this by the issuance of what we call general orders, if we wish to prescribe a certain standard of conduct. We issue general orders.

But general orders are limited to the behavior of the soldier or the officer within the service, and of course such orders must be related to the accomplishment of the military mission.

Therefore what I am saying is that we do not—and, in my view, cannot lawfully—issue an order requiring all soldiers and commissioned officers to support their dependents, and then try them for violating that order, because that conduct is considered to be part of their private life. It is only when their conduct is such that it comes to public notice and it becomes notorious, in other words, that we consider that this is a type of an offense that might be tried by a court-martial.

Mr. CREECH. This is not necessarily considered to be to the prejudice of the good order and the discipline of the armed services or conduct of a nature to bring discredit upon the armed services.

General HODSON. This is the dishonorable failure to support your dependents?

Mr. CREECH. Yes, sir.

General HODSON. Yes, that would be under the second part usually. Usually it will be under that second part, bringing discredit on the military services, yes.

Mr. CREECH. It seems to me that if that would be the case, then you do have of course a valid basis for giving the man a court-martial.

General HODSON. You might have a valid basis for it.

Senator ERVIN. This is an alternative. This authorizes the granting of an undesirable discharge, where there is an established pattern of failure to support one's legal dependents, or where there has been an established pattern for disobeying court orders requiring one to support his legal dependents.

In the one case don't you have a practical consideration which operates that makes it difficult to try a man. A serviceman may be stationed in Minnesota and his dependents may be down at the tip of Florida, and if it hasn't been adjudicated in the court, you have got a controversy between a husband and wife, which is very expensive. It

would be very expensive to transport the wife and witnesses from Florida to Minnesota to establish a case for a court-martial, wouldn't it?

General HODSON. Yes, sir.

Senator ERVIN. In that case you take the position that it is the annoyance and a waste of man-hours on the part of the military personnel that justifies an administrative discharge as contradistinguished from a court-martial.

General HODSON. That is correct, Mr. Chairman. And further I hope to emphasize here that in this particular area it will in my judgment be a very rare case when this man will get an undesirable discharge. He will usually get an honorable or a general discharge.

Senator ERVIN. General, let me see if I understand what fundamentals underlie your testimony. You haven't said this and I want to know if I have made a right deduction. You take the position that the Uniform Code of Military Justice establishes what is equivalent to a set of criminal laws for the military.

General HODSON. Yes.

Senator ERVIN. And that there is an area in which there is an implied contract between the military personnel in the ranks of the service of the Government which imposes upon him certain obligations superior to merely refraining from committing military crimes. He may fall short of performing the implied contract between him and the Government without committing a military crime——

General HODSON. That is correct.

Senator ERVIN (continuing). As denounced by the Uniform Code of Military Justice, or that his offenses may be so insignificant in nature but so repeated in commission as to amount to what you might call an implied breach of the obligation he owes, apart from the obligation to refrain from committing serious crimes denounced in the Military Code.

General HODSON. I think that is a good summary. I wish I had said that myself.

Senator ERVIN. General, I think the evidence establishes that you have your honorable discharge, which I think is recognized quite rightly as a badge of distinction.

It is in one sense the greatest reward that a man can get for his military service, and it is accepted not only by the military but it is accepted by the people generally all through the United States as the highest distinction really that a military man can get, even higher than any medals he might get for valor.

General HODSON. Except for the Congressional Medal, I would say that is true, Mr. Chairman.

Senator ERVIN. If a man had to take his choice between getting an honorable discharge and the Medal of Honor, he would probably take the honorable discharge, don't you think?

General HODSON. I don't know.

Senator ERVIN. But then, on the other hand, of course you have your bad conduct discharge and your dishonorable discharge, which can only be given as I understand the law, as part of the punishment for court-martial.

Then you have got these others, the general discharge and undesirable discharge, which is sort of like Tomlinson's Ghost. To some

extent they sort of flip to and fro between this military heaven and this military hell.

Now don't you agree with the evidence that has been adduced that as far as undesirable discharges are concerned, that they do put a pretty serious stigma on a man?

General HODSON. I understand that that has certainly been the testimony before this committee, and I have no evidence to refute it, and I am sure that in all of our counseling of our enlisted personnel, we point this out to them clearly and unmistakably, that they should so conduct themselves in the military service as to get an honorable discharge, because a stigma is attached to an undesirable discharge.

Senator ERVIN. We had some very interesting testimony yesterday from Colonel Wiener, a member of the bar of the District of Columbia, and a retired Reserve officer.

He advanced the theory there ought to be only three types of discharges, honorable, dishonorable, and sort of a neutral one, or one that doesn't carry any connotation.

I think some of the trouble with discharges other than honorable is the fact that all too often, perhaps due to difficulties of proof or difficulties of one thing or another, an undesirable discharge is used for getting rid of supposedly disreputable characters rather than having the court-martial, which may not be justified by the evidence available. Then the same discharge is also used for some men who have committed relatively small offenses, and I think that is where the confusion in the public mind comes and where the injustice comes about. I am not certain I possess the wisdom of a Solomon to say how it can be remedied.

Now General Berg, if I may ask you one or two questions about your testimony. First, I want to thank you for your very lucid paper, which sets out exactly what I think is one of the major problems to deal with—this question of discharge by administrative boards. I think you have set out the position of the Defense Department exceedingly well, as I understand it.

I take it that there would be no objection to the passage of a law which would secure the basic rights to a person who is confronted with the possibility of receiving an undesirable discharge. He would be given notice of the basis for that possibility, and an opportunity to be heard by the board with the assistance of any available military lawyer, with the right to retain a private counsel of his own. Would there be any objection to incorporating those things into a statute as they are incorporated in substance in this directive?

General BERG. No, sir.

Senator ERVIN. Now what is the policy with reference to giving an undesirable discharge to a man who does not resist the receipt of such a discharge?

General BERG. What is the policy?

Senator ERVIN. Yes.

General. BERG. Well, the directive provides that he will be notified in writing of his rights to a board hearing and of counsel, or that he may waive these rights in writing. If he requests, he will have an opportunity to consult with counsel prior to making the waiver.

Senator ERVIN. As a result of certain experiences I had with complaints made to me, I suggested to one of the former Secretaries of

the Navy that it would be well to have a regulation to require a man who is willing to accept a discharge under less than honorable conditions to sign a written waiver of his rights.

General BERG. I think that is included in the directive. He does have to sign in writing.

Senator ERVIN. Because undoubtedly in a great many of these cases in which the individual is being released from the service by an undesirable discharge he willingly accepts the undesirable discharge as a merciful way of letting him out of the service rather than by a court-martial. That is true with respect to more serious offenses I think. And then he escapes subsequent punishment.

He escapes punishment, but then he gets out into civilian life and he finds it is a handicap. He also finds that under the law he has sacrificed certain benefits that would otherwise accrue to him as a veteran, and then he raises a complaint. It seems to me that taking a written waiver from him would afford pretty good evidence that there is a lack of validity to his complaint.

General BERG. It has been pointed out to me, Mr. Chairman, that on page 11 the directive does provide, in paragraph d(1)(c), that the respondent may waive the "above" rights in writing. The "above" rights are to present his case before a board and be represented by counsel.

Senator ERVIN. I think that is an excellent thing. I am glad it is in there. I made my suggestion prior to that time, as a result of a case where all they had was evidence of confessions, which were subsequently repudiated, and of course they had no evidence of the corpus delicti.

I understand one of your great problems in the services is those who are suspected upon more or less substantial grounds of being guilty of practicing homosexuality.

That is a very difficult crime to prove because it is committed in secret, and it is normally as much disgraceful to the one that aids and abets it as it is to the guilty party. And so it is very difficult to get his testimony.

I think that is one crime that causes so much confusion in the civilian mind with respect to these discharges under other than honorable conditions.

In other words, they know that the service doesn't have the testimony available to convict a man, and therefore they get him out in this way. Then so many of the public thinks that every man who gets an undesirable discharge is likely to have been released from the service on account of homosexuality.

I don't know who is smart enough to deal with that situation. It is a troublesome situation, because it certainly is injurious to the morale of people who have to associate with a man necessarily compulsorily in the service to be compelled to associate with a man they think is a homosexual.

On the other hand, we have this instinctive feeling in the thing that a man ought not to be condemned without a trial, and so we have these two conflicting considerations that cause a lot of trouble in this field. Do you have any solution to this problem?

General BERG. No, sir. I would just comment in passing, Mr. Chairman, that under both unfitness and unsuitability, there are pro-

visions to take care of homosexuals. We actually have cases now where a homosexual will receive a general discharge and in very rare cases even an honorable discharge.

I think that this field is somewhat akin to the field that General Hodson was talking about a minute ago of drug addiction, in which there is some kind of a social change going on as to whether or not the man is sick or whether he is actually committing an offense.

Senator ERVIN. Yes, there are a great many people now trying to change their attitude towards homosexuality.

General BERG. We have been picketed by them in the Department of Defense.

Senator ERVIN. Kipling said there was a day coming when every man should be paid for existing and no man should pay for his sins, and I think that day is about to be here.

Now you state on page 11 of your statement that the military must not be burdened with unfit, incompetent and unqualified persons, because once the individuals have been so identified, they should be eliminated from the services as expeditiously as practicable.

I certainly think that nobody can make a claim that anybody has a vested right to remain in the military, and the military has a specific function to perform. There are many men who through no fault of their own are unfit mentally or who are unfit through a physical handicap that may not be quite great enough to constitute a defect that is observable when they are admitted into service, but that is subsequently discovered. That they are unfit for military service, there is no question about that.

And the military ought to have some practical way to eliminate them without doing an injustice to them, without stigmatizing them.

I once heard a preacher preach a sermon on goodness and he said, "It is not sufficient to be good because a lot of people are good for nothing." I recalled that sermon when we were discussing shirking.

I am interested in the administrative discharge. If we can fix some way to identify these people that are unfit through no fault of their own, they may be characterized as being sort of good for nothing, but distinguish them from being treated as if they were bad people, by a discharge which identifies them in this manner in the eyes of the public, that is what I am interested in, and I realize it is a difficult problem.

But to summarize the thing, I will ask the same question. General Hodson said that his underlying conviction is that the Uniform Code of Military Justice sets up a set of criminal laws for the governing of the military, and that this should be used to punish people who are thought to deserve punishment, but that the question whether one is merely unfit should not be placed in the category of willful misconduct, and that administrative discharge should be retained as to them. That is your position?

General BERG. Yes, sir.

Senator ERVIN. Virtually.

General HODSON. Mr. Chairman, if I could add a point here, the man you are describing I believe falls in the category that we would call, unsuitable. He would get either an honorable or a general discharge under honorable conditions. That is I am now talking about the good for nothing man.

Senator ERVIN. He gets the general discharge.

General HODSON. The general, yes.

Senator ERVIN. I don't think for the good for nothing man it is perfectly valid to make a distinction. I think that the honorable discharge is a mark of honor.

General HODSON. Yes, sir.

Senator ERVIN. And we should have no laws and no regulations that require the military or put them under any kind of coercion to grant a man who doesn't merit an honorable discharge, an honorable discharge. I think that would be about as bad an offense on the one and as what we are trying to cure on the other.

General HODSON. As a matter of fact, Congress has spoken as you know in enacting the veterans legislation, by saying in that legislation that he shall not be entitled to these benefits unless he has a discharge under other than dishonorable conditions. So Congress itself has said if this man is categorized by the military service as having been discharged under other——

Senator ERVIN. General, it has been suggested in a great many cases that notwithstanding the fact that the military may claim justifiably that there is a distinction between the unfit and those who ought to be punished or court-martialed, that nevertheless the Court of Military Appeals should be given jurisdiction under restricted conditions to review discharges under other than honorable conditions; to take under the criminal or civil obligations or the obligations a serviceman owes to the service or to the Government as being transcendent to merely the obligations to refrain from violating the Uniform Code of Military Justice. If we approximated the law generally that you do have courts to review a violation of a man's rights to contract, what is your comment on whether or not the Court of Military Appeals should be given jurisdiction to review undesirable discharges, or discharges under conditions other than honorable?

General BERG. If I am not mistaken, sir, that is one of the bills on which General Hodson testified, and as I remember, we are opposed to that particular provision.

Senator ERVIN. That was my recollection of the testimony, but is that your position?

General BERG. I would defer that to General Hodson on that, sir, if I may.

Senator ERVIN. As I recall, the general is authorized to speak for all the branches of the service on the bills that he discusses.

General BERG. That is correct, sir.

General HODSON. Would you like to have me comment, sir?

Senator ERVIN. Yes, sir.

General HODSON. Well, our position was that we were opposed to granting the Court of Military Appeals a review of the actions of the Board of Corrections of Military Records and the Discharge Review Board.

One thing we pointed out was that we felt that very few legal issues are involved in these proceedings. They are mostly factual in nature, and very few legal issues are involved.

We also felt that the Board for Correction of Military Records and the Discharge Review Board are already doing all that is necessary

in this field, and particularly the Board for Correction of Military Records, in the sense that the Board acts more as a court of equity rather than a criminal court of appeals, and can consider far more matters favorable to the accused than the Court of Military Appeals could under a limited grant of review of the record of trial.

So I think that the respondent in a case of this type is already getting far more relief out of the Board for Correction of Military Records than he could ever expect to get from the Court of Military Appeals, which might be considering only a very narrow legal issue, and would be unable to grant the man any equitable relief.

In other words, the Board for the Correction of Military Records, in granting relief for meritorious cases, has an extremely broad power to grant relief, and I feel that this is adequate under the circumstances.

Senator ERVIN. Well, there would not be too many appeals if you restricted the jurisdiction of the Court of Military Appeals to the power to determine whether or not errors of law were committed by the boards of review.

General HODSON. I would take it that very few cases would ultimately be considered by the Court of Military Appeals, and opinions written thereon, very few cases.

Senator ERVIN. That is what I think, because to restrict the power to only correcting errors of law, because most of your cases are factual. Your law is fairly well established.

General HODSON. But I would also assume or estimate or conjecture that many, many cases would have to be reviewed by the Judge Advocates of the three services to determine whether the Judge Advocate General should certify this case to the Court of Military Appeals, and I would assume also that many of the respondents would require their Government-furnished counsel to go over that record to find out whether they had a ground for petition to the Court of Military Appeals.

So even though I said I believe that the Court of Military Appeals would ultimately take jurisdiction in only a few cases, and would write only a few opinions comparatively, thousands of cases would have to be examined and reexamined and reexamined by the Government-furnished counsel on both sides under the legislation as it is now proposed.

Another thing that might be mentioned at this point, which was covered by General Berg in his statement, is that I think this committee is concerned with administrative discharges, and yet as I read it, the provision which would permit an appeal or a petition to be filed on a case arising out of the Discharge Review Board or the Board for the Correction of Military Records did not limit this jurisdiction to cases involving administrative discharges, but expanded it to cover the other 75 or 80 percent of the work of the Board for Correction of Records, which involves many things other than administrative discharges. And it would permit—if this legislation were enacted—it would permit many appeals in cases, as I say, that do not involve discharges at all.

Senator ERVIN. Of course that objection could be removed by an amendment to restrict it.

General HODSON. I just wanted to point that out.

Senator ERVIN. And also by a provision restricting the right of appeal to the correction of errors of law, and also by giving them something in the nature of a certiorari jurisdiction that requires that there be good cause shown before they review a case.

It seems to me there might be some merit in review, because after a few authoritative opinions, it would settle a lot of the points of law and there would be less cases as time went by.

General MANSS. Mr. Chairman, may I say something in that connection?

Senator ERVIN. Yes.

General MANSS. You may recall the last time we were over here you and I had quite a discussion about this particular point. I think you made an analogy to the number of appeals to the Supreme Court of North Carolina in criminal type cases.

I think the difference here is that in this particular type of situation, as General Hodson said, we would be furnishing counsel. Under those circumstances it has been our experience in the processing of military justice cases which have to come into the Boards of Review, because they involve a sentence to over 12 months confinement or a punitive discharge, that merely by reason of the fact that we furnish the counsel and the accused has nothing to lose, he will go as far as he can in most cases, even in those cases where has pled guilty in a court-martial.

After he is found guilty and sentenced, the case comes up here, he requests appellate defense counsel to assign errors and argue the case in the Board of Review. Then if the board affirms, he requests counsel to petition to the Court of Military Appeals.

I think we can be certain under these circumstances where we furnish counsel that the same thing would happen in the board proceedings, and of course we have many more administrative board proceedings than we do court-martial cases which come through the appellate process into the headquarters.

Senator ERVIN. That puts you on about the same tragic condition in which civilian counsel are put now by the decision of the Supreme Court of the United States.

The State of North Carolina and every State in the Union has to furnish counsel to every defendant who has not got one of his own, and under these recent decisions, furnishing counsel to defend him in the original case, the court tries him and then he can come in the next time and he can try the counsel.

General MANSS. Yes, sir.

Senator ERVIN. And then he can come in a second time and try the court that tries him under postconviction hearing, and then he can come in another time and try his counsel and say his counsel in the postconviction hearing did not represent him properly, he is incompetent, and then he can get another counsel under the decisions to come in and try the second counsel, and so on ad infinitum.

I do not approve of that myself, because I think res adjudicata and stare decisis are pretty wholesome things.

General MANSS. I do not think, Mr. Chairman, that the Supreme Court decisions require the furnishing of counsel to take the case to the highest court in the State or necessarily to the Supreme Court.

Usually after they have finished with the trial in the court of original jurisdiction, except in capital cases, that is as far as they have to go.

Then of course, as you say, we get into the proposition where the accused acts as his own counsel and he starts trying a guy.

(Off the record.)

Senator THURMOND. Mr. Chairman, could I ask General Hodson a question?

Senator ERVIN. Yes, sir.

Senator THURMOND. General Hodson, this retired colonel who testified here the day before yesterday or yesterday as a witness, Colonel Wiener, suggested those three types of discharge, honorable I believe, general, and dishonorable. Have you all given consideration to maybe lessening the number of discharges and have somewhat of a flexible, or lose a little ground there as the colonel suggested?

General HODSON. If I understood—I did not hear his testimony, but as I understood it—he recommended that there be three kinds, honorable, dishonorable, and one in the middle, or one neutral discharge.

Senator THURMOND. I think he said you might call it general or something else. Anyway, whatever it was.

General HODSON. We utilized that system throughout World War II. We had the honorable discharge, we had the dishonorable discharge adjudged by court-martial only, and the so-called blue discharge, which was the neutral discharge. Then as I understand it——

Senator THURMOND. The white was the honorable, the blue was the neutral, and the yellow was the dishonorable?

General HODSON. The yellow was the dishonorable discharge.

So we have used exactly the system that Colonel Wiener as I understand it recommended to this committee yesterday, and we abandoned that system in favor of being a little more specific simply because, I believe, of the suggestion by the Veterans' Administration that this neutral discharge did not give them any clue as to whether the man was discharged under honorable conditions or under dishonorable conditions, with the result that they had to investigate all of these cases to find out, whether—when he got a blue discharge—it was under honorable conditions or under dishonorable conditions.

In other words, it was so neutral that the discharge itself did not tell anybody anything.

Senator THURMOND. Was that changed to assist the Veterans' Administration?

General HODSON. I cannot say for sure, but I recall that it became so difficult to investigate all of these cases of people who received the blue discharge, and to make a redetermination of whether the discharge was under honorable or under dishonorable conditions that this at least was one of the factors that was considered in going into a little more specific type of discharge administratively.

Senator THURMOND. Every now and then I have some fellow who comes in and he may have gotten some discharge when he was in the service and it was not just the right kind and he is handicapped for years and years, even though later he may have lived a good life and has overcome any deficiency he had or he has proved meritorious.

I just wondered if you like your present system better than the one previously used, or was that done just to accommodate the Veterans' Bureau and save them work.

General HODSON. I cannot say for sure whether that was done solely to accommodate the Veterans' Administration, but I know that the vagueness of the discharge was among the factors considered in going into a more specific type of discharge, and that is where the general and undesirable discharge came from.

Senator THURMOND. From your practical experience, how do you feel about it?

Do you think it is better like this?

I have no fixed judgment. I am just making inquiry here.

General HODSON. Well, this area of administrative discharge is, of course, in two compartments.

One is—I think we are all in agreement—that the unfit, the unsuitable, should be separated from the military service. So I do not think we have any problem there. The only problem we have is how do we characterize his service. It is the position of the Department of Defense that we should be allowed to characterize a man's service as either honorable, general, or undesirable by an administrative proceeding.

I do not know whether my personal views are worth very much on this, frankly, because I have the feeling that there is a growing tendency in the United States in the last 25 or 30 years to treat everybody as equal with respect to income, right to schooling, right to a happy life regardless of whether the person works for it or not.

In the armed services we still are following the policy that a man earns the reward which he gets.

Senator THURMOND. I hope you never depart from it.

General HODSON. Whether we are rowing upstream with a broken paddle, I do not know, Senator Thurmond, but our position is that we would like to reward the man who earns an honorable discharge, and we would like to maintain the integrity of the honorable discharge as being a symbol of honorable service, and if we were pushed into the position ultimately of having to give everybody an honorable discharge, of course you and I know that bad money runs good money out of the market, and the honorable discharge would be worth nothing.

Senator THURMOND. I think what you are saying is too true. I do not think that question would arise as to the honorable and dishonorable, but is just the middle ground.

For instance, do you think it is better to call it a general or call it a neutral or call it a bad conduct, and what other terms do we hear now, undesirable?

In other words, is it better to use the terms "undesirable" or "bad conduct" in there, or use some term that indicates a neutral area where it is not dishonorable, but yet you cannot give him that badge of honor that you feel only certain ones deserve?

General HODSON. In that respect, if we went to the two types of discharge such as general under honorable conditions, and honorable, of course both of these discharges would entitle a man to all veterans benefits. Then you have the question of do you want us to certify

everybody who has served in the Armed Forces as entitled to veterans benefits even though we are convinced as people and as voters and as taxpayers that some men did not do anything to earn these veterans benefits.

Senator THURMOND. In other words, the type of discharge you give here not only has been worked out from the Army's standpoint as probably being feasible and practical, but it is a determination eventually on which veterans benefits will be based, and that was probably the chief reason for changing it?

General HODSON. It was certainly part of the reason. I think it should be clear that our designation of this person as receiving an undesirable discharge does not prevent the Veterans' Administration from reexamining the case and determining that this man is entitled to veterans benefits despite our characterization. In other words, our characterization of his service as undesirable, insofar as they are concerned, amounts only to recommendation; of course they would not reexamine an honorable or general discharge.

Senator THURMOND. Again I want to say I hope you cling to your policy of rewarding those who deserve the honor and you do not hesitate to say so when they do not, because the services, if they are going to stand for anything, they have got to stand for something.

This thing of equality of everybody, I am completely disgusted and frustrated with it, and if the services ever give in on that, I think the last vestige of our society is going down. So I hope you will stand right firm.

Thank you, Mr. Chairman.

Senator ERVIN. General, with respect to the boards, you say you do not object to giving power, in fact you approve of giving subpena power to the board which passes upon the question of administrative discharge?

General BERG. Yes, sir.

Senator ERVIN. And that you think the bill should be amended so as to provide also for taking of depositions in those cases?

General BERG. That is correct.

Senator ERVIN. You say that the department is opposed to giving subpena power to the boards of review when they pass upon these subsequent matters?

General BERG. Yes, sir.

Senator ERVIN. I am familiar with the reason you gave for that, but will you pardon me for saying so, I do not think it is very substantial. I do not think it will inconvenience or complicate the hearings at all.

I would think that there are some cases where the board of review would welcome the possession of the power of subpena.

General BERG. Well, Mr. Chairman, let me restate it as I understand it, subject to being corrected—there is a member present from each of these boards in case I do not state it properly.

As I understand it, today if they want to call somebody in when they have one of these particular discharges under review it is no problem for them. They can and often do.

Their concern is that if they were authorized the subpena power, the initiative would pass over to the individual or to his counsel and this could end up in an endless parade of witnesses that would not neces-

sarily make any contribution but could obstruct or delay the proceedings.

Senator ERVIN. Do you not believe that you could take care of that objection by providing that the subpena should issue whenever the board finds that the witness will give testimony that is relevant to the matter pending before them?

I concede the substance of that.

General HODSON. Could I intersperse a comment at this point on this?

Senator ERVIN. Yes.

General HODSON. Generally speaking, I feel that if the statute were amended, or certainly if you authorized us to issue the regulations which would require the respondent to come in with a showing as to the necessity and relevancy of the testimony that would help. However I would suggest that if you also have legislation which permits appeals to the Court of Military Appeals on questions of law, that this particular area would generate most of your appeals. That is, whether the board acted properly in denying the issuance of a subpena.

It would be a most fruitful area of appeal as a question of law as to whether the board abused its discretion.

General MANSS. Mr. Chairman, one other thing.

If you give the subpena power to the original discharge board, and keep in mind again that the respondent is represented by counsel, and he has an opportunity to make the record at this point, these other boards are actually appellate boards. This would be within any precedent any place if you would permit them or the respondent to try these cases de novo in the appellate body—once he has had the opportunity—to make his record.

Senator ERVIN. I would agree with you if the boards of review passed upon these matters upon a record made by the original board, but they do not do that.

Sometimes these things are called up years later, and involve questions of fact.

General MANSS. Yes, sir; if you have not had an opportunity to make a complete record below. But we do not think that this is true.

I preface this now as far as the subpena power is concerned upon giving it to the original administrative discharge board. This is like the court of original jurisdiction, the trial court. Then when you get into the appellate court, you do not try the case de novo.

But these boards, the discharge review board and the boards of correction of military records, have all the files available, they can go into the record.

Senator ERVIN. They can if it is in the record.

General MANSS. Sir?

Senator ERVIN. They can if it is in the record, but it might depend on something——

General MANSS. Then you have something in the nature of a petition for a new trial which is, I think, as the man says a horse of another wagon. I do not think that has anything to do with this. But he has the opportunity below if they have the subpena power in the first board and he is represented by counsel, so that two appellate boards have the opportunity to look at the record below and they

can determine whether or not they think the evidence was sufficient or whatever other reason is advanced.

Senator ERVIN. Yes, but maybe you and I disagree as to the powers of the boards of review. I do not interpret them to be in effect necessarily an appellate board. I think that, as General Hodson says, they have got a lot of equitable powers.

General MANSS. Yes, sir.

Senator ERVIN. And they can correct errors and things that did not come from the original boards at all.

General MANSS. They do not hear testimony and call witnesses. As far as they go is to consider affidavits in certain cases, and this of course they try to discourage.

I take it now you are talking about the boards of review which review the court-martial cases.

Senator ERVIN. I do not set much store, I do not think that the search for truth ought to be limited to affidavits, because I can draw an affidavit and get it signed by Ananias and another signed by George Washington and you cannot tell Ananias from George Washington when you get it down on a piece of paper, if you will pardon me, gentlemen.

Admiral HEARN. Mr. Chairman, the question of subpena power for the board of correction of naval records, I assume you have in mind restricting that to those matters that are before the board which relate to the characterization of a discharge; is that correct, sir?

Senator ERVIN. No, I did not have that in mind, I had broadening the powers to anything under that jurisdiction, because a lot of the corrections ought to be made on the basis of oral testimony.

Admiral HEARN. Of course the discharge matters before the board of corrections constitute only a very, very small part of their overall work.

Senator ERVIN. Oh, yes, over 25 percent I believe General Hodson said in the case of the Army.

Thank you.

Counsel, do you have other questions?

Mr. CREECH. Yes, thank you, Mr. Chairman.

General Berg, going back to your colloquy with Senator Ervin earlier, the subcommittee has received a number of complaints from individuals who have been accused of homosexuality. Perhaps we have had more cases involving this offense than any other in recent months. And the accusation has been made that today in military service to be accused of homosexuality is virtually sufficient for a discharge, that any man today accused of homosexuality has a very difficult time staying in the service, and the charge is made that individuals who are in fact homosexuals frequently accuse others who are not, people whom they may dislike for some reason or something of that sort.

I wonder if you would care to comment on this type of case or this type of allegation.

Do you feel that if a man is accused of homosexuality and he denies it, that he has an opportunity to stay in service?

General BERG. Well, Mr. Creech, I do not think I would be the right one to answer that because I have been kind of far removed from the actual cases. I wonder if somebody else might.

Admiral HEARN. I would like to have Captain Eliot speak for the Navy and Colonel Neville speak for the Marine Corps.

Captain ELIOT. I am Capt. J. C. Eliot, Assistant Chief of Naval Personnel for Performance.

I would say in answer to that question, sir, that that is not so. We see many cases in which an allegation is made, and the case does not proceed to a hearing of any kind. In other words, we do not process the person.

Now the policy in the Navy is that if a person maintains his innocence and is consistent in this, we would rarely ever discharge him. If we did, he would go with a higher type discharge. In other words, he would be given a court-martial if he has maintained his innocence all the way.

Senator THURMOND. Where you had no facts to the contrary?

Captain ELIOT. Yes, sir.

Now the practical problem that we run into, as we are all aware of course, is that we have literally hundreds of cases in which the individual, after being suspected, is interrogated and he is very carefully advised of all of his rights under the appropriate article of the code, and then does make an admission and signs it, most normally in his own handwriting, and then there are no other facts to use in bringing a court-martial trial, so we have this case of the man who has admitted the situation, and we consider that this man has not consistently maintained his innocence. So we may give this man an administrative discharge hearing.

Many of these cases, actually there are hundreds could not be properly brought to court-martial action.

Mr. CREECH. Sir, in the case where you have the admitted homosexual, I believe Admiral Hearn has testified earlier that in this situation that the Navy feels that it is in the best interests of the man certainly to give him a board action to avoid trial and publicity and what have you, and that there is no problem in that type of case, because the man invariably wants it.

But where you have the situation where the man does deny the allegation, the subcommittee has been told that in some cases the accusation will only be in the form of a summary report by the investigating service, and that the man may not even be present at the time that the report is considered, and the accused does not get an opportunity to cross-examine his accuser.

Is this the case, sir, or would the individual accused of homosexuality always have the opportunity to confront his accuser?

Captain ELIOT. Well, he is always given the opportunity of appearing at a board hearing if the decision is made to have an administrative board proceeding. There very well may be cases and there are cases in which the other participant is actually not known by full name, and we probably could not even locate him, but the man may have, on being interrogated, the respondent may have admitted these acts.

Mr. CREECH. No, sir; I am talking about the situation where the respondent denies the act.

Captain ELIOT. Then I do not quite understand the situation that would develop. In other words, he has admitted orally to the investigating team?

Mr. CREECH. No, he has not admitted anything; he has denied.

Captain ELIOT. Well, if he has admitted nothing and he maintains his innocence and cooperates, we would not discharge him, sir. At least we would offer him a court-martial if——

Mr. CREECH. He would not receive an administrative board action in the Navy; is that correct?

Captain ELIOT. Not if he maintains his innocence consistently, sir. Now this is our policy as of now.

Senator THURMOND. May I ask a question right there?

In other words, you would not discharge a man who had not had a chance to confront his accuser?

Captain ELIOT. I cannot answer that affirmatively, sir.

Senator THURMOND. If he denies his guilt?

Captain ELIOT. If he consistently denies his guilt all the way, that is correct, sir; because he would be afforded the advantage of a court-martial.

Senator THURMOND. If he denied his guilt and you felt he was guilty, of course, and you proved it, even then you would give him a chance to confront his accuser? He would have that opportunity, would he not?

Captain ELIOT. That is correct, sir.

Senator ERVIN. I understood you to state that where he had confessed his guilt, and then repudiated his confession after admitting his guilt, and you had no other witness against him, that you might give him an administrative discharge under those conditions?

Captain ELIOT. We might, sir.

The way those are handled in the Navy—the services are different—I assume that you envision a situation where the man would request a court-martial, and we actually do not have witnesses that we can get to proceed with a court-martial, and yet we have his admission, admission which is in his own handwriting signed by him, and given after appropriate warning. We would leave the decision up to the general court-martial authority, which in most cases would be a senior admiral who would decide whether there should be an administrative proceeding, and in most cases if he felt that this man had in fact committed homosexual acts, there would be an administrative proceeding and he most likely would get an adverse discharge. He might get a general or undesirable.

Senator THURMOND. That is only where he had confessed and then later repudiated that confession?

Captain ELIOT. Yes, sir.

Senator THURMOND. Otherwise, he would have a chance to confront his accusers?

Captain ELIOT. That is right, sir.

Mr. CREECH. I wonder if the situation differs in the other services where you have a man who has denied that is guilty of homosexuality, and would he be given an opportunity to have a trial by court-martial if he requested it in the other services?

Admiral HEARN. I think maybe your question should be directed to the other services. But before that can Colonel Neville speak on behalf of the Marine Corps?

Colonel NEVILLE. I am Col. R. B. Neville, head of the Discipline Branch Personnel Department, Headquarters, Marine Corps.

What Captain Eliot says generally applies to the Marine Corps. The only thing that I can add in specific response to your question, Mr. Creech, is that if someone denies consistently we will not discharge. And I can produce at least one case that comes to mind of a man who has had two accusations and very detailed accusations against him, and he is still in the Marine Corps, because he has consistently denied and we were in no position to do anything about it.

However, when a man does not deny and demands trial, we feel the question of trial then rests with the general court-martial convening authority. Sometimes we can go trial. We have had instances, we had one just 2 weeks ago, of a man who consistently denied and we instructed the commanding general, "All right, go to trial," and as soon as this was presented to the respondent, he was told, "You are going to trial," he submitted his resignation and agreed to accept a discharge under other than honorable conditions.

But you cannot in every case go to trial.

Your question about confrontation, Senator Thurmond, confrontation is a fact of life provided the accuser can be present. If he is reasonably available at all, there is no reason he cannot appear in an administrative board proceeding and be subjected to cross-examination, and he is.

Senator THURMOND. Let me ask you this question on that point: If a man has consistently denied his guilt, has never confessed, under these circumstances then would you discharge him unless he was tried and found guilty?

Colonel NEVILLE. I do not know of any case, sir, where we have discharged him. I do know, I can immediately think of one man as I say who has been twice accused over a period of 3 years who is in the Marine Corps today and still serving on active duty.

Senator THURMOND. But you are not in a position to bring the accuser and confront him?

Colonel NEVILLE. Yes, sir; we would be in a position to bring him to trial, but we did not feel that it was worth all the expense because it boiled down to two men, one man's word against the other's.

Senator THURMOND. But did you not say you had two witnesses?

Colonel NEVILLE. No, sir.

Well, we had two separate witnesses, yes, sir; to two separate and distinct incidents, separated by a period of, as I recall, around 18 months. But there is nothing that we feel that we can honorably do in all fairness and justice, because he has consistently denied it.

Senator THURMOND. Were these accusers or witnesses willing to testify against this man?

Colonel NEVILLE. Yes, sir.

Senator THURMOND. Why was he not tried?

Colonel NEVILLE. Because the command did not want to put it to a trial.

Senator THURMOND. Why?

Colonel NEVILLE. Because they felt that it would be a decision of the court based on one man's word against the other's, and apparently felt that the prosecution's case just was not strong enough.

Senator THURMOND. You had two counts, did you not? You had two different men who had come in and said that they knew about it?

Colonel NEVILLE. Yes, sir. There would have been two counts had he been brought to trial. There may have been in both of these cases, Senator, reasons, other than I have suggested to you, why they did not want to go to trial. We leave this decision to the general court-martial convening authority, the general on the scene.

Admiral HEARN. Senator Thurmond, our experience in charges of this nature, when you have the accused and just the accuser, you very seldom get convictions, you very, very seldom get convictions.

Senator ERVIN. You can get no tangible proof outside of the word of the men?

Admiral HEARN. That is correct.

Senator ERVIN. Despite modern efforts to make it appear to be a very small affair, the greater majority of men still consider it a very loathsome offense, and they are very reluctant to convict a man, to find a man guilty beyond a reasonable doubt unless they have got some very convincing evidence?

Admiral HEARN. That is correct.

General BERG. Did you want to hear from the other people?

Mr. CREECH. I would like to go back to what the colonel said a moment ago.

Colonel, I believe you said that a man is also given the opportunity to confront his accuser when he is reasonably available. Now you have indicated that there are situations in which you may not be able to locate the accuser. You may not know his full name, something of that sort.

Someone I believe indicated that just a moment ago. Would you indicate please, or tell the subcommittee, the situations in which you have encountered difficulty in making the accuser reasonably available?

Colonel NEVILLE. I can recall one situation where he was not the accuser. He would have been another witness; in fact, he was a co-participant, but he was dead.

Mr. CREECH. I imagine everyone was relieved you did not call him. [Laughter.]

Colonel NEVILLE. I cannot think of another situation immediately, though, sir, where we had a board hearing and there was a demand for confrontation and it was not granted. I cannot think of one. But I would not want to mislead you and say that it has not happened.

Senator ERVIN. I want to ask one question.

General, I think I understand a little better now what your objections were to giving subpena power to boards of correction and review. You think that it is very rare that the subpena power is necessary because of the fact that they are rather free to admit affidavits that are procured by those who seek relief at their hands?

General MANSS. Yes, sir.

Senator ERVIN. And you feel it is a very rare case indeed that they would not be able to present an affidavit from any witness who had any knowledge and was willing to do anything to assist them?

General MANSS. Yes, sir; this is true, plus the fact that if the original board has the subpena authority, and remembering too, that this is not an adversary proceeding, you should have a complete record below, and it can be considered in appellate review.

Colonel NEVILLE. Mr. Creech, I would like to clarify your last question to me.

I believe that I misunderstood your question and took it more narrowly than you put it to me. I am informed that you asked me if I knew of circumstances in which we would not be able to produce an accuser and provide confrontation in an administrative board hearing, and I do know of situations. I can envisage situations of that type, although I cannot call one to mind, based on personal experience, right at this moment.

If, for example, the accuser were a civilian who refused to appear, then this is left up to the board to weigh his statement plus the testimony of the accused, or the respondent, rather. And I can envisage a situation where an accuser would be in Vietnam, for example, today, and the respondent in New York, where it might be very difficult to get them together. In those situations it has been my experience, and from my own personal knowledge, we do not discharge a man, if he denies the act, based only on the accusation.

Mr. CREECH. Thank you.

Mr. GOODE. James Goode, Office of the Secretary of the Air Force.

As far as the Air Force is concerned, homosexuality of course, is a very broad term. It can cover a multiplicity of types of situations and actions and people. Generally, the policy in the Air Force is if there have been overt acts committed with force and violence against an unwilling party or involving minors, and you have competent proof, he will be tried by court-martial. That is the policy in the Air Force.

Now if there is no force or no special considerations involving minor children, but there are commissions of overt acts, normally they will not be tried by court-martial, since in general the sentence will not be more than dismissal. In such cases they would be administratively separated.

I want to make quite clear that under administrative boards these records are reviewed very carefully, and unless the evidence is clear that the individual is a confirmed homosexual, he will not be dismissed under those regulations. We have to have positive proof that the individual is a confirmed homosexual.

Now, the Secretary has been concerned in certain cases, particularly involving youths in their formative years who are in their first enlistment in the service. They may have been seduced or intoxicated and have committed one isolated act. In a situation of that sort he has been concerned that there be some evidence that this individual is a confirmed homosexual by repetitive conduct, and that one lone isolated act will not forever brand him under that regulation.

This does not mean that where homosexual acts have occurred he may not be dismissed under some other regulation, but he does not feel that he should be branded as a confirmed homosexual unless there has been repetitive conduct to substantiate this fact.

Now as far as homosexual tendencies are concerned, where there is no evidence of any commission of an overt act, this is where you can get into a wide range of differences of opinion as to whether a specific type of conduct constitutes homosexual tendencies. The question of how a person walks, what sort of clothes he wears, whether he has

yellow socks, bizarre behavior and all sorts of abnormal conduct enter into this type of case.

We have never tried any individual for such conduct, but in certain cases where he appears unadaptable to military service, we have dismissed him under administrative regulations. But in those cases they would get honorable discharges.

Senator THURMOND. In those cases, what?

Mr. GOODE. They would get honorable discharges.

Senator THURMOND. Do they get honorable separation where you had the evidence on them?

Mr. GOODE. Well, now, if the evidence is clear that the person has committed a homosexual act, he would unquestionably get an undesirable discharge.

Senator THURMOND. He would be tried by court-martial, I guess. The colonel mentioned where you just have one man's word against another, you did not have enough proof, therefore you would be reluctant to take it before a court-martial.

Mr. GOODE. Unless you had repetitive instances, he denied the accusation and he had a board and he denied the commission of the acts, it would be up to the board to evaluate the nature of the evidence. Normally you would not probably board a person for one action in which he denied the commission of the act, but where you have allegations of repetitive instances of misconduct, you would have a board action, and the board would decide on the nature of the evidence presented whether to believe his denial or believe his accusers.

Senator THURMOND. Or if he had only one act, if you have enough witnesses you could prove it?

Mr. GOODE. That is right.

Senator THURMOND. But if there is only one against another, I can see the difficulty.

Thank you.

General HODSON. I have not had a great deal of experience with homosexual problems, but I can answer your question within its narrow limits.

In the first place, our requirements concerning trial is that we generally do not try a man by court-martial for this type of offense unless the offense has been committed against a minor, or unless force has been used. If it falls into the other categories, it may be for the proper consideration of an administrative board.

Now, with respect to the evidence, which is what you seem to be concerned with here, if we have a simple allegation that this man is a homosexual and that is all we have, of course we have no case, not even sufficient to warrant taking it up for a determination by the officer exercising general court-martial jurisdiction. This type of an allegation is, however, investigated thoroughly by the criminal investigation detachment at the local post.

If they find nothing to corroborate or to support this allegation that this man is a homosexual, then that is the end of the case and it will be dismissed. Normally in this type of case, however, the person against whom the allegation has been made will probably be transferred out of his unit, frequently away from that post, because the word of an allegation of that type spreads rather rapidly, and in order

to give him a fresh start we move him some place where they do not know him.

If, when the allegation is investigated, there is some corroborating evidence which tends to support the allegation, the respondent may be interrogated, and we will assume for the purposes of this discussion that he denies the allegations against him. This case is first considered by the commanding officer of the respondent, who is usually a company commander. We will say he knows the respondent quite well. He has known him for a year or so, and he thinks he is a damned good soldier. That is usually the end of that case, because he believes the respondent is opposed to the allegation, even though there is some corroboration, and he is willing to give the man another chance.

However, he could forward it to the officer exercising general court-martial jurisdiction who is usually a two-star general, and recommend administrative board action. There again the case is looked at. The staff judge advocate will look at it to see whether there is substantial evidence to support the allegation and even though the respondent denies being involved, they may decide to refer the case to an administrative board, and of course the board will consider it.

Among the things the board will consider, of course, is his denial, and we now get to the question of whether he has the right to confront his accusers or the witnesses against him. Those boards do not now have subpena power. If the witnesses are within the military service they will normally be made available in a case of the type you describe. They will normally be made available, because there will be a conflict in the evidence, and the board will want to hear what they have to say, and will not take their affidavits as being adequate.

If the witnesses are not in the military service, our procedure is that they will be invited by the recorder to appear. Sometimes they do, but more often than not they do not appear. So we do have cases where they do not appear, and where the board, after hearing everything, including the fact that this witness will not appear, considering the affidavits and the witnesses who do appear, have recommended discharges under other than honorable conditions, including an undesirable discharge in case of the type now under discussion.

This is about the best answer I can give you on the part of the Army. There are cases of the type that you envision, except for the first part of your allegation, or the allegation that was made to you, that once an allegation of homosexuality is made, a man is through with the service. That is not correct.

Mr. CREECH. General Berg, if I may, I would like to go back to the directive and to ask you, sir, with regard to the provisions under item V, policy A–7, where you are concerned with the administrative discharge under conditions other than honorable, there you say that where a man has been court-martialed and it has resulted in an acquittal, or action tantamount to that, that except when the disposition is based on a legal technicality not going to the merits, that the man will be administratively discharged, that no man, rather, will be administratively discharged under other than honorable conditions.

I wonder, sir, if you would expand upon this as to what you mean by legal technicality, if you could give us some specifics as to exactly what you have in mind.

General BERG. Going back to my statement, Mr. Creech, this is the case in which a man comes up for trial.

Senator ERVIN. I am sort of interested in that question because one time when I was a member of the North Carolina Legislature, I got a petition signed by 15 people asking me to pass a law repealing all the loopholes in the law.

General BERG. This is on S. 756 and the double jeopardy question. We are concerned about the fact that we have a case when there is no question that the offense has been committed, but it does not result in a trial because of dismissal or terminated due to lack of availability of witnesses or for some other reason, which does not have anything to do with the actual commission of the offense.

It may be one in which we have no need for him in the service, and the fact that he cannot be tried by court-martial does not have anything to do with anything over which we have any control.

Mr. CREECH. Well, now, where you have attempted to try a man by court-martial, and he has been acquitted, you say in this type of situation that he would not be administratively discharged under conditions other than honorable except where the acquittal is based on some legal technicality, and the availability of witnesses.

Is this what you mean by a legal technicality?

General BERG. It seems to me like there were some others.

General HODSON. Well, one example of that is the case where you have a completely voluntary confession and at the trial, you put the confession in, and the accused perhaps does not even object to its admissibility. After the termination of the trial, after he has been convicted, he objects because he considers there has not been sufficient evidence of the corpus delicit to corroborate the confession. On review of the case by the staff judge advocate, the conviction is reversed on the grounds that there was not adequate evidence to corroborate the confession.

This is what we would call a rule applicable to a criminal proceeding, but it should not be applicable to an administrative proceeding, and despite the dismissal of the charges, where jeopardy attaches in a case of this type we would say—and in the Army we would require this case to come to the Department of the Army for decision—that you should be able to administratively discharge that man and give him an undesirable discharge if the facts warrant it, despite the fact that the result of his court-martial was tantamount to an acquittal. The legal technicality here is that under the rules applicable to courts-martial, there is not adequate evidence to corroborate the voluntary confession.

Another example might be the running of the statute of limitations.

Mr. CREECH. General, in a situation in which a man denies his guilt, and has been acquitted, what type of legal technicality would be involved there?

General HODSON. You mean when there is a straight—the court acquitted him?

Mr. CREECH. The court acquitted him and the man denied——

General HODSON. And there was evidence pro and con in this case. That is the end of that case. There is no legal technicality that I can think of in that case because the court chose to disbelieve the prosecu-

tion's witness and to resolve the reasonable doubt in favor of the accused and that is the end of the case.

Mr. CREECH. In any situation in which a man denies his guilt, regardless of the technicality for his acquittal, will he be subject to board action which could result in anything other than honorable, or rather under conditions other than honorable?

General HODSON. He denies his guilt?

Mr. CREECH. Yes.

General HODSON. By pleading not guilty, you mean?

Mr. CREECH. Yes. I mean not only by pleading not guilty, you say here in one case which you gave us as a hypothetical case, where you have a confession, which the evidence will not support. You have no corpus delicti, or you have an inadmissible confession. I am not talking about the case where you have an inadmissible confession. I am talking about the situation where a man has denied his guilt. A man consistently denies his guilt.

General HODSON. By pleading not guilty?

Mr. CREECH. Yes.

General HODSON. He took the witness stand?

Mr. CREECH. Well, he took the witness stand or not. He denies his guilt at the time he comes before the board action. If he has been acquitted and denies his guilt, I am trying to envision the type of situation which you expect to cover by this legal technicality, so that we will have a better idea of the type of cases that the individual can expect that he will not receive a discharge under conditions other than honorable.

General HODSON. Well, I again am not quite certain that I understand the problem.

Mr. CREECH. The problem is that we do not know what legal technicality really means here.

General HODSON. I tried to explain what was meant there. We will say a case which is barred by the statute of limitations would prevent criminal prosecution. That would be an example of what we would call under the DOD directive a legal technicality and what we call in the Department of the Army directive a rule which is applicable only to criminal proceedings. It is the same thing in the case where the statute of limitations has run, and in the case where there is a completely voluntary confession, but there is not enough evidence of the corpus delicti to permit the confession to be used in evidence before a court-martial. Those cases are very rare, Mr. Chairman, and as I say, in the Department of the Army wo do not permit proceeding after a court-martial has resulted in action tantamount to acquittal except with approval by the Secretary of the Army. That is how rare they are.

Frequently the case arises not because we have not had the evidence to corroborate the confession. The cases that cause us the most trouble in this area, and probably the only type of cases that we will use this procedure for, are the cases involving child molestation, where the child is of such tender years that her parents or phychiatrist or doctor say it would be detrimental to her mental health if she appears as a witness. We have a case where there is a completely voluntary confession and all we need is one word of corroboration from a 7-year-old

girl, and we feel that we should take compassion on the witness, and so we choose the administrative discharge route.

Senator ERVIN. General, I wonder if you cannot——

General HODSON. They are very rare cases though.

Senator ERVIN. I wonder if we cannot remove the semantic difficulty by amending the bill so as to say that a discharge by administrative proceedings would be barred where the defendant has been acquitted upon the charge forms a basis for providing with a trial on the merits. That would be where the question of guilt or innocence is on the facts submitted and he has been actually acquitted.

General HODSON. That might be all right, Mr. Chairman, if—well, let me put it this way: A typical case, I say typical, I have only had this happen maybe four or five times in 25 years, but the typical case in that period of time has been the case where you have been ready to prosecute. The court has been assembled. You have started to go to trial in the case, and your minor witness, the child of tender years, 9, 10, 11 years old—you have been assured by the mother that the witness will be there, will be ready to testify—and you start the case, and jeopardy attaches, and all of a sudden the witness breaks down on the witness stand, gets scared, and the mother pulls her off or pulls him off.

So jeopardy has attached and yet, unless we have this peculiar exception, we could not do anything about this kind of a case.

That is the type of case that we are talking about here.

Now the other judge advocates general may disagree with me on this, but that is the only kind of a case in which we plan to use this exception.

Admiral HEARN. I would agree, but go a step further.

You take this child of tender years and put her on the stand, you have got to qualify her as a witness, and the court might not accept her as competent to testify because of her age, which would take away your corroboration.

(Off the record.)

Senator ERVIN. Gentlemen, I want to thank all of you for coming and participating in these hearings. I believe this concludes the hearing of the witnesses from the Department of Defense and the different branches of the departments of the armed services, and I want to thank you gentlemen for the assistance and for the very illuminating testimony you have given us. I think our objectives are the same. We just have some difficulty trying to find the road by which we can all get to the same destination. We may have difficulty finding the path that we can all travel to get what I am certain is the common objective of all of us.

(Whereupon, at 5:15 p.m., the committee adjourned, to reconvene at 10:30 a.m., Thursday, March 3, 1966.)

MILITARY JUSTICE

THURSDAY, MARCH 3, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND SPECIAL
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senator Ervin.

Senator ERVIN. The subcommittee will come to order. Counsel, call the first witness.

Mr. CREECH. The first witness this morning is Comdr. Penrose L. Albright, president of the Judge Advocates Association, Washington, D.C. Commander Albright.

STATEMENT OF COMDR. PENROSE LUCAS ALBRIGHT, U.S. NAVAL RESERVE (RETIRED), PRESIDENT, JUDGE ADVOCATES ASSOCIATION

Mr. ALBRIGHT. We appreciate the opportunity to come before you to give our views.

Senator ERVIN. We are delighted to have you—we appreciate your coming.

Mr. ALBRIGHT. I hope you will bear with me. I have a bit of a cold and am somewhat hoarse.

I am appearing on behalf of the Judge Advocates Association and the prepared statement represents the views adopted by the association. Any remarks which I may make beyond the prepared statement are, perforce, my own responsibility.

The Judge Advocates Association is the only association devoted primarily to the legal problems of the armed services and to the interests of the uniformed lawyer. It comprises over 1,500 dues-paying members and is thus larger than the bar associations of some 18 States. Its members comprise primarily active duty judge advocates and legal specialists, lawyer Reserve officers and retired military lawyers. The association is an affiliate of the American Bar Association and has a seat in its house of delegates.

The position taken by the association is as follows:

S. 749. This bill would expand article 37 concerning the unlawfully influencing of action of any court-martial or military boards. The association approves in principle the concept that military courts and boards should in no way be influenced insofar as their judicial

decisions are concerned by the convening authorities or by any other person except as may be proper in the presentation of the case before the court or board in much the same sense that a civilian jury or judge should not be influenced. However, it is doubted if further statutory authority is required. Also, it is to be noted that certain wording in S. 749 might be difficult to define. For example, it is forbidden to "lecture" any member, legal adviser, recorder, or counsel of the board with respect to the findings and recommendations made by the board. Also, no member of the Armed Forces is to be given a less favorable report because of the "zeal" with which he is represented and accused. One wonders whether the term "lecture" would include a written communication or whether a less favorable report might be given to defense counsel who exhibits a lack of zeal in the representation of his clients.

S. 750. This bill requires the opportunity for every member of the Armed Forces to have representation by qualified counsel or at least the opportunity for such representation before he is given a BCD by any court-martial or a less than honorable discharge by board. The association approves this proposed legislation. However, the association has serious reservations as to whether the services should have the power to issue involuntary undesirable discharges in any event. But if the undesirable discharge is to be continued as a method for the involuntary severance of members of the armed services, then most certainly such discharges should not be issued except in accordance with definite standards and with due process of law.

S. 751. This bill would merely extend the period of time in which an accused may petition for a new trial on the grounds of newly discovered evidence, or fraud in the court, from 1 year to 2 years. It has been found from experience that 1 year is frequently insufficient and the association approves this bill. However, it is to be noted that such provision is also contained in H.R. 277 and, in the judgment of the association, H.R. 277 is a technically more correct bill.

S. 759. This bill would eliminate the summary court-martial. The association opposes this bill on the grounds that there are instances where the summary court-martial may perform an invaluable function, as for example, where for a very minor offense an accused demands trial by court-martial. However, since the association also feels that the extended nonjudicial powers were granted by Congress on a tacit understanding that it was better to use such punishment rather than punishment through a summary court-martial which would be considered a Federal conviction, the summary court-martial should be restricted to only those cases where a court-martial is demanded by an accused for a minor offense. Perhaps one answer would be to declare that a summary court-martial is no longer a Federal court.

S. 758. This bill would give an individual faced with a board proceeding wherein he might receive an undesirable discharge, the right to demand a trial by court-martial provided, however, that he waive the statute of limitations and any immunities which he might otherwise have. The association opposes this bill. The bill is felt to be dangerous in that it might give convening authorities undue pressure to circumvent the legal rights of the accused. Also, if an accused is in fact given by the other bills real due process of law in administra-

tive proceedings, then no need is seen for this bill. It is further to be noted that the bill provides that a member may be discharged on the basis of a criminal offense in a State or Federal court of competent jurisdiction. On this, the bill should be more explicit that the conviction involved is not subject to appeal. I am sure you are aware of the Jackson case where certiorari was granted by the Supreme Court, which, however, was compromised by the Department of Justice.

S. 756. The purpose of this bill is to prevent double jeopardy as between military boards and military courts-martial. The association approves this bill providing it is clarified to indicate that it will not abridge the services' right to give a straight discharge. Consideration should also be given as to whether the bill should not properly consider a prohibition against dual punishment. Thus, for example, where an individual is court-martialed, but not given a bad conduct discharge, is it right to turn around and give the individual an undesirable discharge for exactly the same conduct? The association feels it is not.

S. 757. This bill provides for a pretrial conference. Much the same power is provided in H.R. 273. From the association's study of the bill, it was determined that numerous technical errors exist in the bill and that if the items cognizable at a pretrial conference are to be enumerated, they should be fully enumerated. For example, the power of the law officer to take up the admissibility of confessions should probably be set forth. The association approves the bill in principle but feels that H.R. 273 is preferable. I might say parenthetically, I had a certain amount of experience in various Federal courts and find it very questionable whether the pretrial conference serves a useful purpose. Too often have I been at pretrials where I felt that time and effort given to a pretrial was largely wasted. I am, however, assured by my active duty compatriots that a pretrial conference would be a good thing for the military court-martial.

S. 752. This bill sets forth the duties of law officers and permits the utilization of a one-man law officer in general and special courts-martial with the consent of all concerned. The same matter is covered in H.R. 273. The association approves the bill but considers that H.R. 273 is preferable. This is legislation that is long overdue.

S. 753. This bill would set up the Court of Military Appeals as having appellate jurisdiction over the issuance of undesirable discharge. The association opposes this bill on the grounds that this would be an improper mixing of the functions of an administrative board with those of courts-martial. However, the association feels that there should be some type of appellate review under the supervision of the Judge Advocates General on matters of law for administrative boards. Such review would be of an appellate nature and would determine whether the administrative board was conducted in accordance with administrative due process and whether its findings are supported by competent evidence.

S. 754. This bill requires a hearing for undesirable discharges or at least opportunity for same and a recommendation on the basis of testimony and evidence by the board before the separation. Section (b) of the bill requires the utilization of a law officer to instruct the board. Paragraph (c) requires that the member be notified of his

right to be represented by qualified counsel. The association approves the bill in principle but feels that the detailing of the law officer on such board should be permissive rather than mandatory. We feel strongly that individuals who are faced with the option of an undesirable discharge should have qualified counsel before making that option. There are too many instances, having not been given qualified counsel, the wrong option was made. Often this occurs with young boys who are less than 21 years of age.

S. 760. This bill would give subpena power to courts-martial, military commissions, courts of inquiry, investigating officers under article 32, military boards, correction boards and discharge review boards, and any other military courts or boards when authorized by the President, all such power to be subject to rules and regulations as the President may prescribe. The association opposes this suggested legislation as too broad. However, it is recognized that there are many instances where subpena power would be helpful in the procurement of reluctant witnesses both for the accused and the Government. In such instance, it is felt that it should be only given at the hearing level and probably should be subject to the control of a qualified law officer. The checks and balances in the court of claims is the type of discovery procedures that we should have in the administrative boards within the military.

S. 755. This bill would prohibit one member of a board of review from making reports on other members of the board of review. The association opposes this as unnecessary. Consultation with advisory members and members of boards of review indicates that the best procedure is probably for the reports to be made by the Judge Advocate General. But no matter how made, it is felt that there is no need for legislation in this area.

S. 761 and S. 762. These bills relate to criminal jurisdiction to try individuals who are civilians by the U.S. District Court for the commission of offenses punishable by the Uniform Code of Military Justice. S. 761 relates to individuals no longer subject to court-martial. S. 762 relates to individuals who accompany Armed Forces outside the country. The association approves in principle the concept that a happenstance in status should not change a person's liability for punishment for criminal offenses—at least, criminal offenses of a serious nature. However, it is considered questionable whether it would be constitutional to try any person not in the Armed Forces for offenses committed outside the venue of the United States, or to try persons no longer in the Armed Forces for offenses purely of a disciplinary nature. Mr. Wiener has testified on this matter and while I have not read his testimony, I consider him to be an expert in this area of law.

S. 746. This bill would establish a Judge Advocate General's Corps for the Navy. This action is sorely needed and has long been endorsed and advocated by this association. The association again strongly urges the passage of this bill. However, in a review of the bill it is noted that there is no requirement that the Judge Advocate General be appointed from the Judge Advocate General's Corps. It is submitted that provision to this effect should be included in the bill. Our association has questioned through letters, a number of young lawyers

in the Navy. An almost invariable response was that they desired to have professional recognition. They said in effect: "We are not trained to be line officers. We are not qualified to be line officers. We are lawyers. We trained to be lawyers. We want to be lawyers and we would like to be recognized as lawyers in the service." This bill has been submitted previously before the Congress and I undertand that it has been deferred because it is also included in the Bolte bill which has never been considered by the House.

My thinking is that it should not be further delayed under any circumstances, but should be passed forthwith. If it is subsequently amended by the Bolte bill, this is all right. But this bill is needed and it is needed now.

S. 747. This bill would unify the various boards for correction of military records and consolidate them under the Department of Defense. The association believes that this is unnecessary and would adversely affect the present effectiveness of such boards. Accordingly, the bill is opposed. I might say parenthetically on this that I have had the opportunity to appear before all the various correction boards. Each of them has their own personality. But each of them do, I believe, a rather effective job. A good deal depends on the executive secretary. The Navy has been especially fortunate to have the services of Mr. Charles E. Curley, and while I will not go into detail before this committee, I have had several experiences where he has done a magnificent job under very strained circumstances. I would suggest that the present constitution of the board not be changed for that reason, if for no other.

S. 745. This bill would change the name of law officer to "military judge" and establish a "field judiciary." Military judges could be civilians. The association approves the use of the title "military judge." However, it is considered that the "field judiciary" should be optional. It is also considered that the extensive use of civilians as "military judges" would be demoralizing to the uniformed lawyers. I might add on that, that we feel very strongly that military judges should be uniformed lawyers in all cases. We also suggest that some day a better system than the "field judiciary" may be devised. In such case legislation of this type could be harmful.

S. 748. This bill relates to boards of review. It would change the names of courts of military review, require a civilian on such courts, and provide for en banc hearings, there being one court of military review for each service, with panels as needed. Each such court of military review will have a civilian chief judge. The association recommends that the requirement that the chief judge be a civilian, and that each panel have at least one civilian be eliminated. The association, however, concurs that there should be one court of military review for each service, with panels as needed and with a provision whereby the court may be set en banc. Such reforms would improve the appellate posture of the present boards of review in accordance with procedures presently employed by U.S. circuit courts of appeal.

That is the end of my prepared statement. I will entertain any questions that you might have. Thank you.

Senator ERVIN. Mr. Creech, do you have any questions?

Mr. CREECH. Thank you, Mr. Chairman, I do.

Mr. Albright, on page 1 of your statement, with regard to S. 749, you made suggestions for various changes in that bill. I wonder, sir, do you feel that it is possible to legislate effectively against command influence?

Mr. ALBRIGHT. My answer to that would be no. We do have a provision in the Uniform Code of Military Justice that there shall be no command influence. The Court of Military Appeals has held in a number of decisions that almost any unprescribed communication with the courts-martial may vitiate the proceedings as a possibility of command influence.

I served on active duty in the Navy for a period of 7 years. During this period of time, I saw only two cases where I considered there may have been command influence and both of these cases were subsequently reversed on review.

I think a lot depends upon the quality of your officer corps in each service and the training that they have received as to what they should not do in regard to command influence.

Mr. CREECH. I wonder if you feel that it would make any difference if it were made a specific offense of the uniform code?

Mr. ALBRIGHT. I would have no objections to that providing that also you set forth sufficient parameters to define what the offense constituted. I would hate to see a commanding officer who has taken certain action in good faith punished for this. For example, a commanding officer may feel that his officers should be trained more thoroughly in court-martial procedures and in the course of the training they indicated what the average sentences are for various types of offenses. I can see how this might be carried out in the best of faith by a commanding officer and I would certainly recommend against his punishment for this type of action. I might say that although such action might be taken in good faith it would be dangerous in view of the various decisions of the Court of Military Appeals on the subject.

Mr. CREECH. Well, sir, in your longstanding connection with military justice and your long study of the subject, I wonder if you would care to comment upon the assertions made before the subcommittee that in many cases it is a staff judge advocate himself who exercises command influence.

Mr. ALBRIGHT. I think this is probably true. Your staff judge advocate is to some extent given the administrative duties of seeing that court-martials are processed.

I served on the U.S.S. *Coral Sea* before the effective date of the Uniform Code of Military Justice as well as afterward. Being the only lawyer on the ship I was assigned as legal officer. We had some 3,000 members of the crew, and a court-martial on the average of about once a day. I must say from my own experience in these duties that I influenced the processes of courts-martial in a very real sense. I think I was rather liberal in the way I did it, but, nevertheless, influence existed. You will appreciate that I had a certain professional advantage over the individuals who were actually conducting the courts-martial.

I hasten to add that I am not sure that I was right in doing this—but I will state that I did do it and I can see how any individual in the same position would have a very difficult time not influencing the conduct of courts-martial.

To give you an example, we had a case where a touchy constitutional problem was involved. In that particular case I saw to it that counsel was assigned for the individual who was briefed on the constitutional problem and brought same up before the court-martial. We had many instances of young officers who we were attempting to train as trial counsel at that time and we were most careful that an inexperienced officer was assigned as trial counsel only where we knew there would be a guilty plea.

Senator ERVIN. Some of the difficulties that arise in connection with bills like S. 749 and S. 755, arise out of the fact that you cannot take everybody who has anything to do with administration of military justice and wrap them up in cellophane. I do not know if I made myself clear or not. In other words, this is a field in which legislation is extremely difficult because you are attempting to regulate a number of conditions which sometimes manifest themselves in overt acts. As in the case of the United Mine Workers, Judge Goldsboro said it is sometimes a wink and a nod.

Mr. ALBRIGHT. From my own experience, I attempted to educate officers on courts-martial that it was important that justice should be from their heart, but that they should not convict a person where there is insufficient evidence. I also tried to educate them that it was very important that they give the appearance of justice. They should not do something which might be interpreted by the accused or his counsel to indicate that he was in effect getting a "kangaroo court" or anything of that type. In other words, they should avoid the appearance of evil. Where anything of this type came up, we went to considerable extent to assure the individual that this was not the case. It is largely a question of administration and of training your officers in the correct procedures. I think you have in the Armed Forces the problem that a good many officers are trained to make quick decisions—to make hard decisions—and they find difficulty in changing from this type of thinking to more judicious thinking. I do not believe we can get away from this, but have to live with it and it is up to the various services to educate their officers as to what justice requires the best they can.

Senator ERVIN. I think that in the administration of any law if it is possible to have trained men—they have an advantage over the ordinary man—they can separate more easily the notion that they may believe the man may be guilty, but still the evidence must be sufficient to find him guilty beyond a reasonable doubt.

Mr. ALBRIGHT. I think it is true. I think your trained lawyer soon perceives that we really do not determine facts when we determine a past event. Instead we determine probably what happened, not having a television which lets us see into the past. And we also learn that we have to depend upon the evidence, no matter what our hunches may be.

Training for this is not given, and I do not believe it can be given to the line officer unless we can take 2 or 3 years of his time for law school and perhaps another 2 or 3 years to work on courts-martial and act as judge after he has graduated from law school.

Senator ERVIN. Do you think rulings which the Court of Military Appeals has made in the command influence cases lay down sufficient principles to do without additional legislation?

Mr. ALBRIGHT. I would say this: the court has perhaps gone further than is necessary in this direction. I think it is if there is any showing of command influence whatsoever, the odds are that that case will be thrown out by the Court of Military Appeals.

Senator ERVIN. It is your opinion, then, that owing to the difficulties of legislating in this particular area, and owing to the rulings which have been made by the Court of Military Appeals in the command influence cases that S. 749 is not a necessary piece of legislation?

Mr. ALBRIGHT. No, sir; we do not believe 749 is necessary.

Senator ERVIN. In the same connection, your statement on page 4 refers to S. 755. I just wonder whether or not that also deals in a field where it is very difficult to legislate because what you are attempting to regulate is reactions of an individual's mind to another individual.

Mr. ALBRIGHT. The Air Force is the only one now that violates this proposed legislation. I believe the Air Force is making a mistake in what they are doing. I think it is an administrative mistake, though, and would leave it to the Air Force to change it if they saw fit. There may be reasons for having these reports made up by the senior member of the board of review. I do not believe, though, that the bill is necessary as legislation. If you are to legislate in this area your legislation, in my opinion, should be a great deal more comprehensive than S. 755. I believe if you are to legislate in this area that you should give the board of review members the immunity of judges. They should thus be appointed for a number of years by the President or Secretary concerned and only removable at the pleasure of the President or Secretary concerned. In such event, there should be no reports whatsoever on these individuals, just as there are no reports on our district court judges or the judges of the circuit courts of appeal.

Senator ERVIN. I have some misgiving on S. 755 because I was privileged to serve on an appellate court and those who sat with me in the conference room were more competent than anybody else to judge my efficiency as a member of the judiciary. I was never conscious of any suggestion that anybody who might be a senior tried to sway me in the opinion. My primary reation to S. 755 is that this is one of the areas where we got to put faith in intellectual integrity.

Mr. ALBRIGHT. I think this is correct. It just does not happen. Take an individual in the Judge Advocate's office, whether he is on a board of review, an appellate Government counsel, appellate defense counsel, or otherwise, my experience has been that the fellow who is tough, that has principles and lives up to them, he is the man who gets the better fitness reports, he is the man who is promoted and often he is the man who attains flag rank or ultimately becomes the Judge Advocate General.

Senator ERVIN. I always admire a man that stands up and gives the reason for what he did, for the faith that is in him even though his conclusions are different from mine. For that reason I think that when you get into regulating the intellectual processes, you are in an exceedingly difficult field to legislate.

Mr. ALBRIGHT. I think so. We have wishy-washy people in every round of life. They are going to be wishy-washy whether their fitness reports are made out by senior members of the board or anybody else. That is not going to change them.

Senator ERVIN. Thank you.

Mr. CREECH. Mr. Albright, I notice your statement, in your statement your association has serious reservations as whether the military services should have the authority to issue involuntary undesirable discharges at all. I wonder if you could expand on that statement at the bottom of page 1.

Mr. ALBRIGHT. Sir, in my opinion, and this is my personal opinion, the undesirable discharge is a scarlet letter of this generation. A man is branded. It goes with him through the rest of his life and there is nothing he can do to get rid of it except through administrative boards and costly court actions. The statutory authority for the secretaries to issue an undesirable discharge is very shaky in my judgment. Certainly, an undesirable discharge is not noted as such in the statutory authority. In my experience undesirable discharges are frequently given where they cannot obtain a conviction by court-martial because there is a lack of proof.

I have an interesting experience in a Court of Claims case concerning a plaintiff who had been put out with an undesirable discharge. The case was first taken before a board of review which approved the undesirable discharge. I then stepped in the case and we applied to the correction board. The man had been accused of homosexual activities and we asked who made the accusations. In effect the plaintiff said: "I would like to see my accusers." We asked the correction board to give us the names and they would not do so. Nevertheless, the undesirable discharge was upheld and we next petitioned the Court of Claims. At the Court of Claims we had resort to a motion for call and through a court order again asked the service concerned: "Who are these individuals who accuse this man of homosexuality." They gave us two names as witnesses. We called these witnesses and, under oath, they testified that they never had seen the man in their lives.

We recently received a Commissioner's report on the case which will, we hope, and if it is adopted by the court, upset the undesirable discharge. But this is merely an example of what happens only too often—that undesirable discharges are given on the basis of anonymous charges. Or, they are given by individuals who the services refuse to identify and therefore are not subject to cross examination.

Also undesirable discharges are given for various types of conduct and there is really no standard of what conduct is involved. For example, an undesirable discharge might be given to an individual who is an alcoholic although insofar as his performance of duty is concerned, he has a much better than average record. While still another individual who may also have alcoholism to some degree will be treated, will be cured and will eventually be retired or restored to duty. Undesirable discharges are given just for being dirty. What is dirty to one individual may not be dirty to another. Again, there are no definite standards. Nevertheless, whoever gets the dishonorable type discharge is effectively barred from employment as if he were convicted of a felony. Over and above that he is denied an opportunity to work in many places because they assume he is a sexual deviate of one type or another which may not be true.

Mr. CREECH. In the case which you have described, when was that undesirable discharge given? Was it a recent act? The case of the

man you described of being a homosexual without the opportunity to identify his accusers and when they were identified they denied ever having seen the man?

Mr. ALBRIGHT. I have a copy of the Commissioner's report. It is case No. 226–62. I will give you a copy of it.[1]

Mr. CREECH. Is that a recent case?

Mr. ALBRIGHT. It is a report of the Commissioner—as filed by the Commissioner on January 20, 1966.

Mr. CREECH. When was the undesirable discharge given in that case?

Mr. ALBRIGHT. The discharge was given in 1958, and I might say that the individual has suffered financially to a considerable extent because of the undesirable discharge.

Senator ERVIN. The Court of Claims has not acted on that, is that right?

Mr. ALBRIGHT. Yes, they have not acted in the case. You will note I have been careful not to give the individual's name.

Senator ERVIN. Have you studied the Department of Defense statement of December 20, 1965, dealing with undesirable discharges and whether or not it gives adequate protection to persons who have such discharges?

Mr. ALBRIGHT. I have not studied it in any detail. If this committee does nothing else, the very fact that the Department of Defense has brought out this directive is a considerable achievement. However, I do not believe that it goes far enough, and is deficient in that it does not prescribe the elements necessary to prove what is required for an undesirable discharge. For a crime we have definite elements and know what these are.

Senator ERVIN. Yes. Your position is that you have full protection in the issuance of an undesirable discharge, that there should be a basis established by competent evidence?

Mr. ALBRIGHT. I definitely think so. There are too many cases when an attorney starts digging to ascertain what competent evidence exists, it seems to have evaporated.

Senator ERVIN. You and your association, as I construe your statement, take the position that there should be some agency acting as an appellate body to which an individual can appeal and have the matter reviewed on questions of law and on the question as to the sufficiency of the evidence to justify the decision resulting in the undesirable discharge?

Mr. ALBRIGHT. We think there should be appellate procedures. The procedure at the present time is this—after a man has received an undesirable discharge, the first thing he can do is apply to a board of review. I do not know what the percentage of changes which are made by the boards of review, but suspect they are very small. I have heard unofficially they may be as small as 2 or 3 percent. If he loses there he can then take the case to a correction board. It used to be that the correction board did not often overturn the board of review, but I understand, recently they have come to realize that the boards of review are not doing effective jobs and the correction boards

[1] The report of the case, *Neal* v. *U.S.* (Ct. Cl. No. 226–62, Jan. 20, 1966), appears at page 811.

are more frequently taking corrective actions. If he loses at the correction board, he has two alternatives. If he has a money claim, he can go to the U.S. Court of Claims. In either case he can go to the U.S. District Court for the District of Columbia and ask for a declaratory judgment. The law that has been written on the subject largely comes from the U.S. Court of Claims, the U.S. District Court for the District of Columbia, and our Court of Appeals for the District of Columbia circuit.

Senator ERVIN. In your comments on page 3 with reference to S. 753, you state your position and that of your association as being opposed to conferring upon the U.S. Court of Military Appeals jurisdiction to review matters of issuance of undesirable discharges. But you do make the recommendation that there should be some process by which the action of administrative boards can be reviewed. To what extent would you have those reviewed—from the original board or the board of correction or what?

Mr. ALBRIGHT. If I were in position to do so I would set up in each office of the judge advocate general a special board to consider each one of these cases automatically before the individual is discharged from the service. And I would make it as much like an appellate board of review as possible. I would have counsel assigned for each individual. I would have a definite standards and instructions to govern the board, and I would hope by this means to eliminate most of those cases where there is obviously an injustice.

Let me say this. The cases that I have seen have been "horrible examples." I do not think we, as attorneys, see run-of-the-mill cases. But I have yet to see a case where a man was discharged as a homosexual where I felt he was a homosexual. I have yet to see a case where a man was discharged for reasons of alcoholism where I felt he was not carrying out his duties because of alcoholism and the real answer would have been treatment in a hospital.

Senator ERVIN. Yes. The thought is well expressed throughout your entire statement that the committee in considering legislation should be actuated by the thought that it would be highly desirable to upgrade military law and not to bring into the administration of these military matters any great number of civilian board members.

Mr. ALBRIGHT. Definitely. I very definitely believe that. The services are having a tough time keeping competent military lawyers. There is no trouble getting military lawyers for 3 years. Most lawyers are patriotic by nature and desire to serve in time of need. They often participate in civic affairs and in government, as you know. But the future of a lawyer in the armed services at the present time quite frequently does not compare favorably with his possible future outside the military. Largely for this reason they are having a difficult time to attract capable young men to stay in the armed services. I frankly believe that the extensive use of civilian lawyers in military matters would be another blow. You would be saying in effect: "We cannot trust you so we are going to turn over your duties to civilians." Well, quite frankly, I can trust them just as well as I can trust the civilians, and I feel in war, in cases where we have to send people into areas where it may be highly dangerous, the individual should be in uniform. I would hope that we would maintain the administration

of military justice by the uniformed lawyers insofar as possible. This is not to say that I do not believe that there is a place for civilians. It may be a good idea to have one civilian on each board of review. I think this is the case where it gives the individual whose case is being considered the appearance of fairness which I believe to be so important.

Senator ERVIN. Would you leave that in the services where they do not now permit civilian board members——

Mr. ALBRIGHT. I think that should be left as it is.

Senator ERVIN. Do you make it discretionary or mandatory?

Mr. ALBRIGHT. I think that should be discretionary.

Mr. CREECH. Mr. Albright, if I may, I would like to move on to S. 759 with which you state you feel the summary court-martial should not be abolished and you opine among other things that perhaps in order to overcome a stigma a man faces if he is tried by a Federal court and convicted, that this court should no longer be designated as a Federal court. I wonder what your objection would be to having this man tried by a special court-martial? I would like to secure your views on that, sir.

Mr. ALBRIGHT. Usually, where a summary court-martial is utilized, you have a very minor offense. You have something—the individual says, "I am not guilty of this" and "this" is something you ordinarily put a man on report for and give him a reprimand or a few days restriction. But he says, "I am not guilty, by golly. I want a summary court-martial." Well, are you going to go through the procedures of a special court-martial for a very minor offense? For example, not getting up at the right time of the morning or reporting a few minutes late for work where the individual says it is unavoidable, that he was held up at the gate? I think the real answer here is to provide that a summary court-martial is not a Federal court.

Another thing that the summary court-martial does, is to give an opportunity for an officer to look more thoroughly into the situation than would otherwise ensue. The commanding officer at "captain's mast" certainly cannot make a detailed investigation of exactly what the circumstances of each minor offense before him.

Mr. CREECH. I just wonder, sir, if you are concerned as some of the witnesses in the past because of the fear that a special court-martial can impose a heavier sentence, that this is the reason for not having these cases tried by special court-martial rather than by summary? I wonder also, with regard to the testimony the subcommittee has received that this would unduly tie up a large number of men and a special court-martial must have at least three members of the court, if you feel if the code were amended to provide for special courts being a one-man court as a summary now is, but with all of the safeguards that are presently included in the special court, if this would change your feeling about S. 759?

Mr. ALBRIGHT. I think your problem is whether an individual charged with a very minor offense is to be given an option to make a "Federal case" out of it, if he wants to. If these bills are passed, he can have an appointed lawyer and there would have to be a lawyer on the other side. He could request enlisted men so there would be at least five members on the court. There would be a reporter who would have

to take and transcribe the proceedings, and the various appeals. I sympathize with the fellow who has been charged with a very minor offense and feels that he did not do it or feels he should not be blamed for it. He should have some avenue of appeal. But, in my judgment the special court-martial is not the appropriate avenue.

Mr. CREECH. I notice also on page 2, sir, that you state that giving an election of a court-martial to members who are considered for an undesirable discharge might lead to circumvention of their legal rights. I wonder if you would expend on that statement?

Mr. ALBRIGHT. Suppose we have a case where, for one reason or another, a conviction cannot be obtained and this may be very good constitutional reasons. Thus, perhaps the only evidence was obtained through an improper search and seizure, through a confession that was extorted, or the statute of limitations may have run. But you do not like this guy, you want to punish him one way or another. So you say, well, we will not take the court-martial route. We will take the route of the undesirable discharge. With this proposed provision. the man would have to waive the various constitutional immunities if he demanded a court-martial. If the possibility exists that this can be done, it will be done.

Mr. CREECH. Thank you.

Mr. EVERETT. Mr. Albright, with respect to S. 749 and your comment that this was unnecessary in your opinion, the subcommittee has noted article 37 has no provision dealing with unlawful influence on military boards; that is, on administrative proceedings in the military. Do you feel it would be desirable to include a prohibition of unlawful influence on the boards of this type?

Mr. ALBRIGHT. I very strongly feel that if we are to use administrative boards for punitive purposes as they are presently being used, we should go as far as possible to give the same constitutional protection to the members going before such boards that we would give to them if they were going before courts-martial. I do not see any alternative. I think this is the nature of the beast.

Mr. EVERETT. You referred to the influence exercised by staff judge advocates on the military justice process. Do you think it would be desirable to amend article 37 to make it clear that a staff judge advocate also was subject to the prohibition against unlawful influence on a court? The present wording deals with commanding officers and convening authorities but does not specifically include staff judge advocates. Would that possibly be a desirable addition?

Mr. ALBRIGHT. If you were to include the staff judge advocates, why do you not state any other persons in the line of command, because it can also be the Chief of Staff.

Mr. EVERETT. You mean the staff as well?

Mr. ALBRIGHT. Yes.

Mr. EVERETT. In the *Danzine* case, the Court of Military Appeals as I recall was divided two to one with Judge Ferguson dissenting concerning the permissibility under the existing law of pretrial lectures in any form where a commanding officer or staff judge advocate gives pretrial instruction in a sort of lecture form to prospective members of the courts-martial. Do you think it would be appropriate for the subcommittee to consider legislation which would overrule that case

and adopt the dissent of Judge Ferguson or do you think the existing law is preferable—the existing interpretation?

Mr. ALBRIGHT. I do not remember the case exactly. My impression is that under the circumstances of that case, this type of procedure was approved.

The thing that always comes to my mind is that there are times when it is desirable to take all the officers of a command and lecture them on military law. I would be inclined to leave the decisions to the court, although I must say that in that particular case according to my recollection, I am inclined to agree with Judge Ferguson.

Mr. EVERETT. There is a case from the court of claims, *Cole* v. *United States* which involved pretrial instructions to administrative boards in the Air Force where the court intimates that this might raise a due process problem. I wondered if you had any observations concerning due process problems that might exist where pretrial instruction are given to board members in the military?

Mr. ALBRIGHT. What it boils down to is first of all, are pretrial instructions given for a particular trial or whether they are given generally—to instruct the individuals so they will be cognizant of correct procedures—so they will know something about what it is all about, in effect? I do not think there is any question that it is wrong to do it in a particular case and I think that in the Cole case this was the situation.

Incidentally, Cole won his case, as I recall.

Mr. EVERETT. There was some question whether he won it on that ground or some other ground, but he did win the case.

Mr. ALBRIGHT. I would reiterate what I said before, there are some standards that apply to courts-martial that will eventually have to apply to administrative boards because of the same problems that have arisen before the courts-martial will also rise before the administrative boards and will require the same standards.

Mr. EVERETT. Some of the witnesses who testified earlier before the subcommittee indicated that in the event of an article 15 that was declined and a request was made for trial by court-martial, that if the case were referred to a special court rather than to a summary court, the court might have a tendency to mete a heavier punishment for the same offense on the same evidence, and this I assume is independent of different jurisdictional limitations on the punishment that can be adjudged. Would that be in accord with your observation; namely, that for the same offense a special court-martial would tend to impose a heavier punishment than a summary court-martial on the same evidence?

Mr. ALBRIGHT. We both know it could do so if it desired. My feeling though, would be, that punishments would run about the same in each case. The only thing that might influence higher punishments would be that the special court-martial members would be angered by having their time taken up by very minor, trivial offenses. They might react against that.

Mr. EVERETT. You do not feel that members of the special court would infer that this was a more serious crime before it because it had been referred to a special court-martial?

Mr. ALBRIGHT. These men are not unintelligent. They know if the offense were minor, for example—if the offense were that the man

got up late in the morning because, according to him, did not hear the bugle, they would know that was not a serious offense.

Mr. EVERETT. With respect to S. 750, you speak of involuntary discharges—was the terminology involuntary designed to exclude an undesirable discharge in lieu of court-martial or that type of thing?

Mr. ALBRIGHT. This was the attitude taken by the association, that if a person after being fully advised of his rights volunteered for an undesirable discharge, why not let him have it without going through a court-martial proceeding?

Mr. EVERETT. What about the involuntary undesirable discharge which was given on the basis of a civil court conviction for a serious offense, let us say a felony in a State or Federal civil court? Would it be in your opinion that the involuntary undesirable discharge should be abolished?

Mr. ALBRIGHT. This may be the one exception to my feelings of the matter. You have a problem where you cannot obtain the person to try him. He is either in a State or Federal penitentiary somewhere. If you are to give these people involuntary undesirable discharges under such circumstances, certainly you should leave ample room for him to appeal that discharge eventually. One reason is that his conviction may be set aside. Another is that there may be new evidence come to light which will show that in fact that he was innocent of the entire matter.

Mr. EVERETT. By appeal would you include the administrative remedy through the discharge review board and correction board? Would that take care of the type of situation that you are contemplating?

Mr. ALBRIGHT. The difficulty there is that you have a certain number of years in which the man can apply to such boards, after which there is no longer jurisdiction. There are so many things that can happen. You realize a person may be in the penitentiary for 10 years and new evidence will come to light whereby he may be retried and found not guilty. This has happened and it certainly can happen to a man in the military. It would be unfair for him, after being retried and acquitted, to have an undesirable discharge hanging over his head.

Mr. EVERETT. With respect to S. 751 dealing with the petition for new trial, you comment that this extends the period of time. My recollection is that it would have the effect of broadening the category of cases which are currently subject to petition for a new trial under article 73. Did the association also favor this broadening of the type of case that was subject to the petition for new trial?

Mr. ALBRIGHT. Yes.

Mr. EVERETT. With respect to S. 759 which proposes the elimination of the summary court martial and where the judge advocate's association takes the position that this should be limited to those cases where court-martial demanded by an accused for a minor offense, would the desirability for eliminating the summary court-martial be changed in the mind of the association if the one man special court-martial were authorized?

Mr. ALBRIGHT. Well, even if the one man court-martial were authorized, still the accused has to request it and it has to be also approved by the commanding officer. I believe that if you eliminated

this provision for the summary court-martial and permitted an individual to request a special court-martial, you are putting into the hands of an individual the weapon that he can force a Federal trial, a relatively expensive Federal trial on the most trivial offense. I do not think this is good. You have all types of people in the military. You have some who are stubborn as all get out, and so for the most trivial offense sometimes you are going to find it will require the commanding officer to have five members of the court-martial, counsel on each side, and all the various reviews through which the court-martial can go. I do not think this is necessary or desirable.

Mr. EVERETT. As the law now exists and even as it would exist in your proposal, it does name—the commanding officer has the authority to put a man in correctional custody or in confinement for a period of 30 days under procedures where he will not have counsel, where there will be no special court-martial and no trial in the normal sense.

Mr. ALBRIGHT. You are speaking of the Captain's Mast or that sort of thing. It is my understanding that they can demand a summary court-martial.

Mr. EVERETT. Then the summary court in turn, if they make that demand, they will not have counsel?

Mr. ALBRIGHT. This is true.

Mr. EVERETT. And they will not have the prosecuting attorney and—the prosecuting attorney and judge will all be the same person.

Mr. ALBRIGHT. The summary court-martial is not a court in a true sense and what I would like to see done is really describe it as not a Federal court. If a summary court were not considered a "Federal court" even though a person may be wronged by summary court, he is not going to be given a bad conduct discharge for that reason and, when he eventually returns to civilian life, this record should not hurt him unduly.

Mr. EVERETT. With respect to S. 758 and the waiver you referred to there, the waiver of immunities, would it be possible to obviate the objections raised by the association if the waiver were more limited, namely, to the statute of limitations and to double jeopardy and not to include such things as search and seizure and evidentiary matters of type you referred to?

Mr. ALBRIGHT. I think it would be more palatable, but still not entirely palatable. It seems to me these are rights that have been given to him. There are reasons for these rights and we should not put an individual in the position where his options are to waive these rights or take an undesirable discharge.

Mr. EVERETT. With respect to S. 753, you recommend that there be some type of appellate review under the supervision of the judge advocates general on matters of law or administrative boards. Now, is it not true that during the period from 1949 to 1951 a similar system was tried with courts-martial under the judicial council and that this in turn was discarded in order to establish the Court of Military Appeals and might that not be an indication that the proposal of putting the supervision under the judge advocates general this proposal might have some flaws in it?

Mr. ALBRIGHT. I do not think that you can now say the proposal has flaws in it. For example, we have had for a number of years

discharge review boards which are created legislatively, yet in my view the discharge review boards are not doing their job—they are doing a very poor job. My feeling would be to first try it out administratively under the judge advocates general and if it did not work, then legislate and create an appelate body.

Mr. EVERETT. Let me ask you this, carrying forward the concept of the importance of avoiding any appearance of unfairness, how do you think a respondent would react in the questions of law that you presented if his case were being determined under the supervision of the judge advocate general who in one sense is the chief legal advisor for his adversaries?

Mr. ALBRIGHT. You have that in your boards of review at the present time because they are under the administrative cognizance of the judge advocates general. Even the civilian members of the Navy are under the judge advocates general.

Mr. EVERETT. You envisage then a separate board of review because the judge advocates have a loose administrative supervision?

Mr. ALBRIGHT. If I were setting it up and I were a judge advocate general, I would place it with the board of review procedures. In effect, we would have one board of review for this purpose. I would have an appellate defense counsel and an appellate government counsel assigned to cases.

Mr. EVERETT. Would this be at DOD level or at the level of each military department?

Mr. ALBRIGHT. If I were doing it, I would think the DOD would prescribe certain standards and permit the services to take over from there. Each service has problems peculiar to their own.

Mr. EVERETT. With respect to S. 760 and S. 754, in your comment on S. 760, you indicate that the subpoena power would probably be subject to control of the qualified law officer. Would this create problems if the law officer were not assigned as you envisage in S. 754?

Mr. ALBRIGHT. I think this is correct. I think if a law officer were not assigned I would not want to leave any power in the hands of the senior member of the board. Chances are they would have no idea at all how to use that power. I personally would favor a type of power that is presently given to the Court of Claims, whereby they can call on the Government for certain information. If the Government does not want to give the information, it does not have to. But it hurts the Government's case because certain adverse conclusions therefore may be reached. In fact the Court of Claims can conclude that the evidence will be considered as alleged by the petitioner in suitable situations.

You always have a problem when you start subpenaing Government records. However, there is a need for some power of this type. Let me give you an example. I represented a high ranking officer in one of the services who had been selected for discharge as unsatisfactory and the basis for the unsatisfactory report was that he was not doing his job, but was doing only about 50 percent of what his predecessor had done. Well, we wanted to see the records. The individual had informed me that this was not the case, "I did just as much work. We had a certain amount of work coming in," he said,

"and I took care of it." The correction board, of course, could not get the necessary records for us, and could not get permission for us to dig through the files to see what the information was. So finally, through some congressional help, we were able to see one of the Assistant Secretaries who had cognizance over the matter. After telling the story to the Assistant Secretary, he turned around to his aide and said, "Well, cannot we get this information for Mr. Albright?" They did get the information; it proved exactly what my client had alleged—that he was doing the same amount of work that had been done before—and the case was successfully concluded.

Had we had subpena power, we would not have had to ask a Congressman to ask the Secretary to talk to us to hear our story out. We could have simply subpenaed these records.

Mr. EVERETT. In light of the relationship between your observations as concerning having control of the qualified law officer and your observations as to having a permissive law officer, detailing him on a permissive basis, does this not mean that the subpena power would also be permissive and it would depend upon whether the convening power had convened the board to detail a law officer to sit on the board?

Mr. ALBRIGHT. I think this would be a matter of mechanics. If they did not have a law officer on the board, then there should be recourse to the commanding officer, to the staff judge advocate, or to some other proper authority in order to have the subpenas issued.

Mr. EVERETT. In your statement concerning S. 747, you indicate that the unification is unnecessary. I believe it was yesterday that a witness from the Department of Defense indicated that there were some responsibilities for uniformity operations of the boards, the correction boards.

Do you have any suggestions for promoting the uniformity short of enactment of S. 747?

Mr. ALBRIGHT. I think it could be done administratively through the Department of Defense. I do not know what they do today. I imagine the first thing to do be done would be to set up conferences among the various board members, chairmen of the boards and executive secretaries to work out uniform rules and procedures. Perhaps this is being done.

I would say that if anything were to be done to the correction boards, it should make them more indpendent of the services in which they are located. But I might add that, in my opinion, the legislative provision requiring that these boards be civilians has worked out very well. There is considerable contrast between the correction boards and the discharge review boards which are military officers.

One reason for this may be that you get top notch civilians on the correction boards and I am rather fearful that of late many of the officers of the review boards have been of the types who have been passed over for promotion.

Mr. EVERETT. May I ask you if you think—the term board of review in this context, are you referring to the discharge review boards under, I guess—or to the boards of review in article 66 or both of them?

Mr. ALBRIGHT. I was thinking of the discharge review boards. I think the boards of review for courts-martial are doing an exceptionally fine job by and large.

Mr. EVERETT. With respect to S. 745, the association comments that it is considered that the field judiciary should be optional. What was the basis for recommending that this option exist rather than having uniformity as to field judiciary?

Mr. ALBRIGHT. At the present time the Army and Navy do have field judiciaries and they are quite pleased with them. The Air Force believes that the circumstances of their organization are such that they do not need them—they work just as well without it. If they say it works and is working, I would be inclined to let it alone. Certainly, I have not seen the statistics but there must be statistics available to indicate whether it is working or not on the basis of how many cases go to Court of Military Appeals, the number of convictions and the like.

Mr. EVERETT. Do you think there would be any possibility of consolidating an entire service field judiciary? Would this be desirable?

Mr. ALBRIGHT. I think this could be done administratively. It might be desirable in certain areas. However, as a general proposition I would be against it.

Mr. EVERETT. On S. 748 dealing with boards of review, I believe you testified that you thought that it was desirable to have a civilian on the board of reviews, although it should not be in your opinion mandatory.

A few days ago the subcommittee heard testimony from a former, a retired civilian member of the Navy Board of Review to the general effect there had been a policy in the Navy that a civilian not be a chairman of a Navy Board of Review, no matter how long his experience may be. In your opinion is this desirable or undesirable?

Mr. ALBRIGHT. It is an undesirable policy in my opinion.

Mr. EVERETT. You would then treat the civilian just like the other members?

Mr. ALBRIGHT. Yes, sir; to me they are a court of appeals of a type and each individual member should be so treated.

Mr. EVERETT. With respect to the efficiency reports under S. 755 and the analogy to the court of appeals, is there not something inconsistent about the making of an efficiency report by the chairman on the junior members and analogy to the court of appeals?

Mr. ALBRIGHT. I think there is something inconsistent about anybody making a fitness report on members on boards of review, because in effect they are in judicial positions. However, the fact of the matter is, although they may be in judicial positions, they are in a career status. Either they are civil service or military. And if they do not have reports in their records there is a gap. The inconsistency, I think, is in the status rather than in the present procedure.

As I say, if I could make rules on this, I would rule that there be no reports submitted on these individuals, but there would be indicated in the record they were so serving in a judicial capacity for this period of time and that their performance should be considered of the highest.

Mr. EVERETT. Do you know if there is any precedent with respect to military boards of any type, of joint boards for not having effect of this report during the period that the officer is assigned to a particular board activity?

Mr. ALBRIGHT. I believe that this has been done, but I cannot put my finger on exactly when it occurred. But I believe there have been instances where the Secretary of the Navy for one reason or another did not desire that there be fitness reports of certain individuals who were in certain types of duties.

Mr. EVERETT. Thank you, Mr. Chairman.

Senator ERVIN. I know this is a request that might put a lot of work on you, but you have had an opportunity to review these problems from two different angles, both as a military lawyer and as a civilian lawyer. I would appreciate very much if you would study the DOD directive in December and give me a short summary as to what additions or changes should be made to insure due process and a fair hearing for those persons involved in proceedings that look toward an undesirable discharge.

Mr. ALBRIGHT. I would be very pleased to do so, Senator. I want you to realize that the recommendations would be my own on this matter.

Senator ERVIN. I prefer they be your own because you have had a view from both the military and also from the civilian angle on these problems.

Mr. ALBRIGHT. Yes, sir.

Senator ERVIN. Looking at it from the other fellow's experience and from both sides, I think that makes your testimony extremely valuable to the subcommittee.

Mr. ALBRIGHT. Thank you.

Senator ERVIN. You can make that in the form of a letter to me, entirely informal.[1]

Mr. CREECH. Mr. Albright, as a final question, with regard to S. 745 and S. 748, you indicate that you feel the use of civilians as military judges might be demoralizing to military lawyers, to uniformed lawyers.

I notice with regard to S. 745 that you say expensive use of civilians as military judges would be demoralizing. Would you care to elaborate upon these assertions and also I wonder in doing so if you would care to comment on the fact that the judges in the Court of Military Appeals would be all civilians, if this has had any demoralizing effect?

Mr. ALBRIGHT. No, just the opposite. My personal opinion is, that the legislation creating the Court of Military Appeals has been one of the most valuable pieces of legislation from the standpoint of military justice that we have had. I think this is one reason we used the word "extensive" in our recommendations, because we realize that there may be highly qualified individuals who could serve as judges for courts of military appeal. I believe, however, as I said before, we want our Judge Advocate Corps to be of the highest caliber and we are not going to get capable officers unless we are able to hold before them prestige such as being eventually military judges. I am very fearful that if we ever started using civilians as military judges, that the trend would be, perhaps for political and other reasons, toward more and more extensive use of such individuals until we

[1] The requested analysis of the directive appears at p. 794.

would find that in the United States they were used almost entirely, whereas in places such as in Vietnam would be reserved for the uniformed lawyer.

Mr. CREECH. Sir, with regard to building up the prestige of the military lawyer, it is your view that the establishment of an independent field judiciary would have this effect?

Mr. ALBRIGHT. I think an independent field judiciary does aid the prestige of the military lawyer.

Mr. CREECH. Thank you.

Senator ERVIN. Thank you very much.

Mr. ALBRIGHT. Thank you very much, Senator.

(Supplemental views of Mr. Albright follow)

JANUARY 17, 1966.

WILLIAM A. CREECH, Esq.
Chief Counsel and Staff Director,
Subcommittee on Constitutional Rights,
Room 102B, Old Senate Office Building,
Washington, D.C.

DEAR BILL: In a brief conference today you suggested that it might be advantageous for the committee to question me beyond my prepared statement as to certain matters concerning which I have had experience. I would suggest that questions along the following lines might be productive:

1. Undesirable Discharge.—It is my opinion that the undesirable discharge should be outlawed. Today, the honorable discharge means "barely passing" and the undesirable discharge is frequently used where, because of lack of proof or other reasons, a court-martial is avoided. If due process is to be given, present court-martial standards together with negotiated plea procedures could be utilized to rid the services of all undesirable personnel within the framework of due process. If the evidence is insufficient for a court-martial, I believe it is outrageous that guilt should be otherwise presumed.

2. Discharge Review Boards.—It is my impression that these have become essentially rubber stamp agencies. With a few exceptions they are apparently manned by passed-over officers. I would suggest that they be transferred to another agency, perhaps the Veterans' Administration.

3. Boards of Review.—These boards perform a judicial function with personnel of Civil Service and the career military. It is suggested that this personnel administration is incompatible with the function and that appointments to the boards of review should be for a term of years with removal only for cause. Such a position would be incompatible with efficiency reports on its members. At present, when they say of a newly appointed member to the board of review, "Let's see how he works out," such a remark may well be interpreted by the new member as a subtle hint that he should not disagree to any considerable extent with his superiors in command.

4. Correction Boards.—It is my impression that the military correction boards need more independence. Since in theory their function is legislative, it is suggested that they should be an independent agency responsive more directly to Congress, perhaps along the lines of the Comptroller General. To consolidate these boards and place them under the Department of Defense would be like taking them from the frying pan into the fire. I believe that there should be a direct appeal from the correction boards to the Court of Claims.

5. I can give some rather horrible examples of the lack of due process in cases where an undesirable or general discharge has been awarded and of cases before the discharge review boards. I can also give a pertinent example as to why the correction board should have subpena power.

It is my present understanding that I am scheduled to testify Thursday, January 20, but may be rescheduled for the next week in the event that the committee has other matters to attend to on the 20th. Since I am in Washington, I am sure that this can be worked out to the satisfaction of all.

Sincerely yours,

PENROSE LUCAS ALBRIGHT.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Walter K. Bennett, chairman of the Military Law Committee of the District of Columbia Bar Association. Mr. Bennett.

Senator ERVIN. We are delighted to have you here.

STATEMENT OF WALTER K. BENNETT, CHAIRMAN OF THE MILITARY LAW COMMITTEE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Mr. BENNETT. It is a pleasure to be here with you and I certainly appreciate the opportunity to present the position of the military law committee.

My name is Walter K. Bennett. I appear here as chairman of the Military Law Committee of the Bar Association of the District of Columbia. I have been affiliated with the Officers Reserve Corps for many years. I am now a hearing examiner employed by the Federal Trade Commission. The Federal Trade Commission is not concerned with these bills and, of course, I do not speak for it. I have filed a brief statement of my experience, which does not include assignment as either member of a court-martial, judge advocate, or defense counsel. Hence, my testimony here will be based on the experience and the action of my committee and not on my personal experience.

At the outset, may I, with great deference, state my view that this period of the build-up of our military forces in Vietnam, is a most fitting time for your committee and for Congress to consider again the problems of military justice.

You have the delicate task of insuring that absolute battle area authority of military and naval officers is strictly upheld, and at the same time insuring that the great democratic principle of ultimate civilian authority is preserved.

This task assumes greater importance as the numbers of our civilians drawn into uniform increases. The willingness of our young men in uniform to fight for our great principles of freedom and justice is enhanced by insuring that the essential principles of due process are manifested in the Code of Military Justice and in related laws which govern our troops.

The Constitution has specifically entrusted Congress with this problem. For many years, the regular courts were powerless to act except to determine whether a court-martial had jurisdiction. In recent years, the concept of jurisdiction has been extended to include insistence on due process. However, the Court of Military Appeals, within its limited jurisdiction, now affords under Congressional mandate the only general court of appeal, except to the extent that the Court of Claims may act in its traditional capacity in awarding back pay after administrative discharge.

The Constitution itself recognizes the necessary distinction between the rights of a serviceman and that of the civilian. Presentation before a grand jury for example is unnecessary even for an infamous crime in the case of persons subject to court-martial. Congress' power under article 1.8, cl. 14 of the Constitution to make rules for the government and regulation of the land and naval forces is the serviceman's guarantee of fair treatment. Under this power, the Articles of

War and the Articles for the Government of the Navy were enacted and following World War II, the Elston Act and Uniform Code of Military Justice. Under this clause of the Constitution, therefore, the servicemen have a right to look to Congress for the further definition of their rights.

Of necessity, military and naval commanders must look first to the accomplishment of their mission. The right of the individual in battle must be subordinated to the necessity of accomplishing the mission of the command. We make no argument against this position of military necessity. On the other hand, in trials and administrative proceedings, immediate battle decisions are not rendered. They are conducted after the fact, sometimes even—in the case of the correction of military records—after the serviceman has left the service. We had an example this morning that Commander Albright gave us of the man in 1958 who was discharged from the service and his proceedings are now coming up in 1966.

Hence, in such circumstances, the serviceman's morale and confidence in the services is enhanced by the complete fairness of the proceedings. Thus, battle obedience is enhanced. It is to that end that we focus our attention.

The District of Columbia bar association has already submitted its detailed recommendations by letter dated May 5, 1965, signed by Gen. Nicholas E. Allen, my predecessor.[1]

We adhere to the position then taken and today will attempt to summarize briefly that position and then to give some indication of the relative urgency of the bills S. 745 through S. 762. For convenience, we will deal with the 18 bills by category.

In our arrangement, four bills deal with organization, four would effect procedural changes, two create substantive rights, two grant new jurisdiction to Federal District Courts and five deal especially with administrative board functions.

There are four bills dealing with organization, S. 745, 746, 748 and 759. The association recommends the adoption of two as drafted: S. 745 setting up the field judiciary system and incidentally changing the name "law officer" to "military judge" and; S. 746 setting up a judge advocate corps for the Navy.

The association also recommends adoption of S. 748 which would properly constitute the boards of review of court-martials as intermediate courts of appeal naming them Courts of Military Review. It recommends, however, deletion of provisions which would discriminate against retired military personnel.

The association opposes S. 759 which would abolish summary court-martials. We believe that court provides a proper election for both command and accused where circumstances make non-judicial punishment inappropriate.

Let us consider now the five bills which would effect procedural changes S. 750, 751, 752, 755 and 757. The association recommends adoption in their present form of two; S. 752 and 757. S. 752 provides that a law officer be appointed to special courts-martial where a bad

[1] The official recommendations of the Association, as contained in the reports of its military law committee, dated Apr. 1, 1965, appear at p. 431.

conduct discharge is sought. It also authorizes an accused to elect to be tried by a law officer alone. We believe that the issuance of a discharge under conditions which might affect a serviceman's career is so important that any court which could order it should be advised by a competent law officer. We also believe that a law officer—much as is the case with a judge in Federal or State courts—should be permitted, with the consent of the accused, to try general or special court-martial cases without the necessity for requiring the presence of other officers who ordinarily are detailed to the court.

The association also recommends adoption, with suggestions for minor changes, of the other three procedural bills, S. 750, S. 751 and S. 755. S. 750 would enact two sections, the net effect of which would be that a person could not be discharged under conditions that might hurt his career either administratively or by court-martial action, unless afforded law trained defense counsel. The association approves this in principle but believes that General Hodson's presentation of the position of the Department of Defense, that the sections relating to administrative boards should be separately enacted, has merit. We also suggest that waivers of counsel should be given only after a waiting period of 48 hours and should be endorsed by qualified counsel.

S. 751 would permit reopening of a court-martial within 2 years after date of approval by the convening authority.

The association agrees in principal that the usual criminal time limit should apply but believes that it would improve the bill if the grounds were stated and that the limitation of its application to cases 1 year before the date of enactment of the bill should be deleted so that the test would be 2 years after approval of the sentence in all cases.

The fifth procedural bill, S. 755, would prohibit one member of a board of review from rating another member's performance. The association agrees but suggests that the bill should be extended to apply to all judicial bodies and all administrative boards created under authority of the Department of Defense. In the latter case, the amendment should preferably be made to the particular statutes authorizing the boards and not made as an amendment to the code of military justice.

Two bills, S. 749 and S. 758, deal with substantive rights. The association recommends approval of S. 758 in terms. This bill would permit a person notified of proposed administrative action for his discharge on conditions other than honorable to elect to be tried by court-martial unless his misconduct caused his conviction by a State or Federal court. The provisions might be suspended in time of war and an election to be tried by court-martial would waive the statute of limitations.

The association also recommends passage of S. 749 with modifications. The bill would prohibit convening authorities from censuring courts or boards or counsel for their actions on or before those bodies and would prohibit evaluating such service in making out effectiveness ratings. The bill would also prevent unauthorized influence on courts or boards. The association suggests that the bill prevent "directing" action as well as objecting to action after it has been taken.

It suggests that the vague reference to any matter materially affecting status or rights of members of the Armed Forces be deleted, and it questions the applicability of the provision concerning fitness reports to persons customarily engaged primarily in court-martial or board work. Some method of rating such persons must be found if their careers are not to be adversely affected. The association further suggests a redistribution of the provisions of the sections to the statutes which create the various boards.

Two very important bills, S. 761 and S. 762, would extend the jurisdiction of the Federal courts: S. 761 would authorize trial of former members of the service for acts committed while in service, and S. 762 would authorize trial of persons accompanying the Armed Forces overseas. These legislative changes are made necessary to fill the present gap created by court decisions which held that courts-martial had no jurisdiction.[1] The association recommends adoption of both of the bills in terms.

The last five bills, S. 747, 753, 754, 756, and 760, deal specifically with administrative boards. The association suggests substitute treatment for two, S. 747 and 753, and recommends approval of the balance, S. 754, 756, and 760 with minor modifications.

Taking first the bills which the association recommends be adopted with modification, S. 754 would require a special board to be convened and to hold a hearing for the purpose of discharging an individual on conditions other than honorable. It would also require that a qualified law officer be detailed to it and that the respondent have or waive counsel. The association suggests that the designation of the section of the law be changed so that it will amend those sections specifically applicable to administrative boards and that it not duplicate other bills (e.g., S. 750). S. 756 would prohibit administrative discharges on other than honorable conditions if based wholly or partly on grounds on which the serviceman had previously been acquitted by a court-martial or an administrative board. The association agrees in principle with the bill but suggests that the words "in part" be deleted to insure that the grounds be substantially identical. It also recommends that the bills be related to the statutes creating the boards and that it be expanded to require the protection to apply to other boards and to impose a period of limitation (e.g., 5 years) after which misconduct could not be made the basis of separation. S. 760 would confer subpena power on administrative discharge boards, records correction boards and investigating officers. The association has two minor suggestions: (1) that the bill be expanded to include pretrial discovery as in the Federal rules and, (2) be applied to the statutes, e.g., 10 U.S.C.A. 1552 and 1553 which create the boards not to the uniform code.

On the two bills on which the association recommends substitution of a different procedure, S. 747 would have a single correction board for the Department of Defense and one for the Treasury, and S. 753 would give the Court of Military Appeals appellate review of administrative boards' action. The association recommends as its substitute that the provisions of the Administrative Procedure Act, which at

[1] *Toth* v. *Quarles*, 350 U.S. 11; *Kinsella* v. *Singleton*, 361 U.S. 234 (camp followers).

present are construed to exempt boards of the Department of Defense, be deleted and that administrative boards of the Defense Department be required to adopt the same procedures as the administrative agencies. This would insure trial before an experienced and impartial hearing examiner with the right of subpena and the right of judicial review. If this were done, the bills insuring against the command influence on board members, granting subpena powers, or appointing law officers would be unnecessary. The Administrative Procedure Act provides for these matters. For almost 20 years, the independent agencies have had experience under the act. We believe it has improved the character of decisions rendered and insured unbiased fact finding.

In the administrative board field, we suggest that this is a very important recommendation. Parenthetically, we note that considerations should be given to preserving the existing jurisdiction of the Court of Claims.

So far as Federal court jurisdiction is concerned, the proposed bills S. 761 and 762 close a loophole in existing law and appear to be urgently required.

Let me now turn to the two bills described as making substantive changes in the law, S. 749 and 758. S. 749 to inhibit command influence could be cured by the issuance of appropriate departmental regulations. In event the Administrative Procedure Act safeguards are imposed upon boards, the right to elect trial by court-martial contemplated in S. 758 would also seem less urgent

All five of the bills for procedural changes seem important. Perhaps S. 755 prohibiting efficiency ratings by board members of other board members could be handled administratively. However, conforming the period to petition for a new trial to civilian practice (S. 751); authorizing the law officers to act in pretrial and to substitute for a court-martial (S. 752 and 757) and requiring defense counsel in bad conduct discharge cases, as a reflection of *Gideon* v. *Wainwright*, (S. 750) all seem urgent and to require legislative sanction.

Of the four bills on organization, two, S. 745 setting up the field judiciary system and S. 746 setting up a JAG corps in the Navy could perhaps be handled administratively but we regard them as sufficiently significant to require legislation. We oppose abolishing the summary court, S. 759 and we believe that changing the title of the military justice board of review, S. 748 will enhance its dignity and accurately describe its real function. While not as urgent as the first two bills, its passage is recommended with the suggestion that no discrimination against retired officers should be permitted.

Your staff was kind enough to supply me with copies of the statements made on behalf of the Department of Defense last session. Accordingly, may I make some comparisons for you.

A very significant difference in the Department of Defense position and that of the D.C. bar association respects general discharges. The Department considers this as a discharge under honorable conditions, thus not a serious stigma on the serviceman receiving it, and thus not one that requires substantial safeguards against its misuse. This is implicit even in the new directive issued 20 December 1965.

The association, on the other hand, considers a general discharge a serious stigma on the civilian soldier when he is returned to civilian

life. It materially affects his ability to secure employment. As such, we take the position that adequate safeguards must be erected against its misuse.

We also hold the opinion that the hearings held in 1962 gave ample notice of the necessity for bills S. 761 and 762 enlarging Federal court jurisdiction and S. 746 for upgrading the Navy law officers by the creating of a JAG corps (S. 746). Hence, the bills should not be further deferred. My committee also favors the field judiciary system and describing law officers in accordance with their function—that of military judges.

On the other hand, we both oppose the abolition of the summary court (S. 759) we both oppose the commingling of administrative board statutes (S. 753) in the code of military justice, we both oppose prohibiting military lawyers or retired military personnel from serving on boards of review (S. 748) and we both urge strict prohibition of command influence on courts-martial (S. 749).

We hope we shall be able to answer any questions your committee may desire to ask.

Mr. CREECH. Mr. Bennett, I notice, sir, your committee has taken the position that the military exemption from the Administrative Procedure Act should be removed and that administrative boards of the Department of Defense be required to use the same procedures as the other agencies of the Government. I wonder if you would expand upon this recommendation and in giving us, the subcommittee, some indication of the advantages you see.

Mr. BENNETT. Well, I have a little difficulty expanding on it too much, Mr. Creech, for this reason. There is presently before the whole committee of the Judiciary Committee a bill which will amend the Administrative Procedure Act, S. 1336. This has been, as I understand it, reported out by the subcommittee. But the text of the proposed bill has not yet been made publicly available. So I am in the position of not being able to tell you precisely without having seen just what Senator Long's committee has already done on the subject. And, I know that in one of the proposed bills, 1336, the provision which was in section 5 of the present statute has been changed. There are also provisions in section 2, section 7(a), section 4 (1) and (2) which would have to be changed if our proposed change were to take place, and again, there would also have to be—as I think I indicated to you—consideration given to the present jurisdiction of the Court of Claims which might be something which your committee wanted to consider to determine whether or not that should be continued in any event.

Senator ERVIN. And your association is of the opinion that the present jurisdiction of the Court of Claims should be continued?

Mr. BENNETT. My committe did not take any position on it, sir. But I understand that at this Friday's meeting the board of directors of the association is going to be asked to take a position on that subject. And I would assume they will do so and will inform you, your committee of it, if they do so. Now, I got that at a meeting that I attended yesterday afternoon with the Court of Claims committee of the association. That committee was concerned with the possibility that our recommendations might be taken as a suggestion that the

Court of Claims jurisdiction should be wiped out and they asked me therefore to specifically indicate to you that it was one of those things that should be given consideration. That is, not wiping it out should be given consideration. I also understood that there was going to be an effort to discuss the matter at the current board meeting of the association.

Senator ERVIN. I just misconstrued your remark. Your committee is taking no position on that specific point.

Mr. BENNETT. That is correct.

Senator ERVIN. But you intended to suggest to the sub-committee considering these bills that they should give consideration to the question of the desirability of providing expressly that the present jurisdiction of the Court of Claims should be retained?

Mr. BENNETT. Yes, sir, such as the same kind of jurisdiction that a taxpayer has. He has alternate choices. He may go to the Court of Claims, he may go to the district court, he may go through the tax court in certain given circumstances.

Senator ERVIN. I take it that the recommendation of your committee is that there should be a review on the principle of the Administrative Procedure Act—fundamentally based on the general principle that actions of an executive agency should be subject to judicial review so as to assure fundamental rights in administrative proceedings.

Mr. BENNETT. Particularly, as I tried to bring out, Senator, at a time when our Army is increasingly becoming a civilian army, which is going back to civilian life, and which can be seriously—the individuals in which—can be seriously hurt by administrative action which, while it would not deprive them of certain statutory rights; for example, rights to pensions and so forth, would deprive them of the right to get a job in certain places. We think that is extremely important, and we suggested the A.P.A. as another means which might be used—which might be considered by your committee, because it seems to have worked reasonably well in the administrative agencies. And here was another way wherein you could insure that there would be an impartial person; where you could also insure there would be appropriate subpenaes available, supervised by a man who had some experience along that line, a law-trained man who had been picked for his ability and perhaps might be picked for special competence in this field. We thought all of those things were matters which your committee might want to consider. But as far as detailing for you the precise form in which this change should take place, it seemed to me a little bit presumptuous on my part until we had seen what the results which your colleague, Senator Long, and his committee had, and that is presently in camera, I understand.

Mr. EVERETT. I have only one question, Mr. Bennett, with respect to the committee's, your committee's position on S. 759 pertaining to the proposed elimination of the summary court-martial.

Is it your position that the summary court should be retained but only for use in cases where there was an election of trial instead of article 15 or would it have a more general use?

Mr. BENNETT. No, we thought that there were times when it is desirable to have a summary court, both from the command viewpoint and from the viewpoint of the soldier or sailor or serviceman.

There are times, it seems, when this serviceman, for 17 times in a row gets what has sometimes been described as the "captain's mast" article 15 treatment. Under those circumstances it might be that the captain would feel that it was desirable to turn him over to a summary court and let him realize that it was a much more serious offense which would be placed on his record.

Mr. EVERETT. So that the commanding officer would have the option in the first instance to send him to summary court if he so desired?

Mr. BENNETT. Yes, and the individual would have a choice in that case to ask for a special court.

Mr. EVERETT. Thank you, Mr. Chairman.

Senator ERVIN. Mr. Bennett, on behalf of the two subcommittees conducting these hearings I wish to thank you and your association, your committee for a very fine paper which you submitted to the committee.

Mr. BENNETT. It has been a real pleasure to appear and thank you so much for being so patient with me.

APRIL 1, 1965.

S. 745, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 745 would provide the statutory basis for a field judiciary system for general courts martial in each of the armed services.

The committee finds that this system, initiated in the Army under permissive authority, has worked well and justifies its extension, under specific enabling legislation throughout all of the armed services. The committee has noted that the Department of Defense is satisfied with existing law, does not support the bill, and also does not favor the discretionary authority which would be given by this bill to use civilian attorneys and judges as military judges to augment where needed the law officers who are assigned from the regular services, as is the practice, under existing law.

The committee concludes that this bill is in the best interest of the armed services and the personnel thereof, and therefore recommends its enactment.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 747, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 747 would provide for a Department of Defense board for the correction of military records and a similar board for the United States Coast Guard in the Treasury Department by amendment of section 1552 of title 10 of the United States code.

The expressed purpose of the bill is to provide an independent forum to review and correct miltiary records of members and former members of the Armed Forces. The committee opposes a consolidated Department of Defense board at this time.

The committee believes that a preferable method of accomplishing this objective is to remove the exemptions contained in the Administrative Procedure Act section 2(a), 4, 5 and 7a(3) so that henceforth correction of military records shall be handled in the same manner as non-exempted administrative proceedings by hearings before impartial hearing examiners and judicial review.

The committee recommends that the purpose of the bill be accomplished through appropriate amendment of the Administrative Procedure Act.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 748, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 748 would change the designation and structure of boards of review in the military justice system of each of the armed services. The boards would be reconstituted as courts of military review. These changes are intended to strengthen the roles of these boards in assuring fair and impartial review of court-martial records.

The committee agrees with the purposes and provisions of the bill subject to inclusion of the following amendments:

(1) Delete from subsection (b) of proposed new article 66, U.S.M.J. (10 U.S.C. 866) the words "only civilian judges of each court shall be eligible to act as chief judge"

(2) Delete subsection (d) of proposed new article 66, U.S.M.J. (10 U.S.C. 866) entirely

(3) Re-letter subsections (e) through (k) as subsections (d) through (j) respectively.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 749, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 749 would amend article 37 of the uniform code of military justice to lessen command influence on members of courts martial and boards in the military departments.

The committee agrees with this bill in principle and recommends its enactment, subject to the following amendments:

(1) Substitute the word "direct" for the word "lecture" in subsections (a) and (b) of the proposed amendment to article 37, U.C.M.J. (10 U.S.C. 837).

(2) Delete the words "or to any matter materially affecting the status or rights of any member of the armed forces" at the end of subsection (b) of the same proposed amendment.

(3) Revise subsection (c) of the same proposed amendment to read as follows:

"(c) The provisions of subsections (a) and (b) of this section shall not apply with respect (1) to general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, (2) to statements and instructions given in open court by the law officers of a general or special court-martial or the president of a special court-martial to which a law officer has not been assigned, or (3) to statements or instructions given by a legal adviser to an administrative board; *Provided*, Such statements or instructions are given in open hearing or made a part of the record."

(4) Redistribute the provisions of the bill within Title 10 of the United States code so that the provisions dealing with administrative boards are enacted as a part of that chapter of the title which deals with such boards, and not as a part of the uniform code of military justice.

The committee also expresses its reservations concerning subsection (d) of the proposed amendment as it relates to rating of personnel who spend an appreciable portion of their time on the duties outlined in that subsection.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 750, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 750 would amend article 19 of the uniform code of military justice to provide that bad conduct discharges may not be adjudged unless the court-martial concerned makes a complete record and unless the accused is represented by legally qualified counsel.

The committee agrees with the objectives of the bill and recommends favorable action upon it, subject to the following considerations:

(1) The committee prefers the substitute bill which has been offered by the Department of Defense as a substitute for section 1 of S. 750.

(2) The committee prefers the substitute bill which has been offered by the Department of Defense as a substitute for section 2 of S. 750, as an amendment to that chapter of title 10 which deals with administrative boards and not as a part of the uniform code of military justice.

(3) The committee recommends that the passages dealing with waiver of counsel be expanded to require the following:

(a) That at least 48 hours time must elapse before counsel can be waived, (b) that the decision by the individual affected to waive counsel be in writing, and be endorsed by counsel whose qualifications are not less than those prescribed under article 27(b) of the uniform code (10 U.S.C. 827(b)).

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 751, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 751 would amend article 73 of the uniform code of military justice to enlarge the period within which an accused may petition the judge advocate general for reopening a court-martial proceeding to 2 years after approval by the convening authority.

The committee agrees with the objectives of the bill and recommends that it be favorably considered, with the following added provisions:

(1) That the provisions of the substitute bill offered by the Department of Defense in lieu of S. 751 which are not covered by the present text of S. 751 be added to rather than substituted for the provisions of S. 751.

(3) That petitions for a new trial should be made receivable within 2 years of the approval of a sentence by a convening authority without regard to the date of enactment of this bill.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 752, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 752 would amend certain articles and add a new article to the Uniform Code of Military Justice relative to law officers for general and special courts-martial and would give an accused the election to be tried by a law officer alone.

The comittee agrees with the objectives of the bill and recommends favorable consideration, with the following added comments:

(1) The committe approves either S. 752 as introduced or the Department of Defense substitute therefor which accomplishes the same objectives;

(2) The committe is aware of the fact that enactment of either S. 752 or the Department of Defense substitute would require an increase in the number of law officers available, and therefore recommends that the number of law officers be increased accordingly.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 753, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 753 would provide for review by the Court of Military Appeals of boards established under sections 1552 (correction of military records) or 1553 (review of discharges and dismissals) where ordered by the Judge Advocate General or by the court on petition of an applicant.

The expressed purpose of this bill is to provide appellate review of administrative board decisions.

The committee believes that a preferable method of accomplishing this objective is to remove the exemptions contained in the Administrative Procedure Act Sections 2(a), 4, 5 and 7a(3) so that henceforth correction of military records and review of discharges and dismissals shall be handled in the same manner as nonexempted administrative proceedings by hearings before impartial hearing examiners and judicial review.

The committee recommends that the purpose of the bill be accomplished through appropriate amendment of the Administrative Procedure Act.

NICHOLAS E. ALLEN, *Chairman.*

(Supplementary views of the association on S. 753 follow.)

THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA,
WASHINGTON, D.C., *March 18, 1966.*

Re: S. 753

HON. SAM J. ERVIN, JR.,
Chairman, Constitutional Rights Subcommittee, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Mr. Walter Bennett, chairman of the association's military law committee, has testified for the association in connection with S. 753, which would vest in the Court of Military Appeals jurisdiction to review legal issues arising in connection with applications to discharge review boards and boards for correction of military records in the armed services. He has indicated the concern of the Association that adequate protection be given the applicants in proceedings before the boards on factual, as well as legal matters, and opposed vesting review jurisdiction in the Court of Military Appeals. He suggested that the Administrative Procedure Act be made applicable to proceedings which would otherwise come before such boards.

I have been directed by the board of directors of the association to write you requesting that these additional views of the association be made part of the record of hearings on S. 753 and related bills.

The bar association of the District of Columbia urges that the existing jurisdiction of the Court of Claims and the United States District Courts be preserved, whether or not our recommendations are adopted that the Administrative Procedure Act be made applicable to the board proceedings. We feel it very important that express provision be made to preserve the existing power of these courts to grant a trial de novo, especially since only a very small percentage of these cases involve solely questions of law and most turn on questions of fact. Preserving the jurisdiction of these courts would also permit selection of a forum suitable to the convenience of the litigant and simultaneously retain their rights before Constitutional Courts, as provided for in 28 U.S.C. 1346(d), as amended August 30, 1964, and 28 U.S.C. 1491. This, we believe, is particularly significant since all applicants before the discharge review boards are no longer in the military service and a great percentage of applicants before the boards for correction of military records also are not on active duty.

In proceedings before the discharge and correction boards, applicants experience difficulty in being heard, obtaining an adequate factual hearing, getting access to witnesses, records and evidence, through compulsory process, and other rights associated with due process of law. Such rights would be secured if our recommendation to make applicable the Administrative Procedure Act is followed. If, however, your committee determines not to follow that course, it would seem desirable, at least, that the provisions of title 10, sections 1552 and 1553, be amended to require that applicants be afforded the right to be heard in person or through counsel.

Representatives of our association would be pleased to discuss with you or your staff specific language to accomplish these recommendations, should you so desire.

Respectfully yours,

PAUL F. MCARDLE, *President.*

APRIL 1, 1965.

S. 754, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 754 would add a new article 141 to the Uniform Code of Military Justice to require an administrative hearing, a law officer, and individual counsel prior to any administrative discharge under conditions other than honorable.

The committee agrees with the objectives of the bill and recommends its favorable consideration subject to the following comments:

(1) The areas covered by S. 754 are already, to some extent, covered by other proposals contained in S. 745 through S. 762; the committee approves so much of the objectives of S. 754 as will not be covered by other provisions of these bills, if enacted.

(2) The provisions of this bill should be contained in amendments to that chapter of the title which deals with administrative boards, and not as a part of the Uniform Code of Military Justice.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 755, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 755 would amend article 66 of the Uniform Code of Military Justice to prohibit one member of a board of review from rating the performance of other members of the board.

The committee agrees with the objectives of the bill and recommends its enactment, with the following suggested changes:

(1) The provisions of S. 755 should be extended to cover the following:

(a) Judicial bodies falling within the Uniform Code of Military Justice.

(b) All standing administrative bodies created under the authority of the Secretary concerned.

(2) To the extent to which the bodies referred to in (b) above are established by statute, the provision with respect to such bodies should be enacted as an amendment to the statute creating the body involved, and not as a part of the Uniform Code of Military Justice.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 756, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 756 would amend article 44 of the Uniform Code of Military Justice to prohibit administrative discharges under conditions other than honorable if based wholly or partly upon grounds previously the subject of (1) a court-martial trial and acquittal or (2) an administrative discharge board hearing and finding of insufficiency.

The committee agrees with the objectives of the bill and recommends its enactment, subject to the following recommendations:

(a) That in line 9 of subsection 844(d), the word "misconduct" be changed to "charges" and the words "in whole or in part" be deleted;

(b) To the extent to which S. 756 refers to administrative discharge boards, established by statute, the provision with respect to such boards should be enacted as an amendment to the statute creating the board involved, and not as a part of the Uniform Code of Military Justice.

(c) Our association wishes to invite attention to other legislation now in effect which permits regular officers of the Army and Air Force to be separated for substandard performance of duty under procedures which (1) fail to give

any right of confrontation of adverse witnesses, (2) impose on the officer the burden of disproving the accusations made against him, and (3) place no time limitation on past incidents which may be considered. We recommend that this bill be broadened to give protections to officers and enlisted personnel of all services which would (1) require confrontation, (2) place the burden of proof where it constitutionally belongs, and (3) impose a limitation period, e.g., 5 years, on matter which can be asserted as grounds for separation.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 757, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 757 would add a new article to the Uniform Code of Military Justice, and amend related statutes to authorize pretrial proceedings by the law officer of a general court-martial for disposition of preliminary procedural and evidentiary matters, and for acceptance of a plea of guilty from an accused.

The committee agrees that this bill would substantially improve the administration of military justice and therefore recommends its enactment.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 758, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 758 would add a new article 141 to the Uniform Code of Military Justice to grant a right to trial by court-martial in lieu of administrative discharge for misconduct.

The commitee agrees with the objectives of this bill and recommends its enactment.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 759, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 759 would repeal and amend certain articles of the Uniform Code of Military Justice to abolish summary courts-martial.

The committee recognizes that recent enlargement of the authority for nonjudicial punishment under article 15 could result in a reduction in the number of cases referred to summary courts-martial. The committee believes, nevertheless, that the summary court-martial should be retained so that those who may wish to elect trial by summary court-martial in lieu of nonjudicial punishment will be free to do so.

The committee therefore opposes this bill.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 760, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 760 would amend pertinent statutes to confer subpena power upon admintrative discharge boards, record correction boards, and investigating officers appointed under article 32 of the Uniform Code of Military Justice.

The committee agrees with the objectives of the bill and recommends enactment, subject to the following suggested changes:

(1) The provisions of S. 760 should be broadened to include pretrial discovery to the same extent as is now provided under the Federal Rules of Criminal Procedure.

(2) The provisions which relates to the board established under 10 U.S.C. §§ 1552 and 1553 should be enacted as amendments to the statute creating these boards, and not as a part of the Uniform Code of Military Justice.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 761, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 761 would authorize trial in Federal district courts of former members of the Armed Forces for certain serious crimes committed while in military service.

This bill closes the gap left by the decision of the U.S. Supreme Court in *Toth* v. *Quarles* which held that the Uniform Code did not apply to offenses committed by former servicemen when they are no longer in military service. If such personnel now commit such crimes within the United States, the crimes may, or may not, depending upon circumstances, also be a violation of the laws of the State in which they occurred, or of the regular civilian Federal criminal laws. If such crimes are committed abroad, and the individual is then brought home and discharged, the only possible tribunal is that of the foreign country in which the crime occurred, and extradition for purpose of trial would be difficult.

The committee favors the enactment of a bill containing these, or similar provisions, but would prefer to see them enacted as a part of the general law, rather than as an amendment to the Uniform Code.

NICHOLAS E. ALLEN, *Chairman.*

APRIL 1, 1965.

S. 762, 89TH CONGRESS

REPORT OF THE MILITARY LAW COMMITTEE, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

S. 762 would authorize trial in Federal district courts of military dependents and civilian employees for serious crimes committed while accompanying Armed Forces overseas.

This bill closes the gap left by the decisions of the United States Supreme Court in the *Covert* and *Krueger* decisions, as well as certain other decisions which restrict the scope of jurisdiction under the uniform code so as to exclude dependents and employees. The NATO status-of-forces agreement, which divided up the jurisdiction over personnel and dependents of one military force stationed on the territory of another country, was negotiated on the assumption that the uniform code did apply to such personnel. The gap in jurisdiction which results means that such personnel can be tried only by local foreign courts where the crimes were committed.

Accordingly, the committee favors enactment of this bill.

NICHOLAS E. ALLEN, *Chairman.*

Mr. CREECH. The next witness is Mr. Fred W. Shields, attorney at law, Washington, D.C.

Senator ERVIN. Mr. Shields, we are delighted to have you with us.

STATEMENT OF FRED W. SHIELDS, ATTORNEY AT LAW, ALEXANDRIA, VA.

Mr. SHIELDS. Thank you, Senator. I have appeared before this committee back in 1962 and made various remarks which were reported, and I guess by and large I pretty well adhere to what I said then.

I have heretofore filed a statement of my views on the various bills which you have introduced and I presume that statement is before you.

Senator ERVIN. Yes, let the record show that the statement submitted by Mr. Shields to this subcommittee will be printed at this point in full.

(The statement of Mr. Shields follows:)

STATEMENT OF FRED W. SHIELDS, ATTORNEY AT LAW, ALEXANDRIA, VA.

I am Fred W. Shields, an attorney with offices at 718 Queen Street, Alexandria, Va. My practice is confined largely to the representation of service personnel and, more particularly, to naval personnel. In this practice I handle the defense of a substantial number of persons tried by courts-martial and the appellate proceedings involved in such cases, as well as the representation of individuals involved in administrative discharge proceedings, and, finally, the claims of service personnel for amounts believed to be due them as pay and allowances, which claims are generally prosecuted in the United States Court of Claims.

I represent the fleet reserve association, an organization composed of career enlisted men in the United States Navy. However, I wish to make it clear that I am speaking today as an individual and my views do not necessarily represent the views of the fleet reserve association.

The Senate bills which have been introduced by Senator Ervin cover a very broad field and I do not here propose to discuss all of these bills in any great detail. I do wish to state that so far as S. 745 is concerned, I feel that the field judiciary program as it is presently administered in the Navy has operated most successfully. I feel that the program should be continued and it may well be desirable to establish the program through statutory provisions in order to insure its continuance. I would suggest, however, that the duties that military judges be allowed to perform should be enlarged. They certainly should, in my opinion, be allowed to perform duties of a quasi-judicial nature.

S. 746 provides for the establishment of a judge advocates general corps for the Navy. This proposal has been suggested on many occasions and I feel that the advantages of such a corps are obvious. No one really seems to dispute this matter and I do not feel that any further discussion is required.

S. 747 relates to the correction boards established by section 1552 of title 10, United States Code. The changes proposed are, I feel, generally desirable. However, I do not feel that the proposed bill goes far enough. I feel that the statute should definitely provide that a party petitioning any of the correction boards should have the right to a personal hearing before a board if he insists upon it. Under present procedures the boards are not required to grant a hearing. As a practical matter this means that in many cases a trial examiner for the board is the one who really determines whether or not an error or injustice has occurred. Further, I feel that the boards should be required to furnish a petitioner or his counsel with a copy of the trial examiner's brief prior to the time that it is acted upon or considered by the board and the petitioner or his counsel should then be given time in which to reply to the brief. Finally, I feel that serious consideration should be given to extending subpoena powers to the board. A petitioner should have the right, as I see it, to subpoena any material witness that can explain or clarify the record which he seeks to have corrected.

Finally, the statute of limitations is, in my opinion, entirely too short. It should be at least 6 years which is the general statute of limitations on claims against the Government in Federal courts.

S. 748. I do not propose to comment on the provisions of this bill other than to point out that I feel that there are definite advantages to be derived from providing for a fixed tenure of office for the members of the proposed court of military review.

S. 749 does not require much comment on my part. I will say that so far as general courts-martial are concerned, I have not observed many recent attempts to influence the action of general courts. I fear, however, that pressure is frequently brought to bear on the members of special courts-martial, or perhaps more important they feel that pressure is being brought to bear on them. The same cannot be said, however, with respect to summary courts-martial which obviously in most instances operate under the control of the commanding officer who appoints the summary court officer. As I hereafter state in connection with my discussion of S. 759, I feel that the summary court-martial serves no useful purpose and definitely should be abolished.

Various administrative boards, particularly those considering administrative discharges or separations from the service obviously are subject to command influence. The procedures under which these boards operate make such command pressure inevitable. For instance the command makes the recommendation, the command appoints the board members, and the command informs the board members of its recommendation in each given case. Under the circumstances it is virtually impossible for any board member to be unaware of the fact that the command expects him to follow and to approve of the recommendation it has made in a given case. The unfairness to the individual appearing before a field board considering administrative discharge or separation is manifest. It may also be pointed out in this connection that the boards operate under no standards whatsoever. They are not bound by the rules of evidence and they are not required to respect even elemental constitutional rights. It may be pointed out in this connection that the courts have repeatedly held that these boards must accord an individual the right to confrontation of witnesses against him (*Bland* v. *Connelly*, 293 F. 2d 852; (*Davis* v. *Stahr*, 293 F. 2d 860), and that the boards must follow administrative regulations with respect to such separations (*Harmon* v. *Brucker*, 355 U.S. 579). However, so far as I have been able to determine, the Navy Department at least has never specifically informed the board members that they are required to respect such elemental constitutional rights. Nor has it specifically advised the members that the rulings of Federal courts involving such rights are binding upon the members of the board.

In view of the very real injustices that result from the action of these boards I feel that the proposed bill does not afford any very substantial protection to individuals who do appear before such boards and that it should be broadened to provide such protection.

Finally, I suggest that the proposed bill might well be further broadened by an amendment which would require the convening authority of a general court-martial, or the convening authority and the supervisory reviewing authority of a special court-martial to provide the accused or his counsel with a copy of the post-trial legal advice of the staff legal officer or the legal specialist reviewing the case for the convening authority or the supervisory reviewing authority and giving a reasonable time in which the accused or his counsel may reply to it prior to the time such convening authority or supervisory reviewing authority acts. Further I feel that the convening authority or the supervisory reviewing authority should be required, in connection with his review of the proceedings, to certify that he has in fact read the record of proceedings of the trial. It might well be required that he further state when he obtained the record of trial and when he completed reading it. I feel that such a provision would be beneficial because under the decisions of the Court of Military Appeals the convening authority and the supervisory reviewing authority have the duty of personally examining the record of trial. They are required to make their own personal examination of the credibility of witnesses. Despite the duty that the Court of Military Appeals places upon the convening authority and the supervisory reviewing authority one finds in many cases that a staff legal officer's opinion bears the same date as the action of the convening authority or the supervisory reviewing authority. One is supposed then to assume that the reviewing authority has in a single day read a record of proceedings that may be several hundred pages in length; that he has read it critically with a view towards determining and evaluating the credibility of various witnesses and making his own independent

judgment as to whether or not the guilt of an accused was established by competent and credible evidence beyond a reasonable doubt. Manifestly in many instances this just could not happen.

S. 750. No comment on this bill seems to be required. In view of the decision of the U.S. Supreme Court in *Gideon* v. *Wainwright* I can perceive no justification for permitting the trial of an individual before a special court-martial where he is not furnished with qualified counsel to represent him. This is certainly true in the Navy where a special court-martial may adjudge a bad conduct discharge. At least one Federal court has recently recognized the constitutional issue involved in this matter. See in this connection *In re Stapley*, No. C188–65, District Court, Utah, October 1, 1965, 34 U.S. Law Week 2185, but see *contra*, *Leballister* v. *Warden*, No. 3919 HC, District Court, Kansas, November 1, 1965.

S. 751. I do not feel that the proposed bill extending the time in which an accused may petition for a new trial is adequate. It is, of course, an improvement over the existing law which allows but 1 year from the approval by the convening authority of a court-martial sentence for the accused to petition for a new trial. However, in view of the fact that there are only two grounds for a petition for new trial; namely, newly discovered evidence or a fraud on the court, it would seem that an accused might more properly be given the right to petition for a new trial within 2 years from the discovery of newly discovered evidence or the discovery of facts constituting the fraud on the court.

S. 752. This bill would effect what seems to be some desirable reforms in the court-martial system. I certainly feel that a law officer, or some officer possessing legal training and qualification, should sit on a special court-martial. I appreciate also the advantages to be derived by permitting an accused to waive trial by the members of a special court-martial in which a law officer has been detailed and giving the law officer the right to make findings and impose the sentence on an accused. I suggest, however, that unless the law officer of a special court-martial is appointed in accordance with the judiciary program he might well be subject to considerable pressure by the appointing authority.

I feel that references to the summary court-martial should be deleted from the bill in view of the fact that S. 759 proposes the abolishment of the summary court-martial. I wholeheartedly approve of the abolishment of the summary court-martial.

S. 753. I appreciate the intent and purpose of the proposed bill but am by no means sure that the proposed review of cases heard by a board for the correction of military or naval records or a board for the review of discharges and dismissals by the Court of Military Appeals is a practical solution of the problem as it presently exists. Most of the cases heard by these boards involve factual situations and the legal issue involved is of a minor nature. In saying this I do not wish to minimize the right of a petitioner to a hearing before such a board or his right of confrontation of witnesses against him or the protection of any other basic constitutional right or privilege. The fact remains though that most of these cases before these boards do involve the determination of a factual situation. For instance a substantial number of cases before the correction boards that have been reviewed by the courts are those involving the denial of retirement benefits by the correction boards. The determination of an individual's right to retirement involves the factual determination as to whether or not he was incapacitated for the performance of active duty at the time of his separation from service. It is a factual determination involving medical questions and opinions. The cases that have been reviewed by the courts in this field involve the fairness of the review by the boards. The courts have, in my opinion, imposed an unreasonably high standard of proof on the plaintiffs. That is to say the courts will not review the action of a correction board unless the plaintiff establishes its arbitrary or unreasonable nature. In short, he must show that the action of the board either completely disregards the evidence or ignores it. The standard imposed seems to be inappropriate. However, I don't see how a review by the Court of Military Appeals will improve the situation if the review is limited solely to questions of law. I doubt whether the proposed review will result in any fairer disposition of these cases than now occurs.

S. 754. It would certainly be desirable to have someone with legal training sitting as a member of a field board considering administrative separations or discharges. However, the proposed bill does not really solve the basic problems that exist with respect to these boards which I have heretofore pointed out.

S. 755. I have no comment to make with respect to the proposed bill.

S. 756. I believe that S. 756 should also cover the situation of an individual who has been tried by a civil court having jurisdiction over his person which has acquitted him on the charge or substantially similar charges which in fact involve the alleged misconduct for which his administrative discharge or separation is sought.

The change proposed in (e) of the bill is in line with the present policies of the Army and the Air Force, as I understand them. I see no reason why the Navy and Marine Corps should not adopt the same policy.

S. 757. This bill incorporates established procedures with respect to pre-trial confessions which are followed in the federal district courts and most state courts. The changes are desirable.

S. 758. This bill is, in my opinion, one of the most important of the bills which have been introduced and which is being considered by the Subcommittee. I believe that any individual whose administrative discharge is proposed or recommended on the basis of alleged misconduct should have the right to a trial on charges of such misconduct if he so desires. I also question the proposal which would authorize the discharge of a member from the military or naval services under conditions other than honorable on the grounds of misconduct where the misconduct alleged was to a substantial degree the basis for the conviction of a criminal offense in a state or federal court of competent jurisdiction. If such conviction of the individual is relied upon as a basis for a discharge, I feel that it should affirmatively appear that the offense in question was considered a felony conviction and handled as a felony conviction by the court in question. The conviction should also be by a court of record.

More important, I believe that it should be established that the individual clearly understood that the conviction would affect his status in the military service. These safeguards should be imposed in connection with such discharges because in many instances the civilian courts treat offenses as trivial or relatively unimportant offenses although the military services consider them as serious ones so far as an individual's retention in the service is concerned. As a purely practical matter most average soldiers or sailors appearing before civil courts will, if informed or told that a plea of guilty will only result in a nominal fine, usually plead guilty to the offense rather than incur the expense of engaging a lawyer or otherwise contesting the charge preferred against them. Where the case is handled in this manner by a civilian court and military or naval personnel have either pleaded guilty to the charge or have obviously not had any adequate legal representation at the time of trial they should not be considered as guilty of the offense for the purpose of discharge. Each case should be considered de novo on its individual merits irrespective of any plea or finding of guilt under such circumstances.

S. 759. This bill proposes the abolishment of the summary court martial. I feel that the abolishment of this type of court martial is long over due. I know of nothing good that can be said of the summary court martial and it lacks every concept that one has of a fair and impartial trial. It serves no useful purpose in view of the present Article 15 of the Uniform Code.

S. 760. I can perceive of no valid objection to the proposals in this bill extending the right of compulsory process to the various boards listed in the bill.

S. 761 and S. 762 both propose changes in existing law which would enable individuals who have committed offenses for which they could have been tried by the military or naval authorities had proceedings been commenced prior to discharge and to try individuals serving overseas with the military or naval forces to be brought to trial before an appropriate federal court. The proposals seem to be generally desirable and necessary in view of the decisions of the Supreme Court of the United States which have held that such individuals cannot be brought to trial by court martial.

Mr. SHIELDS. I do not see any point in going over all this again. There are certain aspects of what I said there which I think I might emphasize a bit.

But by and large, I went through your various bills at that time somewhat cryptically, I admit that. I did not devote too much time to some of them, but I did go through most of them, but there are some that I would like to talk on and perhaps I am out of order.

Senator ERVIN. As is our customary practice, we leave it up to each witness as to how he would present his views.

Mr. SHIELDS. I want to say that perhaps I am discussing the proposed bills out of order in my discussion, but in view of the remarks of Mr. Bennett, the preceding witness, I do want to discuss, first of all, the bill S. 759 that would abolish the summary court.

Now, first of all, I want you to understand, I talk as a civilian and I do not know command problems and I do not pretend to know anything about command problems. I know or try to know something about the problems of the people who come before the command. They are my problem. I represent people who are in trouble. That is basically my work.

Now, as far as the summary court is concerned, you will recall that when I testified before the committee back in 1962, I took vigorous exception to the fact that the Army would permit a man to decline article 15 punishment, the Army and the Air Force, and the Navy did not. And I thought that if a man wanted a trial he should have it.

Now, we have changed that law since then.

Senator ERVIN. Yes, sir, and I might state that I think the change was made as the result of the 1962 hearings.

Mr. SHIELDS. Well, I think so, too. In fact, I am quite sure it was.

Senator ERVIN. As a matter of fact, representatives of the Navy and Marine Corps appeared before the subcommittee on Constitutional Rights at that time and later before an ad hoc subcommittee of the Senate Armed Services Committee which I had the privilege of chairing and opposed it initially. Then after it was pointed out to them that this system of giving the option to the serviceman to elect to take a court-martial or take a nonjudicial punishment had worked very well in the Army and the Air Force and after pointing out the good public relations aspect and that it was good practice to fall in line with the other two branches of the services, they relented and consented to the amendment which made the change.

Mr. SHIELDS. At least as long as the man was on land.

Senator ERVIN. Yes. In order to compromise, the subcommittee reserved the right to prescribe nonjudicial punishment.

Mr. SHIELDS. Frankly, I will be perfectly honest with you. I do not think that a man is any better off as far as defending himself—in other words, if the man is guilty, I am not worried about that situation. But I am worried about the man, where he thinks he has a defense, and shall we say, he thinks he has a defense and he can talk a lawyer into believing he has a defense and he wants to assert that defense. Now, he is no better off—in fact he is, in many instances, much worse off before a summary court than he would be accepting article 15. This, because first of all, the summary court officer is appointed by the officer who would have administered the article 15 punishment.

Now, he knows that the only reason the officer who would have administered article 15 punishment had not done so, is because the chap had declined to accept the punishment. So, he is appointed to carry out what he must presume was the intention of the commanding officer. All right, even then, let us assume he can act in that capacity. That does not strain one's credulity too much. But let us go a little further. What are the functions of a summary court officer?

First of all, he is a judge. He is a summary court judge. He hears the evidence and he determines the guilt or innocence.

Secondly, he is the prosecutor. He prosecutes the man. He is the one who offers the evidence upon which the man is tried, and finally, in theory, at least, and I do not mind telling you the theory runs awfully thin at times, in theory at least he is defense counsel. He is supposed to protect the man's rights.

Now, Senator, he cannot do all three. You were a former judge, you have been a lawyer—I have never been a judge—but I have acted in a prosecuting role and the defense role. You cannot do it. You have got to take one side or the other and to say that you can properly prosecute and defend and judge, it cannot be true.

Now, I can show you, if you want to, I can present a tape of a summary court which I had over in Bainbridge a few months ago where the officer purported to act in those three capacities and you can determine for yourself which side he was really acting on. My feeling is that if the man contests his guilt—in other words, he does not want to accept the article 15 punishment because he thinks he is innocent, he is entitled to at least something approaching the rudiments of a fair trial and he does not get it in a summary court. Now, so much for that.

Senator ERVIN. Off the record.

(Discussion off the record.)

Senator ERVIN. We will go back on the record.

Mr. SHIELDS. Now, getting down to these bills, in order, or more or less in order, S. 747 is one that I would like to discuss briefly. It deals primarily with correction boards, and I think the changes proposed are desirable, but I wonder whether or not we go far enough.

Now, I like the correction boards—or at least I like the Navy boards, I will put it that way. I do most of my work with the Navy boards and I like the way the Navy board acts, by and large. I do not mean to say that I always agree with everything they do, but I think that it is a pretty good board that is really striving to reach an equitable result in most instances.

On the other hand, I do feel that in any of these administrative proceedings, particularly when they affect a rather fundamental right or a status of an individual, there should be some positive provision for a hearing if desired. As a practical matter, unless you have the hearing, you can never be sure just who decides the issue, let us put it that way. Just put it on that basis. Unless you have the hearings, you really never know whether the board itself has considered this or whether an administrative examiner has made a report, and of course they can make all kinds of reports, good reports, sloppy reports, unfair reports. But I never know exactly what the board has really acted upon. So I do not think any harm or any dire results would ensue from granting every person who petitions for relief before a correction board, the right to a hearing if he asks for it. If he does not ask for it, that is something else again. I do not think that you have to strain yourself all the way, but if he asks for it, why should he not have it? Then at least he can determine what the board is considering, what they heard and why they are acting, at least within limitations.

Another thing that I think would be desirable in proceedings before a correction board is that the trial examiner's report to the board be furnished to the applicant or the petitioner, or his counsel, and he should be given an opportunity, at least, to answer it before the case is considered.

In other words, if he feels that the trial examiner has gone off on a question of law, or upon a question of fact, he should be at least entitled to present his views on such matters to the board before it is acted upon by the board. As it is now, in the absence of a hearing, and in the absence of a right to the trial examiner's brief, you do not know what the board acts on. They can turn down an application for a good reason, a bad reason, or no reason. You just do not know. And then you are confronted with the only avenue of relief, to a court, and then you have to show arbitrary and capricious action on the part of the board, and that is an awfully high standard to apply to an individual who is seeking relief, equitable relief—at least I think it is.

Now, I have made my thoughts known to this committee before about various administrative boards, particularly the administrative discharge boards. I detect in the last year or so improvement in the way those boards are being administered, and at least in the Navy—some improvement. I think there is a desire to give a man a little more in the way of rights and a little better protection of those rights. I have noted that in the Navy, at least, in the last year or so, if a man insists upon his innocence, they will give him a trial by court-martial now. At least in the absence of a prior extrajudical confession they will.

On the other hand, I am still not satisfied by any means with the administrative discharge proceedings. I think the man should, as a matter of right be entitled to a qualified counsel before any of these boards.

I still feel that the boards should have some definable standards under which they operate. For instance, the Court of Military Appeals for the District of Columbia has held, and held very definitely and very succinctly that a man before one of these administrative discharge boards is entitled to the right of confrontation. Now, by and large, I would say that that right is rather completely and entirely ignored by these boards, rather consistently. They just do not pay any attention to that right.

Now, that is a very real right, particularly as a good many of these cases involve alleged homosexual activities and the complaining witness is quite frequently a psychopath himself, if you come right down to it, or he has been browbeaten or coerced into making a statement. I see no reason why these boards should not be definitely informed that they have to conform to basic legal standards as defined by the courts in evaluating these cases. But as of now, they are not. As a matter of fact, the last one that I had was down in New Orleans, and I raised the right of confrontation and the board—that was not their concern. That was not their concern. I may say that the board decided the case favorably but nevertheless, the basic right to confrontation they were perfectly willing to ignore.

There is another thing which I mentioned in my statement which I think would be a desirable improvement with respect to the general

court-martial procedure and that concerns the post-trial legal advice given the convening authority.

Senator ERVIN. In other words, you would insist on the right of an individual in a proceeding who is getting his dismissal with an undesirable discharge to have an opportunity to cross-examine the witnesses against him in the board?

Mr. SHIELDS. That is precisely it.

Senator ERVIN. And he represented by counsel?

Mr. SHIELDS. I think the right to counsel is inherent in that because a Pfc or a seaman is not going to be able to effectively cross-examine any one. I think the right of effective counsel is inherent in all of these proceedings.

Senator ERVIN. I think the directive issued by the Defense Department on December 20, 1965, has taken several steps in the right direction.

Mr. SHIELDS. As I told you, I thought I detected a movement in the right direction and it dates back—I thought it was a little before then, but it has only been in the last year, certainly, that I have noticed it.

Senator ERVIN. I think as a result of the hearings in which there was a very fine interchange of ideas by civilian lawyers and military lawyers in consideration of these problems that have been arising in this field. I think there has been a marked improvement in the administration of justice in this area.

Mr. SHIELDS. Senator, I agree with you 100 percent but I just want to carry it on. That is my position. I just want to carry it on.

Senator ERVIN. In other words, you want the conversion to be fairly complete.

Mr. SHIELDS. As complete as we can make it. I don't know that we can ever have it complete, but we can try.

Senator ERVIN. Attorneys like yourself appeared before the committee at that time and gave us the benefit of your experiences and of your observations and rendered a great public service. I think the Department of Defense and the Departments of the Army, Navy, and Air Force have rendered a great service in this field, too, because they have taken a great many of the suggestions which were made in these hearings and put them into effect in regulations. They have taken remarkable strides toward what we civilian lawyers feel to be the constitutional rights. I share your view that they have not got quite to where I would like to think the final resting place will be for justice in the case of undesirable discharges.

Mr. SHIELDS. Senator, I started practicing law in 1934 and I certainly do not deny there have been many improvements since that date and I hope there will be more. That is my basic feeling about this.

Now, I do not want to extend this unduly. I do want to point out one or two things I do have some feeling about.

One is the post-trial legal advice that is given the convening authority. I feel as a practical matter, and this perhaps is administrative, but I do feel that as a practical matter, defense counsel should be entitled to a copy of that post-trial legal advice and given an opportunity to file a rebuttal or a rejoinder to the convening authority. Because all too often, and I do not think I am being too unfair about

this, but all too often, the post-trial legal advice, it sounds like a brief for a prosecuting attorney and I think that the defense should at least be able to rebut it, because, after all, the convening authority is supposed to consider this record dispassionately and impartially and the defense counsel should have a right to, at least, get his views across, too.

I mean, as I say, this is probably administrative.

Now, I am not going to keep on on this. As I say, most of my remarks have been made in my statement. There is only one other point that I do want to make and that is about the review of the action of the correction boards by the Court of Military Appeals.

That is one of the few, comparatively few any way, proposals that have been made in these Bills that I cannot go along with. I say that because basically, the function of the Court of Military Appeals is to review questions of law, and only questions of law—not questions of fact.

Now, most of these cases before the correction boards involve factual situations. Basically they are almost entirely factual. Now, if you put the review of factual situations before the Court of Military Appeals, you destroy the whole idea upon which the court is set up. Now, at present we do have a review before the Court of Claims, I am not pretending that I am entirely satisfied with the type of review before the Court of Claims. In other words, we cannot, in the Court of Claims develop and show arbitrary conduct on the part of the board. It has got to be arbitrary and capricious conduct. It is a high standard—I think too high a standard of proof. I think that if you got the Administrative Procedures Act in there, something along that line, the standard there prescribed, we would be better off. But I still think basically, the Court of Claims is perhaps the best court for the review of these cases. I certainly do not think the Court of Military Appeals is the proper forum.

As I say, I have sort of sloughed off a great deal of what I have said in my statment but I have touched the high points and you do have my statement covering all the bills.

Senator ERVIN. You have a very fine statement.

Mr. SHIELDS. Thank you, sir.

Senator ERVIN. I commend you on it.

Do you have any questions, Mr. Creech?

Mr. CREECH. Mr. Everett.

Mr. EVERETT. One question, Mr. Shields.

Would the hearing-examiner system be satisfactory for the correction board to have the examiner make a record in all cases and have the board work from the transcript of that hearing?

Mr. SHIELDS. It probably would in a majority of cases. I really do not know. You have to see how these things really are in practice before you can make any hard and fast rule.

Now, all I can talk about is the way they are operating now, primarily before the Navy board. The Navy board has a trial examiner who makes a brief for the board and that brief may or may not be furnished to the applicant or to his counsel. Usually it is furnished and it is not a bad system.

As I say, I am not very hostile about the correction boards. I am pretty much for them. On the other hand, the cases that I get dis-

turbed about is where you do not have the trial exmainer's report and the case goes before the board without a hearing. That is the case that disturbs me.

I do think that if you are going to have a preliminary hearing or something equivalent to a hearing before the trial examiner, there has got to be some way in which the applicant before the board can protect his position before the full board. Does that answer your question. I am not sure that it does.

Mr. EVERETT. Thank you, yes. Thank you, Mr. Chairman.

Senator ERVIN. Thank you, Mr. Shields, we appreciate your appearance here and for the help you have given us as well as your previous appearance.

Mr. SHIELDS. It was a pleasure to appear before the subcommittee.

Mr. CREECH. The next witness is the Honorable Wilson Cowen, Chief Judge of the U.S. Court of Claims.

Judge Cowen is accompanied by the Honorable Ney Evans, Commissioner of the Court of Claims.

Senator ERVIN. We welcome both of you to the subcommittee.

STATEMENT OF HON. WILSON COWEN, CHIEF JUDGE OF THE U.S. COURT OF CLAIMS; ACCOMPANIED BY HON. NEY EVANS, COMMISSIONER OF THE U.S. COURT OF CLAIMS

Judge COWEN. The hour is growing late and I am sure your patience is wearing thin by now.

The record that I have seen in these proceedings—I have not been through all of them, of course—indicates that it has been pretty much of a marathon. I admire you, sir, for the persistence and time that you have spent on this.

I do have a statement here, but in view of the things I mentioned, I think I might summarize our position very briefly because it relates only to S. 753, as I am sure you gentlemen have suspected.

In fact, the previous witness, Mr. Shields, has, I think quite accurately stated the position the court would take. He pointed out the standards that we exercise in these cases are, in his view, a little too rigid. I suppose that if you should call some lawyers from the Department of Justice they would say that we are too liberal.

Anyway, I am grateful for Mr. Shields' remarks and I do emphasize, sir, to the committee that although it may not have been intended, as I understand perhaps it surely was not intended in the full sense it appears—by clause 4 of subsection (b) of S. 753—that the review by the Court of Military Appeals would cover all cases previously reviewed by the two boards named.

Mr. Chairman, that would embrace a great number of pay cases that have traditionally been filed in our court. And we think that the bill certainly needs clarification.

We would emphasize, without spending a great deal of time on the point that ours is a court which has traditionally been a trial court—it is a trial court; it is a fact-finding court. We are zealous of getting the facts in every case, Senator. As the late Chief Justice Charles Evans Hughes reportedly said many years ago, "If you will give me the facts, I will let you select anyone you choose to decide the law."

Senator ERVIN. Judge, I certainly agree with you on that. My father was a member of the North Carolina bar for 64 years. He went into court and tried cases when he was 84 and when I went into his law office he gave me this advice. He said the first advice I give you is: salt down the facts—the law will keep.

Judge COWEN. I think, Mr. Chairman, that advice holds good today in the trial of any case that I know anything about. I think it is still pretty sage, pretty sound advice.

Now, I only have one or two other things that I want to trespass on the committee's time for. I do want to point out—of course as a trial court of original jurisdiction we have all of the elements of due process. We have discovery, we have cross examination, we have all the remainder of them, the elements. Frequently in these cases, Mr. Chairman, we permit parties to supplement the so-called board record, which may be a good record in some cases and may be virtually nothing in others, with oral testimony and by additional documentary evidence where that is necessary to do justice in the case. Sometimes that additional evidence can be obtained only through the process of discovery. And I think, sir, I can close here with a very simple recommendation which I hope the committee will adopt; namely, that some provision be inserted in this bill to the effect that nothing contained therein shall affect the jurisdiction of the Court of Claims.

Senator ERVIN. I would say, Judge, it certainly is not my purpose to affect the jurisdiction of any courts in any bill we pass and we would welcome any clarification that would make that plain beyond any question in doubt.

I want justice and I want there to be as many places to obtain justice as possible. So we certainly have no purpose whatever in introducing this bill, to oust the jurisdiction in any case where it exists, either in the district court or the Court of Claims.

While you have stated frankly sometimes the counsel for claimants in the Court of Claims do not approve of the justice that may be rendered and counsel for the Government likewise in certain cases do not approve it, I would like to say that I think the Court of Claims over the years has conducted its functions in the administration of matters committed to it in such a way, that as far as the people generally in the country are concerned, they have absolute confidence in it as a judicial tribunal.

Judge COWEN. Thank you, Mr. Chairman, you make us feel very good.

Senator ERVIN. Let the record show that Judge Cowen's statement will be printed in full in the body of the record at this point.

(The prepared statement of Judge Cowen follows:)

STATEMENT BY WILSON COWEN, CHIEF JUDGE OF THE U.S. COURT OF CLAIMS

I should like to begin my statement by saying that the Court of Claims is in full accord with the objectives of the series of bills covered by Senator Ervin's statement of January 26, 1965. I should like also to express to this distinguished subcommittee appreciation for the courtesy which has been extended to the court by giving us an opportunity to state our views regarding S. 753, the only bill in the series which affects the jurisdiction of the Court of Claims.

Throughout the period of its existence and for a period of more than 100 years, the Court of Claims has been concerned with the constitutional and

statutory rights of military personnel. It has done so because Congress created it to provide a forum for the adjudication of suits by service men and other citizens against the United States Government on claims that arise under acts of Congress, regulations of executive departments, and the Constitution of the United States.

If S. 753 was intended to mean what it apparently says in giving the Court of Military Appeals exclusive jurisdiction of all cases brought before any board of review of discharges and dismissals or any board for the correction of military records, the Court of Claims opposes the enactment of the bill in its present form.

While the Court of Claims, as noted in the memorandum accompanying S. 753, has jurisdiction only to render a money judgment, such a recovery is the very essence of the relief sought in many cases in our court arising as a result of actions (or inaction) taken by boards for the correction of military records, or by boards which review administrative discharges.

These cases come before us in many forms having no relation to discharge or dismissal after court-martial in any form. They involve a great variety of claims including claims for loss of pay and allowances for unlawful removal or loss of retirement pay. The facts in many of those cases, determined by the court after trials de novo, seldom are affected by the uniform code of military justice.

It is difficult to perceive why legislation should seem desirable which would transfer jurisdiction over these cases from the Court of Claims to the Court of Military Appeals, where review would be restricted to the administrative record, thereby depriving the claimants of their day in court for determination of the facts.

Yet the bill, S. 753, would insert the descriptive, limiting term "court-martial" before the word "cases" in clauses (1), (2), and (3) of subsection (b), section 867, title 10, United States code, while providing in clause (4) for review by the Court of Military Appeals of "all cases" without restriction, considered by boards for the correction of military records or boards for the review of discharges and dismissals; and the addition to section 867 (in new subsection (g)) would give the Court of Military Appeals exclusive jurisdiction of "all cases" without restriction.

While neither of the review boards mentioned is restricted by statute to court-martial cases, we recognize the possibility that the omission of "court-martial" from proposed section (b)(4), after its insertion in clauses (1), (2), and (3), may have been intended only to pick up reviews of summary courts-martial and special courts-martial, as mentioned on page 41 of the subcommittee report of hearings. If such was the intention, we believe S. 753 should be clarified to show it unmistakably.

The court-martial cases represent only a minute fraction of the litigation load of the Court of Claims. On the other hand, cases involving actions taken by the correction boards constitute a much larger segment of our jurisdiction. They include the whole gamut of disability and retirement pay cases, wherein the rendition of a money judgment reflects the ultimate end of justice.

Therefore, if it is intended that S. 753 shall have as broad a scope as its language indicates, we feel that its enactment would drastically curtail rights which are now granted to military personnel under the provisions of the Tucker Act. It is important to emphasize the fact that the final and exclusive jurisdiction which the Court of Miliary Appeals would exercise under this bill is limited in two significant aspects: first, its review is to be based solely on the administrative record, and second, the review is confined to questions of law.

The Court of Claims is a trial court of original jurisdiction. Whenever necessary to meet the ends of justice, it can provide to every service man who asserts a claim within its jurisdiction, a trial of his case on the merits, including a determination of disputed issues of fact. The rights of due process, including subpena and summons, the right to testify under oath, the right of cross examination, and the right to discovery are available to obtain the facts, including material facts not found in the administrative record.

The late Chief Justice Charles Evans Hughes is reported to have said on one occasion. "If you will let me find the facts, you may select anyone you choose to apply the law."

Numerous cases brought by servicemen in our court involve questions of fact. In case after case, it has been demonstrated that the plaintiff could not have

prevailed in the absence of facts revealed through the court's processes of discovery or by the cross examination of witnesses whose attendance at the trial was compelled by the subpena power.

When mention is made in such cases of the "board record," candor compels me to say that experience has shown that the so-called record is a product that varies greatly in quantity and quality. To be sure, there are instances in which summary judgment may be rendered on the basis of a board record. In many cases, however, a trial de novo is required. Even if a transcript of a board hearing is available, there are occasions when justice demands that additional evidence be admitted. Facts not disclosed in a board record may have more bearing on the lack of due process or the failure of a department to observe its regulations that the facts recited in the record. It may be just as important to show that military officials have failed to make certain facts available to the board as it is to look at what the board had before it. The Court of Claims is jealous of its prerogative of getting the facts, because our long experience with these cases has demonstrated that any other course may result in a denial of justice.

In the past 30 years, the Federal Government has grown tremendously and with that growth there has been an increasing tendency toward the omnipotence of administrative action and the potential role of the Government as prosecutor, judge and jury. Therefore, the Court of Claims is opposed to this or any similar legislation that would deprive any citizen who sues the Government of an existing right to a full and fair trial in our court, including the right to discover, produce and present facts which are essential to a just decision.

Senator ERVIN. This will complete the hearings on these bills. The record shall be kept open for 2 weeks for the purpose of receiving any additional statements or any information which any one may wish to convey to the committee.

I want to thank all the witnesses for their appearances and for the aid they have given the subcommittee in considering these very important bills.

Also the members of the Department of Defense, the armed services and individual civilian counsels who have done a tremendous amount of work in assistance to the subcommittee, I sincerely hope that when we complete our work that this field of administration of justice will be improved. We can always improve on that in every area.

I thank everyone, the members of the committee staff for the fine assistance they have given us.

Thank you.

(Whereupon, at 1:15 p.m., the hearing in the above-entitled matter was adjourned.)

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MILITARY JUSTICE

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

AND A

SPECIAL SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, and S. 2907

BILLS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE ARMED SERVICES

PART 2

(APPENDIX A)

Printed for the use of the Committees on the Judiciary and Armed Services

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APPENDIX A

SUPPLEMENTARY MATERIAL[1]

I. General Material

CONGRESSIONAL RECORD, PROCEEDINGS AND DEBATES OF THE

89TH CONGRESS, 1ST SESSION

[Washington, Tuesday, Jan. 26, 1965]

CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

Mr. ERVIN. Mr. President, I send to the desk, for appropriate reference, a legislative program designed to further safeguard the constitutional rights of our Nation's service men and women who for so long have sacrificed so much to protect our American way of life. Senator HRUSKA has joined me in sponsoring some of these measures as will be indicated on the bills when they are printed.

President Johnson recently stated that we must make every effort to improve the status of our military personnel and to make them "first class citizens in every respect." Improved pay and retirement policies, better housing and equitable promotion systems are indeed important steps for improving working and living conditions for our Armed Forces. However, basic to the goal of making military personnel, "first class citizens in every respect," is to insure that they are accorded the rights, privileges and protections guaranteed to every American citizen under the Constitution.

At one time in our history, our fighting forces were said to be without rights; it was said they were not entitled to due process of law, and that the sole test of the legality of a court-martial was whether the tribunal had jurisdiction over the offender and the offense. This view has been discredited by the Supreme Court, which has held that court-martial proceedings must conform to our fundamental concept of due process. Further, military administrative discharge procedures are now subject to judicial review.

Congress, too, has responded to the challenge of extending the constitutional safeguards, so cherished in civilian life, to the countless thousands of men and women who enter the Armed Services. Mr. President, the Uniform Code of Military Justice was enacted in 1950. And equally important, we have established an independent civilian tribunal—the Court of Military Appeals—empowered to review court-martial convictions. This tribunal has carried out its duties with utmost judiciousness in protecting the rights of our military personnel and in preserving our Nation's constitutional safeguards. Indeed, our Nation has made great progress in safeguarding the constitutional rights of our servicemen since the days of Blackstone, when military personnel were considered indentured citizens in a society of freemen.

Despite this progress, however, considerable room for improvement in the quality of military justice remains. Complaints received by the Senate Subcommittee on Constitutional Rights, and the results of its extensive 4-year study, have revealed numerous inadequacies both in the Uniform Code of Military Justice, administrative discharge proceedings, and other important phases of military justice.

Extensive hearings were held by the subcommittee in 1962 to determine the need for legislation to insure a more satisfactory method of safeguarding the constitutional rights of military personnel. In addition to the information received during these hearings from the Defense Department, Court of Military Appeals, bar associations, veterans groups, and experts in military law, the subcommittee also conducted an extensive field investigation at numerous military establishments in Europe to obtain firsthand views as to the adequacy of our present system of military justice. Almost without exception, the subcommittee work has pointed up a very serious need for legislation to modify our system of military justice so that it adequately protects the constitutional rights of our military personnel.

[1] Because of the scope and complexity of this inquiry material in this appendix has been arranged by subject matter.

Protecting the rights of the individual by providing procedures in which disputes about rights and duties can be fairly and equitably decided is basic to our Nation's system of constitutional due process. This system has long been a part of the rights of every citizen. Certainly, Mr. President, it is time that the men and women of the armed services, whose sacrifices almost defy enumeration, should also be provided the protections of our Constitution which are consistent with the duty of the military to portect our Nation.

These measures were introduced early in the last Congress, and I am hopeful that early hearings will be scheduled on these measures in this Congress.

It may be necessary to revise the wording of some of these measures; I am wedded to no particular language. However, the substance of each is, I feel, important if we are to grant the full measure of justice and security to those to whom this Nation has entrusted its defense. For this reason, I hope that hearings on these bills will be held at an early date.

The first of these bills seeks to guarantee to military personnel the basic right that any judicial or quasi-judicial proceeding affecting them be conducted by a fair and impartial tribunal. Over the years there have been numerous complaints of command influence in trials by court-martial and in certain administrative proceedings involving military personnel. The interpretation by courts of article 37 of the Uniform Code, which purports to prohibit command influence with respect to trials by court-martial, is not, in my opinion, sufficient to provide the requisite protection against subtle influences affecting the impartiality of the members of a court-martial. For example, a commanding officer can, under some circumstances, give pretrial instructions to court-martial members without violating this article. Furthermore, there is no prohibition at the present time against command influence with respect to administrative proceedings involving military personnel, even though those proceedings can have tremendous impact on the future of a serviceman and may result in a discharge under other than honorable conditions.

The right to counsel is a fundamental right which applies to all Federal district courts and which the Supreme Court in Gideon against Wainwright has fully extended to State courts. Although an accused, in a general court-martial, must be furnished with a qualified lawyer to represent him, he may be convicted in a special court-martial and sentenced to a bad conduct discharge, a discharge under other than honorable conditions, without having the assistance of legally trained counsel. Similarly, an enlisted man may be discharged as undesirable—or under other than honorable conditions—without having qualified counsel to represent him. Because of the effects of such discharges and the stigma which they create, I consider that, except in an emergency situation created by war, any serviceman should have the assistance of a qualified attorney to assist him in connection with a proceeding which may result in a discharge under other than honorable conditions; and the second bill which I am introducing would so provide.

In the Federal district courts a period of 2 years is provided for the submission of a petition for new trial. Under the Uniform Code of Military Justice, an accused has only 1 year to petition for a new trial even if the petition is based on a fraud which has been committed on the court-martial which might involve a deprivation of due process. Moreover, many convictions by court-martial are not subject at all to the remedy of a petition for new trial, even if that petition is based on an alleged deprivation of constitutional rights. The third bill which I am introducing would extend the time period for the submission of a petition for new trial and would expand the scope of this remedy to include any conviction by court-martial.

The subcommittee has received many complaints concerning summary courts-martial, where a single officer acts as judge, jury, prosecuting attorney, and defense counsel. I find it hard to conceive that the criteria of due process are observed in such a court. Furthermore, any need for the summary court was removed when article 15 of the Uniform Code was expanded to allow a commanding officer to impose greater punishment nonjudicially. Therefore, to better protect the constitutional rights of the enlisted man, the fourth bill proposes the abolition of the summary court-martial.

The Subcommittee on Constitutional Rights has received complaints that a member of the Armed Forces, who was alleged to have been guilty of misconduct, was separated administratively under other than honorable conditions by reason of this misconduct, even though he had requested trial by court-martial. The Uniform Code of Military Justice provides recognition and protection of many of the constitutional rights of military personnel; and yet this protection is circumvented by the procedure that I have described.

In short, in some cases a member of the Armed Forces has been separated under other than honorable conditions and thereby stigmatized without receiving safeguards which both the Constitution and the Congress intended for him to have. The fifth measure proposed today would prohibit any such procedure, although, of course, it would retain the right of the Armed Forces to discharge under honorable conditions a member of the Armed Forces who could no longer serve effectively.

Although article 44 of the Uniform Code of Military Justice provides considerable protection against double jeopardy, I still perceive substantial omissions in its coverage. For example, there is no express prohibition of the administrative discharge of a serviceman under other than honorable conditions for the same alleged misconduct for which he has already been tried and acquitted by court-martial. The sixth bill would be designed to further implement the constitutional right of military personnel to protection against double jeopardy.

The seventh bill recognizes that in some instances cumbersome procedures militate against a fair trial. In this connection, I found that a major impediment to the fair and speedy trial by general court-martial is the absence of any procedure for a pretrial conference between the law officer—who serves as the judge in a general court-martial—and the trial and defense counsel. Interlocutory matters such as the admissibility of evidence alleged to have been obtained by unreasonable search and seizure must be decided at the trial after the court-martial members have assembled. Therefore, lengthy continuances may be necessary after the court has been convened in order to dispose of matters which in Federal courts would have been disposed of long before a jury was impaneled. The result often militates against the fairness of the trial, both from the standpoint of the accused and that of the Government. Under the eighth bill substantial improvement would be effected in this regard.

In Federal district courts or in State courts, the criminal trial is presided over by an independent judge who rules on all matters of law. The Uniform Code of Military Justice requires that a law officer preside over general courts-martial. However, there is no provision for a law officer to preside over special courts-martial, even though these courts can impose a sentence which includes a bad conduct discharge. As a result, there have been cases where a special court-martial sentenced a member of the Armed Forces to a bad conduct discharge without the legal guidance that would be required in a civilian trial to insure adequate protection of the constitutional rights of the accused. The stigma of such a discharge, of course, persists throughout the entire life of the person who receives it. The eighth bill which is being introduced would authorize the appointment of a law officer to any special court-martial and require that, except in time of war, a law officer be appointed in order for the special court to have the authority to adjudge a bad conduct discharge. Also, on the analogy of the waiver of trial by jury permitted in the Federal courts, the accused would be allowed to waive trial by the members of the court-martial and be tried before the law officer alone.

Administrative proceedings in the Armed Forces and especially the proceedings of boards of officers appointed to make findings and recommendations concerning discharge of military personnel, can have very serious consequences for members of the Armed Forces. In light of those consequences, it is not surprising that these administrative board proceedings raise important questions involving constitutional rights of military personnel. Although the Federal courts, since the Supreme Court's decision in Harmon against Brucker, have increased the scope of judicial review of administrative action taken by military authorities, the procedure for obtaining such review is often cumbersome.

Moreover, the Federal courts generally do not have occasion for extensive contact with problems of military law. On the other hand, the Court of Military Appeals is a specialized court, well-acquainted with military law and with the constitutional rights of military personnel. The ninth bill would establish a procedure for appellate review by the Court of Military Appeals with respect to certain administrative actions taken by the Armed Forces.

I have already mentioned the necessity for providing legal guidance for the accused from a trained lawyer as a prerequisite in cases which would result in his receiving a bad conduct discharge by a special court-martial. A similar need

exists with respect to administrative board proceedings that can result in an undesirable discharge, also a discharge under other than honorable conditions. Accordingly, the 10th measure would require that, except in time of war, a board hearing be held prior to an administrative separation under other than honorable conditions and that such a board have a legal adviser with the same qualifications and functions of those possessed by the law officer of a general court-martial under the Uniform Code of Military Justice. In this way, I feel sure that the guarantee of due process will be much better implemented for military personnel being proposed for undesirable discharges.

At the hearings of the Subcommittee on Constitutional Rights it was pointed out that there is no authority for compelling witnesses to appear before military boards concerned with administrative discharges or before an officer who is conducting a pretrial investigation under the provisions of article 32 of the Uniform Code of Military Justice. As a result, vital constitutional rights of confrontation and compulsory process are affected; and it is quite possible that in many cases the boards and investigating officers do not reach the same conclusions that they would reach if they were able to obtain the personal testimony of witnesses, instead of relying on written statements. The 11th bill would authorize administrative discharge boards, discharge review boards, and correction boards, and investigating officers appointed under article 32 of the Uniform Code to compel the attendance of witnesses and the production of evidence where, in their discretion, this seems desirable.

During the hearings of the subcommittee we were informed that in Army and Air Force boards of review, the chairman of the board rated the efficiency of the members of the board and that these ratings helped determine future promotions and assignments of these members. Naturally, this practice does not promote the independence of the board members in cases where they disagree with the chairman. Shortly after the hearings, the Army discontinued this practice; but the Air Force has apparently retained its rating system. Because any such rating system threatens the fairness of the appellate review of courts-martial, including the review of issues involving constitutional rights, it should be prohibited. The 12th bill contains such a prohibition.

Article 3(a) of the Uniform Code of Military Justice purports to authorize trial by court-martial of former members of the Armed Forces who, while in a military status, committed serious crimes for which they cannot be tried by any State or Federal court. In Toth against Quarles the Supreme Court held that this provision was unconstitutional and that court-martial jurisdiction cannot be extended to former members of the Armed Forces. The 13th of these bills would comply with the constitutional requirements set out by the Supreme Court and at the same time would fill a jurisdictional gap by authorizing trial in Federal district courts of serious violations of the Uniform Code which otherwise would not be subject to trial in any American tribunal.

Article 2 of the Uniform Code purports to subject to military jurisdiction civilian dependents and employees accompanying the Armed Forces overseas; but the Supreme Court has held this provision unconstitutional. To fill the jurisdictional gap created by the Supreme Court decisions, it has even been proposed that civilian dependents and employees overseas be given a quasi-military status and be organized into a Support Corps. I doubt the constitutionality of such a proposal and I am even less convinced of its desirability. The appropriate method for handling the problem seems to be the one contained in the 14th bill, which would authorize the trial in Federal district courts of persons who commit serious offenses while accompanying the Armed Forces outside of the United States. I realize that there may be differences of viewpoint as to whether the jurisdiction of American courts should be limited only to persons in a special relation to the military or should instead be extended to include other categories; as to what should be the statute of limitations and the authorized punishments; and as to which categories of offenses should be punishable. I believe, however, that the proposal dealing with the trial of certain persons accompanying the Armed Forces outside of the United States will provide the starting point for the solution of the problem.

The value of the constitutional right to counsel depends greatly on the ability and independence of the attorney who is defending the accused. It is my belief that both the independence and the ability of lawyers in the Navy might be enhanced by the creation of a Navy Judge Advocate General's Corps, like that of the Army, the 15th bill would establish this corps.

Congress has established boards for the correction of military records and these boards often provide a remedy for servicemen who have been deprived of their constitutional rights by reason of actions taken by military authorities. I feel, however, that 10 United States Code, section 1552, which establishes these boards, should be modified in order to provide a more effective and independent forum to review applications for correction of military records. The 16th bill I have introduced is designed to achieve that objective.

Among the most significant developments in military law is the field judiciary system. It was developed by the Army and later was adopted by the Navy. The members of the field judiciary preside as law officers of general courts-martial and apparently have implemented effectively the right of accused military personnel to be tried by court-martial in accordance with the concepts of due process. During the subcommittee's hearings, with the exception of the representatives of the one service which has not adopted a field judiciary system, the witnesses, who discussed the system, praised it. In light of the proven virtues of this system for insuring due process, I am proposing the statutory recognition and adoption of the field judiciary system. The 17th measure implements this proposal.

Under article 66 of the Uniform Code of Military Justice, boards of review examine the records of trial by court-martial in serious cases. In addition to reviewing the legality of the conviction, these boards have a power, which the Court of Military Appeals does not have, to weigh the evidence and to evaluate the sentence imposed. In many instances, claims of deprivation of constitutional rights must stand or fall on the basis of factual determinations made by these boards. I am convinced that the role of these boards in protecting the constitutional rights of servicemen and in insuring a fair and impartial appellate review of court-martial convictions can be better fulfilled by some changes in the structure and designation of the boards. The last of the 18 bills is designed to accomplish certain changes to improve the boards of review.

Each of the bills is the outgrowth of extensive study and detailed research. Each of them benefits from the testimony received during the hearings conducted in February and March, 1962, by the Subcommittee on Constitutional Rights, from an intensive 17-day field investigation and from the comments and suggestions of hundreds of former judge advocates who have written to the subcommittee. Each of them is designed to better insure the constitutional rights of members and former members of the Armed Forces and of persons accompanying the Armed Forces overseas. No objective could be more important at the present time than to protect the constitutional rights of the men and women in uniform who stand ready to protect the Constitution of the United States.

SUMMARY OF BILLS

S. 745

S. 745 would change the title of the law officer of a general court-martial to "military judge" and authorize the appointment of civilians as military judges. It also would require each armed force to establish a so-called field, or trial, judiciary system by providing that a military judge would be "assigned and directly responsible to the Judge Advocate General of the armed force of which he is a member" and generally perform only duties of a judicial nature.

Reason the bill is proposed.—The field judiciary program used first by the Army and more recently by the Navy has received widespread approval. This system is considered to have reduced errors at trials and to have assured that the accused serviceman received due process. The law officers appointed under the field judiciary program apparently have been immune from command influence because the law officer is not assigned to the staff of a field command, but comes under the supervision of the office of the Judge Advocate General of his armed force.

Departmental views.—The Department of Defense has no objections to changing the title of law officers to "military judges," but the department objects to the part of the bill that would establish by law the field judiciary system. The Army and the Navy now operate such a system, but the Air Force does not. The department argues that each armed force should be permitted to determine on the basis of its needs the best method of discharging its responsibilities in administering military justice. It also argues that although the system now used by the Army and the Navy is successful at present, it should not be required by law.

S. 746

S. 746 would establish a Judge Advocate Generals Corps in the Navy.

Reason the bill is proposed.—Under the Navy's existing system officers performing law specialist duties are in a restricted line, special duty category to which persons with legal training are appointed. Such officers often must be both line officers as well as legal officers. This bill is intended to enhance the independence of lawyers in the Navy and to attract lawyers of greater ability.

Departmental views.—The Department of Defense favors the objective of this bill and suggests enactment of its legislative proposal on the subject instead of S. 746.

S. 747

S. 747 would consolidate three separate boards for correction of military records into a single board composed entirely of full-time civilians. The board would have authority to correct any military record, including the authority to correct the findings and sentence of courts-martial not reviewed by a board of review. The board would have power to make a binding determination that records should be corrected.

Reason the bill is proposed.—The correction boards today do not usually have full-time members and members of the boards may be compelled to subordinate their duties on the board to other pressing responsibilities. Moreover, there is the possibility that separate boards will apply statutes differently, with a resulting lack of uniformity.

Departmental views.—The Department of Defense is opposed to the bill because of its views that:

(1) although there is a degree of statutory uniformity among the services, there are significant differences in policies and regulations governing personnel administration;

(2) correction boards are not appellate bodies, but are administrative devices to correct errors that result largely from misinterpretation or inaccurate implementation of directives, rather than statutes. Many of the cases involve a variety of administrative actions peculiar to an administrative service and do not pertain to discharge; and

(3) establishment of a single bill would deprive the secretary of a military department of his only means for correcting administrative errors affecting persons under his jurisdiction.

The single board would also depart from the concept that the secretary of a military department should be responsible for detailed administrative procedures within his area of responsibility.

The department also points out that while it favors authority to modify, set aside, or expunge the findings or sentences, or both, of a board of review, such decisions are essentially the exercise of a judicial function and that power to make such decisions should be given to the Judge Advocates General, instead of to an administrative board operating outside the established system of military justice.

In his report on this bill the Comptroller General recommends several amendments if this bill is to be favorably considered.

S. 748

S. 748 would establish within each military deaprtment a Court of Military Review to replace the present boards of review. Each Court of Military Review would consist of as many three-judge panels as the secretary concerned considers necessary. Judges of the court could be either military officers or civilians, but only a civilian judge could be designated as chief judge and at least one judge of each three-judge panel must be a civilian who is not a retired member of an armed force. Civilian judges would serve during good behavior and could be removed only for physical or mental disability or for other cause after notice and hearings.

Reason the bill is proposed.—The present boards review records of trial by court-martial in every case where the sentence as approved affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad conduct discharge, or confinement of one year or more. Unlike the Court of Military Appeals, which can act only on findings and sentences that are incorrect in law, the boards of review review issues of fact and such subjects as whether sentences are appropriate.

Navy boards of review now have as members both officers and civilians. The Army and Air Force boards use only military officers. The practice of the Navy in having civilian members is thought to provide more continuity and perhaps to facilitate an understanding and application by the board of legal principles enunciated by the all-civilian Court of Military Appeals. The change in terminology of the boards to "Courts of Review" is intended to enhance the stature of the boards and to emphasize their judicial role as guardians of the rights of military personnel.

Departmental views.—The Department of Defense opposes this bill because of its view that the bill would have an erosive effect on the prestige of military lawyers, as military lawyers could not qualify to preside over a Court of Review. The department assumes that civilian judges on the court would receive higher pay than their military counterparts and that this would create a morale problem for the military judges. The department objects to fixing the tenure of military officers on the court so that they could not be reassigned until the expiration of their terms no matter what circumstances might argue for their reassignment elsewhere. The department also points out that when the number of boards has to be reduced following an increase because of war or national emergency all personnel cuts would have to be made at the expense of the military judges, since civilian judges could be removed only for physical or mental disability or cause. The bill also eliminates authority the President now has to establish branch offices of a judge advocate general, including one or more boards of review, in distant commands.

A technical difficulty commented on by the Treasury Department is that the bill would abolish the board of review now operating in the Coast Guard without providing authority for a replacement.

Another comment of the Treasury is that it opposes vesting in Courts of Military Review the power to suspend all or any part of a sentence in any case referred to it. It comments that the desirability of suspending a disciplinary discharge depends in large part on the likelihood of rehabilitation of the accused and that this can be judged only from matters not set out in the record, to which the boards are limited in their review. In short, the department indicates that suspending a disciplinary discharge is more an executive function than a judicial one.

S. 749

S. 749 would broaden the prohibitions against command influence in court-martial cases by (1) extending the prohibitions to certain administrative boards; (2) extending the prohibitions to members of staffs of convening authorities and commanding officers; and (3) prohibiting evaluation of performance as a member of a court-martial in preparing effectiveness or fitness reports.

Reason the bill is proposed.—The bill is intended to provide protection against subtle influence affecting the impartiality of the members of a court-martial or persons involved in administrative proceedings.

Convening authorities and commanding officers are now prohibited from censuring or reprimanding court-martial members, but there is no similar prohibition on the members of the staffs of convening authorities and commanding officers.

Pre-trial instructions to court members have been permitted in a decision of the Court of Military Appeals.

There is no prohibition of command influence upon discharge boards or other administrative boards that deal with rights of service personnel affecting their "liberty" and "property."

Departmental views.—The Department of Defense and the Department of the Treasury question the advisability of enlarging the Uniform Code of Military Justice to include provisions regarding administrative boards. Their view is that these provisions should be put in a different place in title 10.

The Department of Defense is opposed to the part of the bill that prohibits persons preparing fitness or effectiveness reports from considering a subordinate's performance of duty as a member of a court-martial or board and that prohibits a person preparing such reports from giving a less favorable rating because of the zeal with which a subordinate acted as defense counsel. The department considers that this provision discriminates against those persons who serve full time as defense counsel or as members of a court martial or board, since these persons would have no basis on which to be rated.

The proscriptions against command influence would apply to boards relating to (1) administrative discharge or separation, (2) the type of discharge to be issued, (3) the demotion or reduction in grade of any member, and (4) any matter affecting the status or rights of any member. The department suggests that the proscriptions should be limited to those boards empowered to recommend administrative discharges under conditions other than honorable. The fourth subject above is said to be so broad that it could include promotional selection boards, boards passing upon types of duty assignments, and boards assigned to make studies concerning broad personnel problems.

Subject to these comments, minor exclusions, and sharpening of certain definitions, the department is not opposed to this bill.

S. 750

S. 750 would (1) provide that bad conduct discharge could not be adjudged except in time of war unless the accused was represented or afforded the opportunity to be represented at the trial by a defense counsel who is a qualified lawyer, and (2) provide that no member of the armed forces could be administratively discharged or separated from service under conditions other than honorable unless the member had had the opportunity to appear and present

evidence in his own behalf and had the opportunity to be represented by a defense counsel who is a qualified lawyer.

Reason the bill is proposed.—Although the accused in a general court-martial must be furnished with a qualified lawyer to represent him, the accused in a special court-martial may be sentenced to a bad conduct discharge or a discharge under other than honorable conditions without having the assistance of a counsel who is a lawyer. An enlisted member may be administratively discharged as undesirable or under other than honorable conditions without being represented by a defense counsel who is a qualified lawyer.

In a special court-martial a "defense counsel" must be appointed for the accused, but there is no requirement that this counsel must be a graduate of an accredited law school, or a member of a bar, or certified as competent by his judge advocate general.

Evidence or information favorable to the accused may not be placed in the record by a counsel who because of his lack of legal training does not recognize what evidence would probably benefit the accused. Each service has procedures for administrative discharges, which may be honorable, general, or undesirable. The serviceman being considered for undesirable discharge usually is provided an opportunity for a hearing before a board of officers. While he may be represented by counsel, there is no statutory requirement that the counsel be legally trained or experienced.

Departmental views.—The Department of Defense favors the prohibition against appointing non-lawyers as defense counsel before special courts-martial in time of peace.

The Department also favors the requirement that a person appearing before a board that can recommend an administrative discharge under conditions other than honorable be afforded an opportunity to appear and present evidence in his own behalf and to have the right, unless waived by him, to be represented by civilian counsel of his choice, or by military counsel who is a qualified lawyer. The department recommends, however, that these provisions be inserted in title 10 at a place other than in the sections dealing with military justice.

S. 751

S. 751 would provide that any time within two years after approval by the convening authority of any court-martial sentence an accused may petition the judge advocate general for a new trial on the ground of newly discovered evidence or fraud on the court. The law now permits an accused to petition for a new trial only if the sentence includes death, dismissal, a dishonorable or bad conduct discharge, or confinement for one year or more. The petition must now be filed within one year after approval of the sentence by the convening authority.

Reason bill is proposed.—Under existing law if a person has been convicted in a court-martial where he has been deprived of due process, he has no remedy unless the sentence involves a dishonorable or bad conduct discharge, or confinement for one year or more. Even if the sentence is sufficiently severe to authorize a petition for a new trial, the petition must be filed within one year. In contrast, the Federal rules of criminal procedure authorize a petition for a new trial because of newly discovered evidence at any time within two years from judgment.

Departmental views.—The Department of Defense and the Department of the Treasury have no objection to extending the time within which a petition for a new trial may be submitted. The Department of Defense submitted a substitute draft bill eliminating the retroactive effect of S. 751.

S. 752

S. 752 would (1) permit the assignment of a law officer to a special court-martial and (2) prevent a special court-martial from adjudging a bad conduct discharge unless a law officer was assigned and a verbatim record of the trial was kept, and (3) permit an accused to be tried by the law officer alone of either a special or a general court-martial if the accused, after notice, waives his right to trial by the members of the court.

Reason the bill is proposed.—There is no provision for a law officer to preside over special courts-martial, even though these courts can impose a sentence that includes a bad conduct discharge. The stigma of a bad conduct discharge is such that it seems appropriate to require that a law officer be provided for a special court-martial proceeding if the court-martial is to have the authority to adjudge such a discharge.

Since waiver of jury is well recognized in the Federal district courts and has been held constitutional, it seems desirable to extend this practice to military trials. Under the bill an accused, after having been provided with defense counsel qualified in the law, could consent to trial by a single officer court.

Departmental views.—The Department of Defense and the Department of the Treasury favor the objective of the bill. The Department of Defense recommends enactment of a draft bill proposed as a substitute for several of the bills pending before the subcommittee. This draft bill represents the recommendations of the Judge Advocates General of the armed forces, the General Counsel of the Treasury, and the Court of Military Appeals. It is too long to summarize at this point.

S. 753

S. 753 would authorize the Court of Military Appeals to review legal issues that arise in connection with proceedings before boards for the correction of military records or boards for the review of discharges and dismissals.

Reason bill is proposed.—The jurisdiction of the Court of Military Appeals now extends only to cases tried by court-martial. The sponsors of the bill consider that this court is qualified to review legal issues that arise in connection with administrative discharges or other administrative proceedings affecting the rights or status of members of the armed forces. The intended review by the court would be solely on maters of law and would not embrace review of factual issues.

Departmental views.—The Department of Defense and the Department of the Treasury oppose S. 753. The views of these departments are that (1) there is not sufficient evidence to show that present administrative remedies are inadequate; (2) boards for the correction of military records consider very few cases involving strictly legal issues, their deliberations relate to the interpretation of service regulations, policies, and procedures, and their decisions are based on general principles of fairness and equity, rather than law; (3) the bill attempts to merge the purely administrative functions of a secretary with the military justice functions of the judge advocate general; (4) the number of cases eligible for appeal is so large that a backlog of cases could result in confusion and chaos; (5) if the Court of Military Appeals is empowered to direct certain administrative actions, such as the reinstatement of an officer, serious constitutional questions would be raised; (6) the requirement for legally qualified officers being assigned to serve as counsel for respondents and the government in cases before the Court of Military Appeals would impose an unacceptable demand on military manpower resources; and (7) parts of the bill relating to the review of administrative actions should not be drafted as an amendment to the Uniform Code of Military Justice.

S. 754

S. 754 would provide that no member of the armed forces could be discharged in time of peace under conditions other than honorable unless he had first been given a hearing before a board that recommended such discharge. The board convened for this purpose would have assigned to it a non-voting legal officer and the person appearing before the board must be provided qualified legal counsel or to have civilian counsel of his choice. The respondent could waive the hearing required by the bill after consultation with his counsel.

Reason the bill is proposed.—The sponsors of the bill consider that a need exists for providing legal guidance by a trained lawyer for the accused as a prerequisite to administrative board proceedings that can result in an undesirable discharge or a discharge under other than honorable conditions.

Departmental views.—The Department of Defense is opposed to S. 754 because of its view that current procedures already provide the protection the bill intends. The departmental report indicates that regulations require board proceedings in cases of discharge under other than honorable conditions, except where waived by the respondent, that counsel is provided, and that, when reasonably available, a lawyer is assigned as counsel.

S. 750 has provisions on the right to counsel that are similar to those contained in this bill.

S. 755

S. 755 would prohibit a member of a board of review from preparing efficiency reports on the other members of the board.

Reason the bill is proposed.—In hearings before the Subcommittee on Constitutional Rights, testimony disclosed that the chairmen of the Army and Air Force boards of review prepared the efficiency or fitness reports on the junior members of the board. These reports helped determine future promotions and assignments. Some witnesses indicated this practice tends to inhibit the junior members in making an independent and impartial evaluation of the cases on which they are acting.

Departmental views.—The Department of Defense is opposed to the bill because of its view that the bill represents a legislative incursion into an essentially administrative management function.

S. 756

S. 756 would prohibit an administrative discharge under other than honorable conditions for conduct of which an accused has been acquitted in a trial by court-martial. The bill also would prohibit an administrative board, when it is considering whether a person should be reduced in grade, or discharged, or separated from military service under conditions other than honorable, from making findings or recommendations less favorable to that person than a previous board that considered substantially the same evidence.

Reason the bill is proposed.—Article 44 of the Uniform Code of Military Justice provides protection against double jeopardy, but there is no express prohibition of the administrative discharge of a member under other than honorable conditions for the same alleged misconduct for which he has already been tried and acquitted by court-martial. The sponsors of the bill consider that the armed forces should not be free to harass a member by repeated trials or hearings of the same issue and that such repeated hearings do not conform to concepts of due process or the spirit of the double jeopardy prohibitions.

Departmental views.—The Department of Defense supports the principle of the bill and comments that the proposed safeguards are already substantially contained in current regulations and policies. The departmental report suggests clarifying amendments if the bill is to be favorably considered.

S. 757

S. 757 would authorize the law officer of a general court-martial to conduct a pretrial conference with counsel for both sides, the accused, and a reporter present. The law officer would have authority to entertain and make final disposition of any motion or interlocutory question of which he has authority to make final disposition during trial. The pretrial conference would be used also to simplify the issues, receive stipulations, and consider other matters that would aid in fair and speedy disposition of the case.

Reason the bill is proposed.—The absence of any express authority for a pretrial conference means that any motions or objections to the introduction of evidence must be made during the trial itself. At that time the law officer must excuse the members of the court and conduct an out-of-court hearing on the motion or objection. This procedure is costly to the government in terms of manpower, since the court members usually must remain immediately available while the out-of-court hearing is being held.

Departmental views.—Both the Department of Defense and the Department of the Treasury favor the objective of this bill. These departments suggest, however, that a substitute bill recommended by the Court of Military Appeals, the Judge Advocates General of the armed forces and the General Counsel of the Department of the Treasury be enacted.

S. 758

S. 758 would give members of the armed forces the right to demand trial by general or special court-martial in any case where it is proposed to discharge a member administratively under conditions other than honorable, if the grounds of the proposed discharge would constitute a violation of the punitive articles of the Uniform Code.

Reason bill is proposed.—All the armed forces have procedures for administrative separation of members. In some instances such separations are based on alleged misconduct and can result in an undesirable discharge. Such administrative discharge proceedings are not subject to the same statutory safeguards that apply to courts-martial.

Departmental views.—Both the Department of Defense and the Department of the Treasury oppose enactment of this bill.

The Department of Defense report indicates that undesirable discharges are used to separate members whose misconduct is so gross they have clearly demonstrated their ineligibility for retention and whose records do not warrant an honorable or general discharge. Persons included are those whose records show frequent involvement of a discreditable nature with civilian authorities or military authorities, or both, deserters whose trials are barred by the statute of limitations, and fraudulent enlistees. The department indicates that uniform regulations governing administrative discharges require that the person concerned has the right to (1) have his case heard by a board of not less than three officers; (2) appear in person before such a board; (3) be represented by a counsel who, if reasonably available, should be a lawyer; and (4) to submit statements in his own behalf.

The Treasury Department report argues its belief that there are valid reasons for separating persons in some cases by administrative action rather than by court-martial even where the separation is for conduct constituting an offense triable by court-martial. The department's principal use of the undesirable discharge is for homosexual cases. The report points out that these cases are difficult to handle by court-martial even though the member concerned has confessed. In a court-martial a person who pleads not guilty cannot be convicted on the basis of an uncorroborated confession. Proof is difficult because the offense takes place in private with no witnesses other than the participants and the participants can, and usually do, avail themselves of the privilege of refusing to testify. The department suggests that other legislation requiring that a member be given the opportunity to consult with counsel who is a qualified lawyer before waiving his rights to counsel or to a hearing would correct any abuses under the present system.

S. 759

S. 759 would abolish summary courts-martial.

Reason bill is proposed.—Public Law 87-648 greatly expanded a commanding officer's authority to impose nonjudicial punishment. For a commanding officer in the grade of major, or equivalent, and above, the punishment that can be imposed is practically coextensive with that a summary court-martial can adjudge. Because of complaints of abuses by single officer summary courts-martial, the sponsors believe this type of court can be dispensed with.

Departmental views.—Both the Department of Defense and the Department of the Treasury favor retaining the summary court-martial, at least for the present.

The Department of Defense considers that elimination of this court may be justified in the future, but that the authority expanding the nonjudicial punishment a commanding officer can give has been in effect too short a period to justify repealing the authority for summary courts-martial. Since a member can refuse nonjudicial punishment and elect trial by court-martial, repeal

of the authority for summary courts-martial would mean an accused would have to be tried by a special court-martial or a general court-martial. The composition and formality governing these two types is often disproportionate to the offense.

The Department of the Treasury suggests that if the authority for summary court-martial is to be repealed, the privilege of a member to demand trial by court-martial in lieu of nonjudicial punishment should also be repealed. As an alternative the department suggests that the summary court-martial might be retained with modifications.

S. 760

S. 760 would authorize administrative discharge boards, discharge review boards, boards for the correction of military records, and officers conducting pretrial court-martial investigations to issue subpoenas and compel the production of other evidence.

Reason the bill is proposed.—The sponsors believe that vital constitutional rights of confrontation and compulsory process are affected because there is no authority for compelling witnesses to appear before military boards concerned with administrative discharges or an officer conducting a pretrial investigation.

Departmental views.—The Department of Defense and the Department of the Treasury are not opposed to the bill, but neither department believes experience has demonstrated a need for the proposed changes.

The Department of Defense comments that there has been no authoritative court decision on whether the 6th Amendment rights of confrontation and compulsory process apply to court-martial proceedings, and thus it is inaccurate to refer to these rights as being constitutional. Other comments of the department are that—

(1) A pretrial investigation is not a trial and does not establish guilt or innocence, but is analagous to grand jury proceedings where affected persons have no subpoena rights. Granting an accused military person the right to subpoena witnesses to pretrial investigations would give the military person superior rights to those enjoyed by civilians.

(2) The part of the bill relating to administrative boards should not be enacted as an amendment to laws governing military justice.

(3) The exercise of the subpoena power imposes a burdensome obligation on citizens and that without a demonstrable benefit, its use should be reserved for cases where the public interest outweighs other considerations.

89TH CONGRESS
1ST SESSION

S. 745

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To further insure to military personnel certain due process protection by providing for military judges to be detailed to all general courts-martial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 801 (10 (article 1 (10)) of title 10, United States Code, is amended by striking out " 'Law officer' " and inserting in lieu thereof " 'Military judge' ".

(b) Section 806 (c) (article 6 (c)) of such title is amended by striking out "law officer" and inserting in lieu thereof "military judge".

SEC. 2. Section 816 (article 16) of title 10, United

States Code, is amended by striking out in clause (1) "law officer" and inserting in lieu thereof "military judge".

SEC. 3. Section 826 (article 26) of title 10, United States Code, is amended to read as follows:

"§ 826. Art. 26. Military judge of a general court-martial

"(a) The Judge Advocate General of the military department concerned shall detail a military judge to every general court-martial convened within the military department of which the Judge Advocate General is a member.

"(b) A military judge shall be a commissioned officer of the armed forces, or a civilian, who is a member of a Federal court or a member of the highest court of a State and who is certified to be qualified for duty as a military judge of a general court-martial by the Judge Advocate General of the armed force of which such military judge is a member or employee, as the case may be.

"(c) Except in the case of a general court-martial convened by the President or the Secretary of a military department, an officer detailed as military judge of a general court-martial shall not be a member of the same command as the convening authority of such court-martial; and in no case, except in the case of a general court-martial convened by the President or the Secretary of a military department, shall the convening authority of a general court-martial (or any member of the staff of such convening authority) be responsible

for the preparation or review of any report concerning the effectiveness, fitness, or efficiency of any officer detailed as a military judge of a general court-martial convened by such authority.

"(d) Any person certified to serve as military judge shall be assigned and directly responsible to the Judge Advocate General of the armed force of which he is a member or of which he is an employee, as the case may be. A military judge shall perform such duties of a judicial nature other than those relating to his primary duty of military judge of a general court-martial whenever such duties are assigned to him by or with the approval of the appropriate Judge Advocate General. Duties of a nonjudicial nature may not be assigned to a military judge except in time of war, and then only with the approval of the appropriate Judge Advocate General.

"(e) Any military judge of one armed force may be detailed to serve as military judge of a general court-martial of a different armed force with the consent of the Judge Advocate General of the armed force of which such military judge is a member or employee, as the case may be.

"(f) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

"(g) The military judge of a general court-martial may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court."

SEC. 4. Section 866 (article 66) of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(g) No member of a board of review shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial."

SEC. 5. Section 827 (a) (article 27 (a)), 829 (b) (article 29 (b)), 837 (article 37), 839 (article 39), 841 (a) and (b) (article 41 (a) and (b)), 842 (a) (article 42 (a)), 851 (b) and (c) (article 51 (b) and (c)), 854 (a) (article 54 (a)), and 936 (b) (article 136 (b)) of title 10, United States Code, are amended by striking out "law officer" wherever it appears in such sections and inserting in lieu thereof "military judge".

SEC. 6. The amendments made by this Act shall become

effective with respect to general courts-martial convened on or after the first day of the third calendar month following the date of enactment of this Act.

TO IMPLEMENT THE CONSTITUTIONAL RIGHT OF SERVICE PERSONNEL TO RECEIVE DUE PROCESS AND FAIR AND IMPARTIAL TREATMENT IN TRIALS BY GENERAL COURTS-MARTIAL

Background memorandum: At the present time there are three kinds of court-martial—general, special, and summary courts-martial. The general court, which must consist of at least five members, is not subject to the same limitations of its jurisdiction that apply to other courts-martial. (See articles 18–20 of the Uniform Code of Military Justice, 10 U.S.C. 818–820.) Therefore it is used for trial of the more serious offenses, where the sentence and punishment may be quite severe. Because of the consequences of a conviction by general court-martial, Congress required for the first time in the Uniform Code of Military Justice that each general court-martial have a law officer, who must be a qualified attorney and, like a judge, sits apart from the members of the court, rules on interlocutory questions, and instructs the members concerning the law applicable to the cases before them. Unlike a Federal judge, the law officer, under present law, is not authorized to impose sentence; nor may he rule finally on challenges to the court-martial members.

Since the Uniform Code first took effect in 1951, the Court of Military Appeals has tended more and more to equate the status and responsibility of the law officer to that of a judge and has inferred that Congress intended for him to have certain powers—like that of declaring a mistrial—which a trial judge would usually possess. Also, the Army and more recently the Navy have initiated a program—the field judiciary (or trial judiciary) program—designed to enhance the independency, impartiality, and efficiency of their law officers. This field judiciary program, which was described in detail during the course of the hearings held in 1962 by the Subcommittee on Constitutional Rights (see pp. 838–839 of the hearings), has received widespread acclaim and has produced signal results in reducing errors at the trial and in assuring that the accused serviceman received due process. Moreover, the law officers appointed pursuant to the field judiciary program have apparently been especially immune from command influence and so have been better able to assure the fairness and impartiality of the trial.

Because the advantages of the field judiciary program have proved so great, several witnesses at the hearings urged that it be given specific recognition by the Congress and applied to each armed service. In this way the airman could be better assured of receiving the same type of trial by general court-martial that the soldier and sailor have obtained under the field judiciary program. Moreover, until the field judiciary system is required by statute, there will always be the risk that even the Army or Navy might abandon it.

Under the field judiciary program, the performance of duty as law officer is a full-time matter—rather than something to be sandwiched in among a host of nonjudicial duties. Furthermore, the law officer is not assigned to the staff of a field command, where he may be trying a case and may be subject to subtle or overt command influence, but instead falls under the supervision of the Office of the Judge Advocate General of his armed service. Efficiency reports concerning a member of the field judiciary, which will help determine his future promotions and assignments, are prepared by a senior member of the field judiciary, rather than by some commanding officer in the field.

Since the time of the subcommittee's hearings last year, the Army has introduced various refinements of the field judiciary program. However, the basic ingredients of the system remain the same; namely, mature full-time

law officers, who are not subject to any sort of influence by the commander who has convened the general court-martial to which the law officer has been appointed.

If the field judiciary is to be given statutory sanction, the members of the judiciary could properly be redesignated as "military judges" a term which could give a clearer picture of their function. Also, with a view to obtaining the best utilization of personnel and in accord with the premise that justice should be of the same quality in all the services, interservice exchange of the members of the field judiciary should be facilitated, so that an Army law officer could be readily available for an Air Force general court-martial, or vice versa. At the present time, under paragraph 4g(3) of the 1951 Manual for Courts-Martial, such interservice appointments are possible—with the consent of the Secretary of each Department involved; but, probably because of the cumbersomeness of obtaining the consent of both Secretaries, this authority is used quite infrequently. An easier procedure for interservice use of qualified law officers seems desirable.

Although the members of the field judiciary should be full-time military judges, it would not be inconsistent with this concept for them to perform duties of a judicial nature other than in a general court-martial. For instance, there have been proposals to reconstitute the special court-martial with a law officer or to provide a law officer for administrative discharge boards considering proposed discharges under other than honorable conditions. Therefore, it does not seem amiss to provide that, although the primary duty of the military judge shall be to serve on general court-martial, he shall not be disqualified to perform other duties of a judicial nature. Also, because of possible manpower problems during wartime, it seems desirable to provide that the requirement of full-time judicial duty for the military judge shall not apply in time of war; and the Judge Advocate General shall be free to assign to the military judge nonjudicial duties to the extent that this may become necessary.

There is much to be said in favor of requiring a minimum tour of duty for the military judge, so that he could not be reassigned at once to some other type of activity if his decisions proved favorable to the accused. On the other hand, this requirement might introduce excessive rigidity in the system and might preclude the Judge Advocate General from removing from duty as military judge an officer who had not displayed suitable competence and impartiality. On balance, the best solution at this time seems to be to rely on the fairness of the Judge Advocate General not to reassign a military judge to other duty merely because he has ruled frequently in favor of accused persons.

During the hearings no loud voices were heard in favor of having civilian lawyers preside over general court-martial, as is currently done under the British Articles of War. However, no objection is apparent to amending the Uniform Code to enable a civilian attorney to serve as military judge or law officer if the Judge Advocate General chooses to assign him to such duty. Although such an authorization would probably never be used by the Armed Forces, it seems desirable to give them this option.

To implement the foregoing proposals, it seems necessary to:

(a) Amend article 26 of the Uniform Code, 10 U.S.C. 826, to require that every general court-martial have a military judge, who shall have the same qualifications and disqualifications now stated in article 26(a) except that he may be either an officer or a civilian employee. Then, after setting forth the qualifications of the military judge and prohibiting the convening of a general court-martial without such a judge, article 26 should provide that this military judge shall not be a person assigned to the command of the officer who convenes the court-martial, unless the court-martial is convened by the President or the Secertary of the Department (art. 22(a)). Furthermore, this military judge shall be assigned to the office of the Judge Advocate General of his armed service, although he may be attached for administrative or recordkeeping purposes to some other organization or activity. No efficiency or fitness report shall be prepared on the military judge by any convening authority, other than the President or the Secretary of the Department, nor be prepared by any person who is assigned to the staff of any such convening authority. Furthermore, article 26 should provide that, the military judge's primary and full-time duty shall be as judge for general courts-martial, except that this shall not preclude his performance, with the consent of his Judge Advocate General, of other duties of a judicial nature to the extent they do not interfere with his duties

in general courts-martial and except that in time of war the Judge Advocate General may assign him additional duties of a nonjudicial nature.

(b) Enact a new subsection of article 26 which will allow a military judge to serve in a trial by court-martial or other judicial proceeding which involves a member of a different armed force, so long as this is done with the consent of the Judge Advocate General of his own armed force.

(c) In every article of the code which refers to the law officer of a general court-martial, substitute "military judge" (e.g., arts. 16, 26, 27, 29, 39, 41, 42, 51, 54).

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, April 13, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 745, 89th Congress, a bill to further insure to military personnel certain due process protection by providing for military judges to be detailed to all general courts-martial, and for other purposes. The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

S. 745 would change the title of the law officer of a general court-martial to "military judge" and authorize the appointment of civilians as military judges. It would also require each armed force to establish a so-called field, or trial, judiciary system by providing that a military judge would be "assigned and directly responsible to the Judge Advocate General of the armed force of which he is a member" and generally perform only duties of a judicial nature. Section 4 of the bill would amend 10 U.S.C. 866 (art. 66) to provide that no member of a board of review would be eligible to review a record of trial if he had performed other inconsistent duties with respect to the case being reviewed.

Although there appears to be no apparent merit in such changes, the Department of Defense has no objections to those portions of the bill that would change the title of law officer to "military judge" and make corresponding technical changes in other sections of the Uniform Code of Military Justice to reflect this terminology. Further, although it is considered entirely unnecessary, there is no objection to section 4 of the bill, which would specify by statute matters that disqualify a member of a board of review from acting on a case.

However, the Department of Defense objects to those features of the bill that would require by law the establishment and use of a field, or trial, judiciary, and specify by statute details concerning the assignment and duties of the military judge. At present, the Army and the Navy each operates a trial, or field, judiciary system, substantially as contemplated by the bill. Under existing conditions, those systems have been successful and found to meet the needs of those services. The Air Force has not experienced a need for such a system. It has found that by using carefully selected judge advocates as law officers (without placing them in a separate assignment category) professional competence equal to that found in the other armed forces has been maintained; and a reservoir of skilled law officers will be available in time of war or emergency to meet the needs of an expanded armed force. There is no indication that this diversity has resulted in any evils that should be corrected by requiring all Armed Forces to conform to a standard program.

The Department of Defense feels that each armed force should be permitted to determine, on the basis of its needs, the best method of discharging its responsibilities in administering military justice. In any case, although the trial judiciary system now used by the Army and Navy is successful under present conditions, crystallization of the system by statute would not be desirable. For example, experience may show that the program could be improved in a variety of ways not contemplated by the bill. Most important, however, is that the eventualities of a war or emergency might well pose insurmountable problems to the use of such a program under those conditions.

It is suggested, in the memorandum accompanying this bill, that the proposed authority to use civilian employees as law officers would not be used. This department is opposed to the enactment of a useless statute. Assuming that qualified civilians could be found and would be willing to serve under difficult circuit-riding conditions, the fact that their rates of compensation

would in all likelihood exceed that of their military counterparts would raise problems of morale within the Armed Forces.

Proposed 10 U.S.C. 826(e) (art. 26(e)), as contained in section 3 of the bill, provides for interservice use of law officers (military judges). This provision is unnecessary. Paragraph 4.g.(3) of the Manual for Courts-Martial, 1951, promulgated by Executive order, authorizes interservice use of law officers with the concurrence of the Secretary concerned. Secretarial authority under that paragraph may be delegated to the Judge Advocate General, and in fact such a delegation has been made in the Army and Air Force. The procedure contemplated by this section, therefore, can be, and is being, implemented under existing law.

In short, this bill would impose on the Department of Defense a detailed assignment and utilization system for a segment of its professional officers that is neither needed nor desirable.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

(Signed) EUGENE M. ZUCKERT,
Secretary of the Air Force.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, March 23, 1965.

RICHARD B. RUSSELL,
Chairman, Committee on Armed Services, U.S. Senate
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 745, to further insure to military personnel certain due process protection by providing for military judges to be detailed to all general courts-martial, and for other purposes.

The proposed bill would amend the Uniform Code of Military Justice, generally, to change the title of the law officer of a general court-martial to "military judge". Article 26 of the Code, 10 U.S.C. 826, would also be amended to provide for the appointment of civilians as military judges and to require that military judges be assigned and directly responsible to the Judge Advocate General of the armed force of which they are members and that military judges perform only duties of a judicial nature. Additionally, article 66 of the Code, 10 U.S.C. 866, would be amended to prescribe conditions under which a member of a Board of Review would be ineligible to review the record of a trial.

With respect to those provisions of the bill which would change the name of the law officer and which would list the conditions under which a member of a Board of Review would be ineligible to act as such, the Treasury Department would have no objection to their enactment. The title by which the law officer is known and a statutory statement of the practices presently followed in the Coast Guard would have no substantial effect upon the operation of the military justice system.

The Department is concerned, however, that the inflexibility of the proposed system for military judges will substantially affect the organization of the Coast Guard in connection with the administration of the Uniform Code. The Coast Guard, as the smallest of the Armed Forces, has not found it necessary to establish judiciary systems in which personnel are assigned to full-time duty in connection with the conduct of courts-martial. Experience for the past 5 years in the Coast Guard indicates that the maximum number of general courts-martial in a single year for which a law officer was required was six. This small number would not require the assignment of a military judge to full-time judicial duties which the proposed bill would require for each armed force. The Department much prefers the latitude presently allowed by the Uniform Code which permits each armed force to determine a method of administration of the Code suitable to its size and needs.

The present system providing for law officers has not proved ineffective in use. Selection of mature and experienced law specialists as law officers has resulted in a professional standard being maintained in the courts-martial which have been held in spite of the fact that the officers concerned have not been assigned to judicial duties exclusively. The same is true of the qualified counsel employed in courts-martial in the Coast Guard, As a result, it is believed that the highest professional standard in the administration of military justice in the Coast Guard has been maintained.

It is observed that subsections (a) and (c) of article 26, as proposed to be amended, use the term "military department" in referring to the organizations and officials concerned with the appointment of military judges or courts-martial. Subsections (b) and (d) of that Article use the term "armed force" for the same purposes. In 10 U.S.C. 101, the term "military department" is defined to mean Army, Navy, and Air Force. The term does not include the Coast Guard, and its use in the proposed article serves to exclude the Coast Guard from the application of the requirements recited in the subsections in

which the term is used. It would be more appropriate to use the term "armed force" throughout the bill's provisions in order to insure that the Coast Guard is included for all purposes.

Except for its provisions dealing with terminology and ineligibility of members of the Board of Review, the Treasury Department is opposed to the enactment of S. 745.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 746

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To further insure due process in the administration of military justice in the Department of the Navy by establishing a Judge Advocate General's Corps in such Department.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 5148 of title 10, United States Code, is amended by redesignating subsections (a), (b), and (c) as subsections (b), (c), and (d), respectively, and by adding at the beginning of such section a new subsection as follows:

"(a) The Judge Advocate General's Corps is established as a Staff Corps of the Navy, and shall be organized in accordance with regulations promulgated by the Secretary of

the Navy. Members of the Judge Advocate General's Corps in addition to their other duties shall perform the duties of law specialists under the Uniform Code of Military Justice."

(b) The catch line of such section is amended to read as follows: "**Judge Advocate General's Corps: Judge Advocate General; appointment, term, emoluments, duties**".

SEC. 2. Section 5149 of title 10, United States Code, is amended to read as follows:

"**§ 5149. Office of the Judge Advocate General: Deputy Judge Advocate General; Assistant Judge Advocate General**

"(a) An officer of the Judge Advocate General's Corps shall be detailed as Deputy Judge Advocate General of the Navy. While so serving he is entitled to the rank of rear admiral (upper half) unless entitled to a higher rank under another provision of law. The Deputy Judge Advocate General is entitled to the same privileges of retirement as provided for chiefs of bureaus in section 5133 of this title.

"(b) An officer of the Judge Advocate General's Corps shall be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank of rear admiral (lower half), unless entitled to a higher rank under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy, or who, after serving at least six months as Assistant

Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the grade of rear admiral. He is entitled to the retired pay of a rear admiral in the lower half of that grade, if he is retired as a rear admiral.

"(c) When there is a vacancy in the office of Judge Advocate General or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases."

SEC. 3. (a) Chapter 539 of title 10, United States Code, is amended by adding after section 5578 a new section as follows:

"§ 5578a. Regular Navy: Judge Advocate General's Corps

"Original appointments to the active list of the Navy in the Judge Advocate General's Corps may be made from persons who—

"(1) are at least 21 and under 35 years of age; and

"(2) have physical, mental, moral, and professional qualifications satisfactory to the Secretary of the Navy.

For the purposes of determining lineal position, permanent grade, seniority in permanent grade, and eligibility for promotion, an officer appointed in the Judge Advocate General's

Corps shall be credited with the amount of service prescribed by the Secretary of the Navy, but not less than three years."

(b) Such chapter is further amended by inserting in the table of sections at the beginning of such chapter immediately after

"5578. Regular Navy: Dental Corps."

the following:

"5578a. Regular Navy: Judge Advocate General's Corps."

SEC. 4. Section 5587 (c) of title 10, United States Code, is amended by striking "law,".

SEC. 5. (a) Section 5600 (b) of title 10, United States Code, is amended by adding at the end of paragraph (1) a new clause as follows:

"(D) Judge Advocate General's Corps—at least three years;".

(b) Such section is further amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

SEC. 6. (a) Subsection (h) of section 202 of title 37, United States Code, is amended by—

(1) striking out "or" at the end of clause (6);

(2) redesignating clause (7) as clause (8); and

(3) adding immediately after clause (6) a new clause as follows:

"(7) Deputy Judge Advocate General of the Navy; or".

(b) Subsection (i) of such section is amended by striking out clause (3) thereof and by redesignating clauses (4) and (5) as clauses (3) and (4), respectively.

(c) Such section is further amended by adding at the end thereof a new subsection as follows:

"(k) An officer serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral lower half."

SEC. 7. All law specialists in the Navy shall be redesignated as judge advocates in the Judge Advocate General's Corps. All provisions of title 10, United States Code, not inconsistent with this Act, relating to officers of the Medical Corps of the Navy shall apply to officers of the Judge Advocate General's Corps of the Navy.

TO IMPLEMENT THE CONSTITUTIONAL RIGHTS OF NAVAL PERSONNEL TO DUE PROCESS AND ASSISTANCE OF COUNSEL BY ESTABLISHING A JUDGE ADVOCATE GENERAL'S CORPS IN THE NAVY

Background memorandum: The importance and necessity of the assistance of counsel in preparing a defense to criminal charges has long been recognized as basic to Anglo-American law, and was guaranteed to an individual by the sixth amendment to the Constitution ("to have the Assistance of Counsel for his defense.") Constitutionally, this right to counsel is more often seen as part and parcel of the requirement of due process set forth in the fifth amendment. Thus, the denial of the right to counsel is considered a deprivation of of the due process. In a recent opinion by the Supreme Court, this requirement was even further extended to State courts under the 14th amendment.

Although the necessity for legally trained counsel has long been spelled out by decisions as regards civilian courts, the existing provisions of the Uniform Code of Military Justice set forth mandatory requirements for qualified counsel which have had significant effects upon the administration of military (and naval) justice. For example, the code requires the presence of at least three uniformed attorneys at every general court-martial and of at least one

attorney in connection with the review of every court-martial—general, special, or summary. In addition, the code requires that the accused must be represented by an attorney during the pretrial investigation prerequisite to a general court-martial, if he requests such representation, and no deposition will be admissible in evidence in a general court-martial unless the accused was represented by a lawyer.

In light of this increased demand for lawyers for the proper administration of military justice, it is evident that the uniformed legally trained officer must spearhead the protection of the rights of the accused set forth under the code and, more broadly, under the constitutional mandate for "due process." Such protection can only be accomplished where the attorney can be assured of complete independence in the performance of his military duties.

There seemed to be agreement at the hearings of the Subcommittee on Constitutional Rights on the necessity for the creation of a separate Judge Avocate General's Corps in the Navy and that the result would be to enhance the independence of naval counsel, as well as their efficiency (see subcommittee hearings, p. 401).

Under the existing system the Office of the Judge Advocate General of the Navy is a restricted line special duty category to which legally trained individuals are appointed. As such it carries out the functions required under the code in the administration of military justice. Often the legal officer must be both line officer as well as legal officer; in fact, in past years he was used for alternate sea and legal duty to maintain his "line" experience. With the advent of the specialization required by the code, law has become a full-time job for these officers. Often also the paths of regular Navy thought and Navy legal thought appear to be on collision course, and under the existing system substantial pressure can be brought against legal officers to accomplish certain results which other officers consider to be in the best interests of the Navy, irrespective of the legal issues involved and the rights of the accused individual. Perhaps this conflict can best be summed up by the following which appeared in the Military Law Review, April 1959 (p. 111):

"The Judge Advocate General's Corps of the Army bears the heavy responsibility of seeing that the large body of statutes, regulations, and customs governing the military service, both internally and in its relations with the civilian world, is enforced correctly and fairly. It must persuade impetuous officers of the line, impatient of legal restrictions, of the virtues of orderly procedure according to the law."

There seems to be little disagreement that there should be a separate Judge Advocate General's Corps created within the Navy; the only point of issue is how such a step can be brought about and implemented into actual practice.

The attached draft is a revision of H.R. 6889, which was introduced in the House by Representative Vinson during the last Congress, and seems to be quite acceptable to most of the individuals concerned. This effort has received the support of Admiral Mott, Judge Advocate General of the Navy who, as he stated in the subcommittee hearings (p. 401), feels that creation of a separate Judge Advocate General's Corps for the Navy "would be better for the Navy. I think a Judge Advocate General's 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."

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., March 23, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense on S. 746, 89th Congress, a bill to further insure due process in the administration of military justice in the Department of the Navy by establishing a Judge Advocate General's Corps in such department.

S. 746 would accomplish two principal changes in the laws which pertain to the Office of the Judge Advocate General of the Navy and the status of officers who currently are law specialists in the Navy. These changes are:

(1) A Judge Advocate General's Corps would be created as a staff corps of the Navy and all officers now designated as law specialists in the Navy would become judge advocates in that Corps. Original appointments in the Corps would be authorized, in lieu of the present authority to commission officers in the line of the Navy with designation as law specialists.

(2) In lieu of the present authority to detail an officer in the line of the Navy or an officer of the Marine Corps as Assistant Judge Advocate General of the Navy, mandatory requirements would be established for the detail of of officers of the Judge Advocate General Corps to the position of Deputy Judge Advocate General of the Navy and to the position of Assistant Judge Advocate General of the Navy. While serving as Deputy Judge Advocate General an officer so detailed would be entitled to the rank, pay, and allowances of a rear admiral (upper half). While serving as Assistant Judge Advocate General, an officer so detailed would be entitled to the rank, pay, and allowances of a rear admiral (lower half). Under current law, there is no statutory prescription of temporary rank for the Assistant Judge Advocate General of the Navy, and he is entitled only to the highest pay of his rank, whatever it may be.

The substantial effects of both of the principal changes described above are included in the legislative proposal transmitted to the Congress on March 15, 1965, as a part of the Department of Defense legislative program for the 89th Congress, entitled to amend title 10, United States Code, relating to the appointment, promotion, separation, and retirement of members of the Armed Forces, and for other purposes.

It is strongly recommended that the purposes of S. 746 be considered only in the broader context of the legislative proposal referred to above, to insure proper consideration of the whole career implications which are inherent in the changes.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

(Signed) L. NIEDERLEHNER,
Acting General Counsel.

THE GENERAL COUNCIL OF THE TREASURY,
Washington, March 24, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 746, to further insure due process in the administration of military justice in the Department of the Navy by establishing a Judge Advocate General's Corps in such Department.

The proposed bill would establish a Judge Advocate General's Corps in the Department of the Navy. Officers now serving as law specialists in the Navy would be redesignated as judge advocates in that corps. The position of Deputy Judge Advocate General would be created with the grade of rear admiral (upper half). The grade of the Assistant Judge Advocate General would be specified as rear admiral (lower half).

The proposed bill relates only to the internal administration of the Department of the Navy and would have no effect on the Treasury Department. Therefore, we have no recommendation as to its enactment.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 747

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To protect the constitutional rights of military personnel by providing an independent forum to review and correct the military records of members and former members of 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 subsections (a) and (b) of section 1552 of title 10, United States Code, are amended to read as follows:

"(a) (1) There is hereby established in the Department of Defense a board to be known as the 'Board for the Correction of Military Records') hereinafter in this section referred to as the 'Board'). The Board shall be composed of

nine members appointed from civilian life by the Secretary of Defense. No retired member of an armed force of the United States or of the United States Coast Guard shall be eligible for appointment to the Board.

"(2) Each member of the Board shall be appointed for a period of three years, except that (A) 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 (B) the terms of office of the members first appointed to the Board shall expire, as designated by the Secretary of Defense at the time of appointment, three at the end of one year, three at the end of two years, and three at the end of three years. The Secretary of Defense shall designate from time to time one of the members of the Board to serve as Chairman.

"(3) Each member of the Board shall receive the same salary which shall be fixed by the Secretary of Defense. No duties other than those directly concerned with the administration of this section may be assigned to members of the Board if such duties in any manner interfere with or adversely affect the proper administration of this section.

"(4) The Board shall determine the number of members required to constitute a quorum, and shall prescribe its own rules of procedure for the conduct of its affairs. A vacancy in the Board shall not impair the right of the remain-

ing members to exercise the powers of the Board. The Secretary of Defense may remove any member of the Board, after notice and hearing, for neglect of duty or malfeasance in office, or for mental or physical disability, but for no other cause.

"(5) Upon his certificate, each member of the Board is entitled to be paid out of appropriations for such purpose (A) all necessary traveling expenses, and (B) reasonable maintenance expenses, incurred while attending Board meetings or transacting official business outside the District of Columbia.

"(b) It shall be the function of the Board to review the service record of any member or former member of an armed force and to correct such record when it considers such action necessary to correct an error or to remove an injustice. The power of the Board shall include authority to modify, set aside, or expunge the findings or sentence, or both, of a court-martial case not reviewed by a board of review pursuant to section 866 of this title (article 66) when it considers such action necessary to correct an error or to remove an injustice; and in any case in which the Board determines that an error has been committed or an injustice suffered as the result of a court-martial trial which has been reviewed pursuant to section 866 (article 66) it may recommend to the Secretary concerned that the Secre-

tary exercise his power under section 874 or 875 of this title (article 74 or 75). Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

SEC. 2. Section 1552 of title 10, United States Code, is further amended by—

(1) redesignating subsections (c), (d), and (e) as subsections (d), (e), and (f), respectively;

(2) adding after subsection (b), as amended by this section, a new subsection (c) as follows:

"(c) No correction may be made under this section unless the claimant or his heir or legal representative files a request therefor within three years after he discovers the error or injustice. However, the Board may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.";

(3) striking out "department concerned may pay" in subsection (d), as redesignated by this Act, and inserting in lieu thereof "department concerned shall pay";

(4) striking out "who was paid under subsection (c)" in subsection (e), as redesignated by this Act, and inserting in lieu thereof "who was paid under subsection (d)"; and

(5) adding at the end thereof a new subsection as follows:

"(g) (1) The Secretary of the Treasury is authorized to establish in the Treasury Department a board to review and correct military records of members and former members of the United States Coast Guard. Such board, if established, shall be composed of three civilian members, appointed by the Secretary of the Treasury, none of whom shall be members of or retired from the United States Coast Guard or the armed forces. The members of such board, if established, shall be appointed for a term of three years, except that (A) 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 (B) the terms of office of the members first appointed to the board shall expire, as designated by the Secretary of the Treasury at the time of appointment, one at the end of one year, one at the end of two years, and one at the end of three years. The Secretary of the Treasury shall designate from time to time one of the members of the board to serve as chairman. The board shall have the same powers and functions regarding the correction of military records of members and former members of the Coast Guard as the board established under subsection (a) of this section has with

regard to the correction of military records of members and former members of the armed forces.

"(2) In the event the Secretary of the Treasury does not elect within one year after the date of enactment of this paragraph to establish a board pursuant to paragraph (1) hereof, the board established under subsection (a) of this section to correct military records of members and former members of the armed forces shall have authority to review and correct military records of members and former members of the Coast Guard in the same manner and to the same extent as it may review and correct military records of members and former members of the armed forces."

SEC. 3. Any case pending before any board established under section 1552 of title 10, United States Code, on the effective date of this Act shall be transferred for review and disposition to the appropriate board authorized to be established pursuant to the amendments made by this Act.

SEC. 4. The amendments made by this Act shall become effective on the first day of the third calendar month following the month in which this Act is enacted.

TO PROTECT THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL BY ESTABLISHING AN INDEPENDENT AND IMPARTIAL FORUM TO REVIEW POSSIBLE ERRORS OR INJUSTICES AFFECTING THE RECORDS OF SERVICE PERSONNEL

Background memorandum: The Congress has provided for Discharge Review Boards and Boards for the Correction of Military Records (see 10 U.S.C. 1552–1553). The former boards are composed of military personnel and review the type and nature of any discharge or dismissal from the Armed Forces, unless the discharge or dismissal resulted from the sentence of a general

court-martial. The correction boards, which are composed of civilians, have the authority to recommend to the Secretary of their Department that he "correct any military record of that Department * * * to correct an error or to remove an injustice." The correction boards are established by each military Department and by the Secretary of the Treasury; their members are usually performing other duties in addition to the duty as member of the correction board. Although the correction boards can recommend corrective action with respect to the findings and sentence of a court-martial, the effect of such recommendations is unclear in light of the direction in article 76 of the Uniform Code of Military Justice that the proceedings, findings and sentence of courts-martial, after undergoing the appellate review prescribed by the code, "shall be final and conclusive." Of course, for summary court-martial cases or special court-martial cases that have not resulted in a punitive discharge, the appellate review of the case is somewhat limited; and under the present wording of article 73 a petition for a new trial cannot be submitted. Absent the possibility of relief from the correction board, the serviceman has little chance to rectify an injustice at the hands of the court-martial even though his constitutional rights may have been violated.

Since the correction boards today do not usually have full-time members, the members of the board may be compelled to subordinate their duties on the board to other pressing matters. Furthermore, even though many of the statutes and directives applicable to requests for correction of records may apply to all the Armed Forces, there is always the possibility that the different correction boards will vary quite markedly in their application of those statutes—with a resulting lack of uniformity. Accordingly, it seems desirable to have a single correction board for the military departments with the members of this board to have no other duties. The Secretary of the Treasury should have the authority to establish his own correction board for Coast Guard cases or to have applications for correction of records considered by the Defense Department board. The unified correction board, which, for administrative purposes should be located in the Office of the Secretary of Defense, should have the authority either to make binding determinations that records should be corrected to correct an error or injustice or to recommend action to the Secretary of the appropriate military department. With respect to cases that have not received the full appellate review by a board of review authorized under article 66 of the Uniform Code, the correction boards should have full authority to modify, set aside, or expunge either the findings or the sentence of the court-martial; and article 76 of the code should be amended to this effect. Even with respect to cases that have been reviewed under article 66, there seems nothing amiss in giving the boards authority to recommend to the Secretary of the appropriate military department that he take action under articles 74 and 75.

To implement this proposal it seems desirable to:

(a) Amend 10 U.S.C. 1552 to provide that the Secretary of Defense shall appoint a board of civilians which may order the correction of any military or naval record when the board deems this necessary to correct an error or remove an injustice.

(b) Require in 10 U.S.C. 1552 that the members of the correction board devote substantially all of their working time to their duties as board members.

(c) Modify article 76 of the Code (10 U.S.C. 876) and 10 U.S.C. 1552 to authorize the correction board to modify, expunge, and set aside for any purpose a court-martial conviction that has not been reviewed by a board of review under article 66 of the Uniform Code; and to authorize the correction board, even in cases which have been reviewed under article 66, to make recommendations to the Secretary of the appropriate military department, which recommendations shall however be purely advisory, concerning the exercise of his discretion under articles 74 and 75 of the Uniform Code.

(d) Authorize the Secretary of the Treasury either to establish his own correction board, which need not be composed of employees who have no other duty, or to submit applications for relief received by him to the Defense Department Correction Board under regulations to be promulgated jointly by him and the Secretary of Defense; but the correction board which considers Coast Guard cases shall have the same authority in these cases as the Defense Department Correction Board has in cases concerning requests for correction of military records.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, April 13, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 747, 89th Congress, a bill to protect the constitutional rights of military personnel by providing an independent forum to review and correct the military records of members and former members of the Armed Forces, and for other purposes. The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

In general, this bill would create a single civilian Board for the Correction of Military Records within the Department of Defense. The Board would have authority to correct any military record, including authority to correct the findings and sentence of a court-martial not reviewed by a board of review. A similar board would be authorized for the Department of the Treasury to correct the records of members, and former members, of the Coast Guard.

To the extent that the bill would affect the Department of the Treasury, the Department of Defense defers to the views of that agency. However, to the extent that the bill would affect the Department of Defense, it is opposed to its enactment for the following reasons:

(*a*) The concept of a single board for the correction of military records appears to be predicated on the assumption that statutes, policies, and regulations governing personnel are uniform in nature. There is a degree of statutory uniformity among the services, but there are marked divergencies in the policies and the regulations in the area of personnel administration. Consequently, the present boards are concerned primarily with justice and equity in individual cases arising in a particular service.

(*b*) The boards established pursuant to 10 U.S.C. 1552 are not appellate bodies. The primary purpose of the boards is to provide an administrative method for the correction of errors in individual records, most of which are the result of misinterpretation or faulty implementation of specific departmental directives as opposed to statutes. A large number of the cases considered do not pertain to discharge or other adverse actions. Many cases involve a variety of administrative actions which are peculiar to an individual service and which will remain so under any foreseeable changes. Members of the present boards are individuals who are engaged actively, and experienced, in the administrative procedures of the service involved. In the light of these facts, it would appear probable that establishment of a single board would necessitate the appointment of panels composed of civilians with expert knowledge of the policies and directives of a particular department. The net result would be that each panel would operate in much the same way as the board established under the present statute.

(*c*) Establishment of a single board would deprive the Secretary of a military department of his only means of redressing administrative errors affecting individuals under his jurisdiction. A single board also would place an additional administrative function on the Secretary of Defense contrary to the concept that the Secretary of a military department should be responsible for the detailed administrative procedures pertaining to his area of responsibility.

It is noted that the board that would be established under this bill would be authorized to modify, set aside, or expunge the findings or sentence, or both, of a court-martial not reviewed by a board of review, and to recommend that the Secretary exercise his authority under 10 U.S.C. 874 or 875 (art. 74 or 75) in cases "reviewed pursuant to section 866 (art. 66)". With respect to actions on cases not reviewed by a board of review, which have become final,

additional statutory authority would be desirable. However, the determination of whether a conviction should be set aside or modified for legal reasons is essentially the exercise of a judicial function. It is therefore believed that the authority to make such a determination should be given to the Judge Advocate General, rather than to an administrative board operating apart from the established system of military justice. In its report on S. 751, the Department of Defense submitted a substitute draft bill and sectional analysis for consideration by your committee. The substitute bill proposes to amend 10 U.S.C. 869 (art. 69) to authorize the Judge Advocate General, on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused, to vacate or modify the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a board of review.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

(Signed) EUGENE M. ZUCKERT.

61-764 O—66—pt. 2——4

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., March 24, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 747, to protect the constitutional rights of military personnel by providing an independent forum to review and correct the military records of members and former members of the Armed Forces, and for other purposes.

The bill would amend section 1552 of title 10, United States Code, to create a single board for the correction of military records within the Department of Defense which would be composed entirely of civilians. A similar board would be established in the Treasury Department for the Coast Guard. These boards would have authority to correct any military record in order to correct an error or remove an injustice. In addition, authority would exist to correct the findings and sentence of any court-martial not reviewed by a Board of Review.

Under the proposed bill, no member of a board could be a member of or retired from an armed force. As the term "armed force" is defined in title 10, United States Code, it is possible that this provision would exclude from boards those persons who have maintained a reserve component affiliation while pursuing a civilian career or who have retired from a reserve component after having maintained a reserve component affiliation while pursuing a civilian career. If the bill does not bar these individuals from serving on the boards, then there would be no significant impact on the existing Treasury Department board. If, however, the bill is to be interpreted so as to exclude such persons, then elimination of certain members of the existing Treasury Department panel would be required. It is observed that under such an interpretation, many well-qualified persons who have pursued civilian careers in Government service while maintaining a reserve status would be excluded from service on these boards.

With regard to the additional authority given the Board for Correction of Military Records under the proposed bill, the Department is of the view that it is not appropriate for a nonjudicial body to review judicial proceedings to determine their propriety. A Board for Correction of Military Records is not an appellate tribunal as that term is normally used, but, rather, is an administrative board created to relieve Congress of the burden of passing private legislation to correct errors or remove injustices in military records. Review of judicial proceedings is alien to this function. The Department believes that the authority involved should, if considered necessary, be given to the Judge Advocates General of the military departments and the General Counsel of the Treasury Department with respect to the Coast Guard.

In its report on S. 2004, 88th Congress, the Department of Defense proposed a substitute bill for that bill which included a provision to amend 10 U.S.C. 869 (art. 69, Uniform Code of Military Justice) to permit review and action by the Judge Advocate General in cases not reviewed by a Board of Review. Since this would accomplish the purpose by a method believed preferable by the Department, enactment of the proposal of the Department of Defense in lieu of this provision of the bill is recommended.

As a technical matter, it is noted that throughout the bill reference is made to the Armed Forces and the Coast Guard. Under 14 U.S.C. 1, the Coast Guard is an armed force and would therefore be included in a reference to the Armed Forces. It would be more appropriate to use the terminology presently used in title 10 and employ the term "military departments" when referring to the Army, Navy, and Air Force but not the Coast Guard, and the term "Armed Forces" when referring to the military departments and the Coast Guard.

With respect to those provisions of the bill which would affect the Coast Guard, the Treasury Department is opposed to enlarging the authority of the Board for Correction of Military Records and is, therefore, opposed to enactment. To the extent that the provisions of the bill would affect the Department of Defense alone, the Department defers to the views of that agency.

The Deparment has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., May 20, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services, U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your letter of April 9, 1965, forwarding several copies of S. 747, 89th Congress, a bill to protect the constitutional rights of military personnel by providing an independent forum to review and correct the military records of members and former members of the Armed Forces, and for other purposes. You request our views and recommendations on the bill.

Two identical bills, S. 2017 and H.R. 8579 were introduced in the 88th Congress. No action was taken on either bill.

Section 1 of S. 747 would amend subsections (a) and (b) of section 1552 of title 10, United States Code, and would authorize, in lieu of the several boards now authorized by section 1552, the establishment of one board in the Department of Defense which would be vested with authority to review military records and to correct such records when it considers such action necessary to correct an error or remove an injustice. Section 1 also includes provisions relating to appointment, responsibility, salary, and travel and maintenance expenses of the board.

Under the provisions of 10 U.S.C. 1552(a), 1964 ed., currently in effect, the Secretary of each military department, under procedures established by him and approved by the Secretary of Defense "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." The Secretary of the Treasury may, in the same manner, under procedures prescribed by him) correct any military record of the Coast Guard. Except when procured by fraud, a correction made as so provided is final and conclusive on all officers of the United States.

The bill, S. 747, reflects the view that there are some weaknesses in the present arrangements governing the correction of military records. By substituting one board for the several boards now authorized, the proposed legislation would eliminate the possibility that the several correction boards will vary in their interpretation of similar facts and the application of statutory provisions to such facts with a resulting lack of uniform treatment being accorded members or former members of the uniformed services. We are in agreement with the basic purpose of S. 747, which as stated is intended to protect the constitutional rights of military personnel. However, no information has been brought to our attention which suggests a need for the proposed legislation or that such rights are not being protected adequately, under legislation currently in effect.

Subsection 1(a)(3) provides that each member of the board "shall receive the same salary which shall be fixed by the Secretary of Defense" (lines 16 and 17, p. 2). While acknowledging that the Secretary of Defense would no doubt be prudent in the matter, it will be observed that the bill, as presently worded, contains no limitation in the matter of salary. The maximum of such salary, while not specified, apparently would be limited by the provisions of 5 U.S.C. 2212 which provides that the annual rate of a salary fixed by administrative action shall not exceed the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended. Compare 10 U.S.C. 867, 1964 ed.

It is provided in subsection (a)(4) (lines 22 and 23, p. 2) that the board shall determine the number of members required to constitute a quorum. The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number. Since the basic purpose of the bill is to protect the constitutional rights of military personnel, we believe the better plan to achieve such an objective would be to delete from the bill the authority purposed to be vested in the board to determine what shall constitute a quorum and let the bill stand with the sole provision that no correction of

military records be effective unless pursuant to the action of a quorum of the board. In that way at least five members of the board will have to participate in every case presented to the board. Otherwise, we believe, the law itself should spell out the exact number of members which it is desired shall constitute a quorum.

In subsection (a)(5) it is provided (lines 6 to 11, p. 3 of the bill) that upon his certification each member of the board is entitled to be paid out of appropriations for such purpose (A) all necessary travel expenses and (B) reasonable maintenance expenses incurred while attending board meetings or transacting official business outside the District of Columbia. This provision is vague and could result in some confusion and uncertainty. We recommend that it be clarified so as to be more specific as to the amounts authorized. In this connection, it is noted that the reasonable maintenance expenses of judges of the Court of Military Appeals while attending court or transacting official business outside the District of Columbia is limited to "not more than $15 a day." See 10 U.S.C. 867(a)(1).

Subsection (b), beginning at line 12, page 3, provides that it shall be the function of the board to review the record of any member or former member of an armed force and "to correct such record" when it considers such action necessary to correct an error or to remove an injustice. Except when procured by fraud, such a correction (lines 2, 3, and 4, p. 4) "is final and conclusive on all officers of the United States." Under this section the authority to correct a military record is transferred from the Secretaries of the military departments concerned to the members of the board. The board language contained in subsection (b) empowers the board to take such action irrespective of the views of the Secretaries of the military departments. We believe that the board should be required to secure and give due consideration to the recommendations of the Secretary concerned in each case. Also, this same portion of the bill would empower the board "to modify, set aside, or expunge" the findings or sentence, or both, of a court-martial case not reviewed by a board of review under the provisions of 10 U.S.C. 866 (art. 66, Uniform Code of Military Justice) and, in any case in which the board determines that an error has been committed or an injustice suffered as the result of a court-martial trial which has been reviewed in accordance with the provisions of 10 U.S.C. 866, it may recommend to the Secretary concerned that the Secretary exercise his powers under 10 U.S.C. 874, to remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than the sentence approved by the President, or to substitute in appropriate cases "a form of discharge authorized for administrative issuance" in lieu of a previously executed sentence of dishonorable or bad conduct discharge as authorized in 10 U.S.C. 875(b) or in lieu of a previously executed sentence of dismissal as authorized in 10 U.S.C. 875(c). In this latter connection the basic constitutional rights of military personnel presently appear to be well shielded from arbitrary or capricious action by local field commanders under the provisions of the Uniform Code of Military Justice providing for review of all court-martial sentences, including review of such sentences by the Court of Military Appeals and under the provisions of 10 U.S.C. 1553 providing for the review of discharges or dismissals by a board of review consisting of five members, not to mention the concurrent jurisdiction in such cases of the boards for correction of military records as now established under 10 U.S.C. 1552 (1964 ed.).

Clauses (1) and (2) of S. 747 would further amend the provisions of 10 U.S.C. 1552 by redesignating subsections (c), (d) and (e) as subsections (d), (e), and (f), respectively, adding new subsection (c) as follows:

"(c) No correction may be made under this section unless the claimant or his heir or legal representative files a request therefor within 3 years after he discovers the error or injustice. However, the board may excuse a failure to file within 3 years after discovery if it finds it to be in the interest of justice."

Provisions similar to the foregoing are presently contained in 10 U.S.C. 1552(b). We believe this requirement is poorly defined and should be clarified. If the actual date of discovery is not a matter of record in the case file (as our Defense Accounting and Auditing Division has noted in many instances of this nature) the limitation becomes meaningless and compliance therewith can be determined only where the request is filed within 3 years after the error or injustice actually occurs.

Clause (3) in section 2 of S. 747 strikes out the words "department concerned may pay" in subsection (d) of 10 U.S.C. 1552 as redesignated in the bill and inserts in lieu thereof the language "department concerned shall pay." The change proposed appears to be more technical than real, since in actual practice we are not aware of any instance where a payment due under a correction of records has been intentionally withheld by virtue of the language "may pay" presently contained in the law. In this connection we invite attention to H.R. 7326, 89th Congress, a bill introduced April 8, 1965, to amend section 1552(c) of title 10, United States Code, to provide for the deduction of interim earnings from the payments of active duty pay and allowances found due members or former members of the uniformed services as a result of the correction of their military records. The general purpose of this proposed legislation is to provide uniform treatment of military and civilian personnel in similar situations.

Section 4 of S. 747 would provide that the amendments made by the new act "shall become effective on the first day of the third calendar month following the month in which this act is enacted." We believe that a period longer than that prescribed in section 4 would be needed to establish and bring into operation the basic changes proposed in S. 747.

As requested by you, we enclose 16 copies of this report.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

89TH CONGRESS
1ST SESSION

S. 748

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To provide additional constitutional protection for members of the armed forces by establishing Courts of Military Review, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 866 (article 66) of title 10, United States Code, is amended to read as follows:

"§ 866. Art. 66. Courts of Military Review

"(a) There is established for each military department an appellate court which shall have authority to review, as provided in this section, courts-martial cases tried by that military department for which such court was established.

Each such court is a court of record and shall be known as the Court of Military Review for the military department for which it is established. The Court of Military Review for any military department shall, for administrative purposes only, be located in such department.

"(b) The Secretary of each military department shall appoint persons to serve as judges of the Court of Military Review for that military department. The Court of Military Review for each military department shall consist of as many three-judge panels as the Secretary of the department concerned shall deem necessary. The Secretary of the military department concerned shall from time to time designate one of the judges of the Court of Military Review for such military department as chief judge of such court. Only civilian judges of each court shall be eligible to act as chief judge. Any civilian and any commissioned officer of the armed forces shall be eligible for appointment to a Court of Military Review if such civilian or officer is a member of the bar of a Federal court or the highest court of a State, has had not less than six years' experience in the practice of military justice, and meets such other qualifications as may be prescribed by the Secretary concerned.

"(c) The Court of Military Review for each military department shall sit in panels of three judges each for the purpose of reviewing courts-martial cases. The composi-

tion of such panels shall be determined by the chief judge of the court concerned; but the chief judge on his own motion, or on the request of at least one-half of the judges of the court concerned, may require the court to sit en banc for the purpose of reviewing any particular court-martial case. A judge of the Court of Military Review of one military department may sit as a judge of the Court of Military Review for another military department when authorized to do so by the Secretaries of the military departments concerned.

"(d) At least one judge of each three-judge panel of any Court of Military Review shall be a civilian who is not a retired member of any armed forces.

"(e) (1) Any commissioned officer appointed to a Court of Military Review shall be appointed for a term of three years, and shall be eligible for reappointment.

"(2) Any person appointed to a Court of Military Review from civilian life shall be appointed in accordance with the civil service laws. Any person appointed to such court from civilian life shall serve during good behavior, and may be removed from office only for physical or mental disability or other cause shown, upon notice and hearing, by the Secretary concerned.

"(f) Any person appointed to a Court of Military Review shall be known as military judge, and any commissioned

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officer appointed to serve on a Court of Military Review shall, in all matters relating to the work of such court, be addressed and referred to as a military judge without reference to his military grade.

"(g) The Judge Advocate General shall refer to the Court of Military Review the record in every case of trial by court-martial in which the sentence as adjudged by the court-martial affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

"(h) In any case referred to it, a Court of Military Review shall act only with respect to the findings and sentence as approved by an officer exercising general court-martial jurisdiction. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, should be approved. It may, also, suspend all or any part of the sentence. In considering the record it shall have the authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.

"(i) If a Court of Military Review sets aside the findings and sentence it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and

sentence and does not order a rehearing it shall order that the charges be dismissed.

"(j) The Judge Advocate General shall, unless there is to be further action by the President, or the Secretary of the Department, or the Court of Military Appeals, instruct the convening authority to carry out the mandate of the Court of Military Review. If the Court of Military Review has ordered a rehearing and the convening authority finds a rehearing impracticable, he may dismiss the charges.

"(k) The Chief Judges of the Courts of Military Review shall prescribe uniform rules of procedure for proceedings in and before such courts subject to the approval of the Chief Judge of the Court of Military Appeals."

SEC. 2. (a) Section 865(b) (article 65(b)), section 867(b), paragraphs (2) and (3) (article 67(b) (2) and (3)), section 867 (c) and (f) (article 67 (c) and (f)), section 870 (b), (c), and (d) (article 70 (b), (c), and (d)), and section 871(c) (article 71) of title 10, United States Code, are each amended by striking out "board of review" wherever it appears in such sections and inserting in lieu thereof "Court of Military Review".

(b) The first sentence of section 868 of such title (article 68) is amended by striking out ", and to establish in such branch office one or more boards of review".

(c) The last sentence of section 868 of such title (article 68) is amended to read as follows:

"That Assistant Judge Advocate General may perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General would otherwise be required to perform in respect to all cases involving sentences not requiring approval by the President."

(d) Section 869 of such title (article 69) is amended by striking out "reviewed by a board of review" and inserting in lieu thereof "transmitted for review to the Court of Military Review".

(e) Section 873 of such title (article 73) is amended to read as follows: "If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action."

SEC. 3. The provisions of this section shall become effective on the first day of the third calendar month following the calendar month in which it is enacted. Any case pending before a board of review on the effective date of this Act shall be transmitted to the appropriate Court of Military Review for review and disposition.

To Provide Additional Constitutional Protection for Members of the Armed Forces by Establishing Courts of Military Review, and for Other Purposes

The Uniform Code of Military Justice makes provision in article 66 for boards of review to review the record of trial by court-martial in every case where the sentence, as approved, affects a general or flag officer, or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for 1 year or more. Certain other cases tried by general court-martial may also be referred to the boards of review pursuant to article 69 of the code. While the Court of Military Appeals acts only with respect to findings and sentence which are incorrect in law, the boards of review also review issues of fact and such matters as the appropriateness of sentence. Thus, in cases raising constitutional issues, such as the voluntariness of a confession, the boards of review may reexamine factual, as well as legal, issues in deciding the case on appeal.

During the hearings of the Subcommittee on Constitutional Rights concerning the "Constitutional Rights of Military Personnel," it was explained that the Navy boards of review have as members both naval officers and civilian employees of the Navy Department. On the other hand, the boards of review of the Army and Air Force use only military officers. In order to assure that the board members will have an opportunity to develop some degree of expertise in their work, it would seem advisable to provide a minimum tour of duty for these military members of the respective boards. The practice of the Navy in having civilian members on the boards provides some continuity and probably facilitates understanding and application by the board of the legal principles enunciated by the all-civilian Court of Military Appeals. To enhance the stature of the boards of review and emphasize their judicial role as guardian of the rights of military personnel, it also seems desirable to redesignate them as "Courts of Review." Because of the relatively small number of cases processed by the Coast Guard Board of Review, it may not be feasible to reconstitute the boards in that particular service.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, D.C., April 17, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 748, 89th Congress, a bill to provide additional constitutional protection for members of the Armed Forces by establishing Courts of Military Review, and for other purposes. The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

S. 748 would amend 10 U.S.C. 866 (art. 66) to establish within each military department a Court of Military Review to replace the present boards of review. Each Court of Military Review would consist of as many three-judge panels as the Secretary concerned considers necessary. Judges of the court could be either military officers or civilians. However, only a civilian judge could be designated as chief judge, and at least one judge of each three-judge panel would be required to be a civilian who is not a retired member of an armed force. Civilian judges would serve during good behavior and could be removed from office only for physical or mental disability, or for other cause, upon notice and hearing.

The Department of Defense objects to this bill. It appears to misapprehend the status and stature of the military lawyer, and would make an unnecessary and drastic revision of the intermediate appellate portion of the military court-martial system. The Department of Defense is not persuaded that the administration of military justice in the Armed Forces would be improved if senior military officers who have devoted their entire adult lives to the practice of military law were replaced by civilian employees. Further, one of the most serious consequences of the enactment of this bill would be its erosive effect on the prestige of military lawyers. By its terms, it tells all judge advocates and legal officers of the Armed Forces that they will never be qualified to reach the top of their profession—that is; to preside over an appellate court appointed by a service Secretary.

Under the provisions of this bill, civilian judges would be required to have 6 years of experience in military justice; and at least one civilian judge who is not a retired officer must be appointed to each three-man panel of the court. In view of these requirements, it is doubtful that a sufficient number of civilians who also have the other qualifications expected of a judge of an appellate court exists to fill the positions created. In addition, since civilian judges on the court would in all probability receive higher pay than their military counterparts, a serious morale problem would be created for the military judges.

The proposed fixed tenure of miliary officers on the court would freeze their assignment until the expiration of their terms. This would preclude the reassignment of officers whose abilities in other fields might, under unusual circumstances, demand their assignment elsewhere. In rare cases, an officer assigned to the court might display a lack of adaptability to appellate court duties, and his reassignment would also be precluded. Under present practice, members of boards of review generally serve for periods adequate to provide the desired continuity and expertise, usually for a term approximating that contemplated by the bill. However, sufficient flexibility is presently provided to cover the unusual situations mentioned above. The proposed legislation would destroy this flexibility.

Under the present system, officers on boards of review may be freely assigned and reassigned to increase or decrease the number of boards needed by a service at a given time. The assignment of civilians to those boards (or courts, as they would be established by the bill) would detract from this flexibility by injecting

into the picture, in addition to the statutory tenure envisioned by the bill, civil service laws and regulations on such matters as recruitment, job retention rights, and transfers. This lack of flexibility would become significant in the event of war or national emergency when an expanded armed force would necessitate a rapid increase in the number of intermediate appellate tribunals, and in a postwar period when the number of those tribunals would be drastically reduced. For example, the Army at one time had 14, and the Air Force 8, boards of review. Had the provisions of this bill been law at that time, the Army would have had 14 civilian judges and the Air Force 8. When the number of boards was reduced, all personnel cuts would have had to be made at the expense of the military judges, since civilian judges could be removed only for physical or mental disability or cause.

It is further noted that S. 748 would eliminate the authority of the President under existing law (10 U.S.C. 868 (art. 68)) to establish branch offices of a Judge Advocate General (including one or more boards of review) in distant commands. No similar authority would be provided under this bill to decentralize the operation of the Court of Military Review in the event of war or national emergency. During World War II, the Army had boards of review in branch offices in the Pacific, China-Burma-India, North Africa, Mediterranean, and European theaters of operation. Such decentralization was found essential to the efficient administration of military justice in a greatly expanded armed force.

Members of boards of review in the Armed Forces are independent and free from control in the exercise of their judicial functions. This bill would, if enacted, add nothing to their judicial competence or independence, nor would it substitute a better system. Instead, it would create increased costs and a multitude of administrative problems, and result in generally less qualified appellate bodies than exist under present law.

It is also noted that S. 748 would repeal existing 10 U.S.C. 866 (art. 66) in its entirety and provide a new intermediate appellate system only for the "military departments". The Coast Guard would thereby be left entirely without an appellate structure.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

EUGENE M. ZUCKERT.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., March 24, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 748, to provide additional constitutional protection for members of the Armed Forces by establishing Courts of Military Review, and for other purposes.

The bill would amend article 66, Uniform Code of Military Justice, to establish an intermediate appellate tribunal, the Courts of Military Review, within each of the Armed Forces except the Coast Guard. That court would, in essence, assume the functions of the Board of Review presently in operation. The bill would authorize the appointment of judges, both military and civilian, to the Courts of Military Review. The chief judge of each court would have to be a civilian, and at least one of the judges on each three-judge panel of each court would have to be a civilian who is not a retiree from the Armed Forces.

The bill would change existing practice in that it would require that the chief judge of a Court of Military Review be a civilian appointee. The Department objects to this provision. Senior military lawyers who have practiced under the code for the bulk of their military careers should be able to preside over an intermediate appellate tribunal and, in the opinion of the Department, are well qualified to do so. Concern for military influence does not seem well founded in view of the position of the all-civilian U.S. Court of Military Appeals at the apex of the military justice hierarchy. Furthermore, the Department feels that the change would have a detrimental impact on military lawyers in that it, in effect, implies that they are unable to exercise the independence required of a judicial officer as effectively as their civilian counterparts. The decisions and dissenting opinions of the boards of review, handed down over the past 13 years, clearly show that this is not the case. Under present practice, with military officers as chairmen of the Boards of Review, fewer and fewer cases have had to be reviewed by the Court of Military Appeals each year. It follows that the boards, chaired by military officers, have properly interpreted and applied the principles enunciated by the higher court. In addition, the Department seriously doubts that a sufficient number of civilians of the caliber desired for a chief judge of a Court of Military Review who possess the requisite 6 years of experience in the practice of military justice would be available for appointment. Experience has indicated that there are relatively few civilian lawyers who practice primarily or exclusively in the field of military law.

The Department also objects to the provision which establishes a term of 3 years for commissioned officers appointed to the Courts of Military Review. Such a requirement would remove the flexibility inherent in the present system, flexibility which is needed in the Coast Guard because of its small size. The Coast Guard Board of Review presently hears about 20 cases a year; therefore assignment to the board is not a full-time job for an officer. The bill would, therefore, result in freezing an officer in an assignment solely because of his collateral duty assignment when the needs of the Coast Guard might dictate that he be shifted out of his full-time job to another location. As a practical matter, officers who have been assigned Board of Review duties in the past have served terms approximating 4 years; however, the Department feels that it should be possible to transfer its officers on the basis of the needs of their full-time assignment rather than their collateral assignment. It could not do so under S. 748.

The Department notes that the bill would abolish the Board of Review presently operating in the Coast Guard and yet it would provide no replacement therefor. This result obtains since the bill would establish a Court of

Military Review only for each of the military departments, and the definition of the term "Military departments", found in 10 U.S.C. 101(7), does not include the Coast Guard. The Treasury Department would be opposed to this feature of the bill since it has a continuing need for an appellate body like the present Board of Review.

It is noted that article 66, as amended by the bill, would require referral of cases to the Court of Military Review on the basis of the sentence as adjudged by the court-martial. The present article 66 requires referral of cases to the boards of review on the basis of the sentence as approved by the supervisory authority. The change is opposed since it would require referral of an undue number of cases in which the sentence, as finally approved by the supervisory authority, is relatively minor. This would overburden the Courts of Military Review without commensurate benefit.

It is also noted that article 66, as amended by the bill, would give the Courts of Military Review the power to suspend all or any part of a sentence in any case referred to it, a power which the presently existing Boards of Review do not have. The Department does not believe it appropriate to give that power to the Courts of Military Review. In this respect, the Department agrees with the views of the dissenting opinion in the case of *United States* v. *Estill* (9 USCMA 458, 26 CMR 238). In that opinion it is pointed out that the desirability of suspending a disciplinary discharge will depend, in large part, on the likelihood of rehabilitation of the accused. The likelihood of rehabilitation, in turn, is based in large part on the accused's attitude toward military service and authority, his prior record in regard to both good and bad conduct, and his family situation. Often these matters are not set out in detail in the record. And yet the court would be limited to the record as, indeed, the Boards of Review are limited under article 66 of the code. In short, the Department feels that the Courts of Military Review because of their judicial, as opposed to executive, function and their remoteness from the accused in his daily life are not in a position to evaluate the accused's likelihood of rehabilitation nearly as well as the convening authority or others in the chain of review who have access to material outside the record.

In view of the foregoing comments, the Treasury Department is opposed to enactment of S. 748.

As a technical matter, it is noted that subsection (a) of section 2 should apply also to 10 U.S.C. 867(b)(1), 10 U.S.C. 867(d), and 10 U.S.C. 868. It should also be noted that subsection (e) of section 2, which amends 10 U.S.C. 873, apparently by inadvertence, would delete the first sentence of the section as it is now written.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

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89TH CONGRESS
1ST SESSION

S. 749

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To insure to military personnel certain basic constitutional rights by prohibiting command influence in courts-martial cases and in certain nonjudicial proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 837 (article 37) of title 10, United States Code, is amended to read as follows:

"§ 837. Art. 37. **Unlawfully influencing the action of any court-martial or the action of certain military boards; effectiveness reports**

"(a) No authority convening a general, special, or summary court-martial, nor any other person subject to this chapter may lecture, censure, reprimand, or admonish the court or any member, law officer, or counsel thereof with respect to the findings or sentence adjudged by the court, or with respect to the exercise of its functions and duties in the conduct of any past, pending, or future proceedings before the court.

"(b) No person subject to this chapter may lecture, censure, reprimand, or admonish any board, or any member, legal adviser, recorder, or counsel thereof, with respect to the finding and recommendations made by the board, or with respect to the exercise of its functions and duties in the conduct of any past, pending, or future proceedings before the board, if the proceedings with which such board is concerned relate to the administrative discharge or separation from service of any member of the armed forces, or to the nature and character of the type of discharge to be issued to any member of the armed forces, or to the demotion or reduction in grade of any member of the armed forces, or to any matter materially affecting the status or rights of any member of the armed forces.

"(c) The provisions of subsections (a) and (b) of this section shall not apply with respect (1) to general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the law officer of a general court-martial.

"(d) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or as a member of any board described in subsection (b) of this section, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as defense counsel, represented any accused before a court-martial, or any respondent before a board described in subsection (b) of this section.

"(e) No person subject to this chapter may attempt to

coerce or, by any unauthorized means, influence directly or indirectly the action of any court-martial, or any other military tribunal, or of any board described in subsection (b) of this section, or of any member of such court-martial, tribunal, or board, in reaching the findings, sentence, or recommendations in any case, or the action of any convening, appointing, approving, or reviewing authority with respect to his judicial acts in the case of a court-martial or other military tribunal case, or his acts of approval or disapproval of the findings or recommendations made by a board described in subsection (b) of this section."

SEC. 2. Section 898 (article 98) of title 10, United States Code, is amended by striking out the semicolon at the end of item (2) and inserting in lieu thereof a comma and the following: "or with any provision of section 837 of this title (article 37) relating to the proceeding before certain military boards described in such section."

SEC. 3. The table of sections at the beginning of such chapter VII of chapter 47 of title 10, United States Code, is amended by striking out

"837. 37. Unlawfully influencing actions of court."

and inserting in lieu thereof

"837. 37. Unlawfully influencing the action of any court martial or the action of certain military boards; effectiveness reports."

To Protect the Constitutional Rights of Service Personnel To Receive a Fair and Impartial Trial by Court-Martial, To Have the Assistance of Counsel, and To Have Cases Considered in Accordance With Requirements of Due Process

Background memorandum: Article 37 of the Uniform Code of Military Justice, 10 U.S.C., section 837, prohibits unlawful influence on the members of a court-martial. This prohibition reflects an effort to assure the impartial trial which is guaranteed in the sixth amendment. Unfortunately, despite the existence of article 37, complaints of command influence have not been absent with respect to trials by court-martial. Moreover, the Court of Military Appeals, by a 2-to-1 vote, has permitted the continuing use of pretrial instructions to court members. Testimony given to the subcommittee at its hearings on the constitutional rights of military personnel took the position that, in order to guarantee more adequately the impartiality of the court-martial members, the scope of article 37 should be broadened. Not only a convening authority or commanding officer but also the members of their staff should be prohibited from censoring or reprimanding any court personnel, including the counsel of the court. Any sort of pretrial instruction to members of courts-martial, now purportedly authorized by paragraph 38 of the Manual for Courts-Martial, should be expressly prohibited. Evaluation of a person's performance as a court member should not be a basis for the rating he receives on an effectiveness or fitness report used for purposes of determining his promotions and assignments. Similarly, a defense counsel should not be subject to the threat of a low rating on his own fitness report in retaliation for his vigorous defense of an accused person; otherwise the accused may, as a practical matter, be deprived of his constitutional right to the full assistance of counsel.

Article 37 contains no prohibition of command influence exerted upon discharge boards or other administrative boards which are considering important rights of service personnel—rights affecting their "liberty" and "property." For many of the same reasons applicable to courts-martial, and concept of due process would seem to demand that the participants in such board actions be protected from sanctions or retaliation, enabling them to perform their duties as their conscience guides them, instead of being forced to rely on a superior military authority for direction.

To implement these proposals for protecting the constitutional right of military personnel to a fair and impartial trial or hearing which will accord with the requirements of due process, it seems necessary to:

1. Rewrite article 37 of the Uniform Code, 10 U.S.C. 837, to provide that, not only a convening authority or other commanding officer, but also any member of their staff, or other person subject to this code, shall not censure, reprimand, or admonish a court-martial, or any member, law officer, or counsel thereof.

2. To avoid indirect efforts to control the behavior of court members, add to article 37 a provision that, in the preparation of any effectiveness report, fitness report, inefficiency report or other document used for determining promotions, transfers, or assignments of service personnel, no person subject to the Uniform Code shall be free to consider or evaluate any performance of duty as a court-martial member.

3. To avoid indirect efforts to inhibit defense counsel, add to article 37 a provision that, in the preparation of any effectiveness report, fitness report, efficiency report or other document used for determining promotions, transfers, or assignments of service personnel, and with respect to a person who has served as a defense counsel, no person subject to the Uniform Code shall be free to prepare a less favorable report than would otherwise be the case because of the vigor and zeal with which the person being reported on has performed his duties as defense counsel.

4. Prohibit expressly the giving of instructions before trial by any convening authority, other commanding officer, or member of their staff, with the exception of general courses in military justice designed to instruct the members of a command concerning the provisions of military law and the procedures of courts-martial and with the proviso that instructions given in open court by the law officer of a general court-martial to the members of the court, at the outset of the trial or otherwise, shall not be prohibited.

5. Either broaden article 37 or put in an additional article at the end of the Uniform Code (or an additional section elsewhere in title (10) so that the prohibition of article 37 shall be equally applicable to board proceedings concerning administrative discharges or separations and administrative reductions. Thus, no authorty convening a board to make findings or recommendations, or both (with respect to an administrative discharge or separation, or with respect to the nature and character of such discharge or separation, or with respect to any demotion or reduction of any service personnel, or with respect to any matter affecting materially the status or rights of any officer or serviceman) or any commanding officer or member of his staff, or other person subject to the Uniform Code, shall censure, reprimand or admonish such board, or any member, legal adviser, recorder, or counsel thereof with respect to the findings or recommendations made by the board, or with respect to any other exercise of its or his functions in the conduct of its proceedings. The same provisions concerning effectiveness or fitness reports should apply here that would apply to courts-martial under the preceding suggestions to amend article 37. Also, there would be a catchall prohibition applicable like that in article 37 which would apply to anyone subject to the Uniform Code of Military Justice who attempts to coerce, or by any unauthorized means influence, the action of any board of officers or other board considering findings or recommendations pertinent to an administrative discharge or separation, or an administrative demotion or reduction of any service personnel, or with respect to any other matter affecting materially the status or rights of any officer or serviceman, or any member of such board, in making findings or recommendations or in the performance of their duties in any case or proceeding, or the action of any convening, approving, or reviewing authority with respect to his acts in connection with such case or proceeding. Depending on the manner in which the prohibition against unlawful influence is applied to administrative proceedings in the armed services, it will also be necessary to rewrite article 98 of the Uniform Code, 10 U.S.C. 898, so that the penalty it authorizes will expressly apply to such behavior.

DEPARTMENT OF THE NAVY,
OFFICE OF LEGISLATIVE AFFAIRS,
OFFICE OF THE SECRETARY,
Washington, D.C., April 5, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 749, a bill to insure to military personnel certain basic constitutional rights by prohibiting command influence in courts-martial cases and in certain nonjudicial proceedings, and for other purposes, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

The general purpose of the bill is to amend 10 U.S.C. 837 (art. 37, UCMJ), which presently prohibits unlawfully influencing the action of courts, to: (1) Broaden those prohibitions; (2) extend the broadened prohibitions to certain administrative military boards; (3) prohibit consideration or evaluation of the performance or conduct of military personnel when they are acting as members of, or counsel before, a military court or administrative board; and (4) bring all the foregoing prohibited conduct within the punitive provisions of 10 U.S.C. 898 (art. 98, UCMJ).

The Department of Defense is generally opposed to extending the provisions of chapter 47 of title 10, United States Code (Uniform Code of Military Justice) to encompass the procedures for administrative boards. It is considered fundamentally unsound to broaden the Uniform Code of Military Justice to include administrative functions which unlike courts-martial are not established by the Uniform Code of Military Justice and do not have as their fundamental purpose the punishment and deterrence of criminal activity. Statutory provisions concerning the operation of boards would be better placed with those other statutes which pertain to the administrative functions which the boards are performing.

The following comments relate to specific provisions of the proposed bill:

(1) The bill revises the first sentence of the present 10 U.S.C. 837 to broaden its scope. Two major changes are effected: (*a*) The word "lecture" is inserted before the words "censure, reprimand, or admonish," apparently with a view to specifying a fourth type of prohibited conduct; and (*b*) the prescribed prohibitions are extended to all persons subject to the Uniform Code of Military Justice. The words "censure, reprimand, and admonish" have specific meanings aside from their generic meanings. "Lecture" is included in the word "reprimand" in the military context and therefore would not add a fourth prohibition. The word "direct" while ordinarily included in the word "admonish" is, in fact, not so included within the military context and consequently would be a more meaningful prohibition. It is recommended that the word "direct" be substituted for the word "lecture" in line 6 on page 2 of the bill.

(2) The proposed amendment to 10 U.S.C. 837(b) extends the same proscriptions contained in subsection (a) to members, counsel, recorders, and legal advisers of boards convened to determine: the administrative discharge or separation of a member of the Armed Forces; the type of discharge to be issued; demotion or reduction in grade of a member; or any matter materially affecting the status or rights of any member of the Armed Forces. It is considered that the conduct prohibited by this subsection should be limited to those boards which recommend administrative discharge under conditions other than honorable. Also, the last phrase is so broad that it would in effect include promotional selection boards, boards passing upon particular types of duty assignments, and even boards assigned to make studies concerning broad personnel problems since the recommendations of such boards usually affect "the

status or rights" of members of the Armed Forces. It is recommended, therefore, that the bill be revised on page 2, line 22 through 25, by deleting all which follows the words "Armed Forces" in line 22. Further, for the reasons stated in the preceding paragraph, it is recommended that the word "direct" be substituted for the word "lecture" in line 12 on page 2 of the bill.

(3) The proposed 10 U.S.C. 837(c) exempts from the proscriptions of subsections (a) and (b) general instructional and informational courses on substantive and procedural aspects of courts-martial and instructions given in an open court by a law officer of a general courts-martial. If the word "direct" is substituted for the word "lecture", as recommended, in subsections (a) and (b) there would be no apparent need for so much of the subsection as concerns instructional and informational courses in courts-martial procedures. There is a need for the remaining portion of the subsection in that the dictionary definition of the word "admonish" might be interpreted technically to preclude the law officer warning a court-martial to ignore inadmissible evidence. Since 10 U.S.C. 851 gives the law officer of a general court-martial and the president of a special court-martial the same responsibilities with respect to rulings, instructions, and charging the courts, it would appear appropriate to include the latter in 10 U.S.C. 837(c). In addition, it is believed that the prohibitions set forth in subsection (b) should not be applicable to advice given by a legal adviser to an administrative board. In consonance with the foregoing it is recommended that subsection (c), page 3 of the bill, be revised to read as follows:

"(c) The provisions of subsections (a) and (b) of this section shall not apply to statements and instructions given in open court by the law officer of a general court-martial, the president of a special court-martial, or to statements and instructions given by a legal adviser to an administrative board."

(4) The proposed amendment of 10 U.S.C. 837(d) provides that no person subject to the Uniform Code of Military Justice in preparing effectiveness, fitness, efficiency, and certain other reports may (1) consider or evaluate the performance of duty of any such member as a member of a court-martial or as a member of any board described in subsection (b), or (2) give a less favorable rating or evaluation of any member of the Armed Forces because of the zeal with which such member as defense counsel represented any accused before a court-martial or any respondent before a board described in subsection (b). This provision would operate to the detriment of both the services and the individual concerned since it would in effect prohibit an objective evaluation of the member concerned. Furthermore, these provisions would discriminate against those officers called upon to serve in a full-time capacity as defense counsel or as a member of a court-martial or board. Such discrimination would prejudice these officers in competing for promotion or desirable duty assignments with other officers who have all periods of their service covered by favorable reports. Such a result is considered inequitable. It is recommended, therefore, that this subsection be stricken from the bill.

(5) The proposed amendment of 10 U.S.C. 837(e) extends the present proscriptions of the second sentence of article 37, Uniform Code of Military Justice, to all boards described in subsection (b). This subsection is not opposed on its merits.

(6) Section 2 of the bill would extend the present article 98, Uniform Code of Military Justice, to make it an offense for any person subject to the Code to knowingly and intentionally fail to enforce or comply with any provision of the proposed new article 37 relating to the proceedings before certain military boards. There is no objection to this section on its merits.

If S. 749 is revised as recommended above, and, in addition, provision is made for more appropriate distribution in title 10, United States Code, of those portions relating to administrative boards, the Department of the Navy, on behalf of the Department of Defense, interposes no objection to its enactment.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. KEAR, Jr.,
Captain, U.S. Navy, Deputy Chief.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 19, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 749, to insure to military personnel certain basic constitutional rights by prohibiting command influence in courts-martial cases and in certain nonjudicial proceedings, and for other purposes.

The Department understands that this is one of a series of bills which resulted from the extensive hearings on constitutional rights of military personnel, held by a subcommittee of your committee in February and March of 1962. One of the chief objects of concern at those hearings was the issuance of administrative discharges. S. 749 is one of several bills in this series which seeks to place additional safeguards for the service member in the administrative discharge procedure.

Section 1 of the proposed bill would amend article 37 of the Uniform Code of Military Justice, 10 U.S.C. 837. This section presently contains certain prohibitions designed to eliminate command influence over courts-martial. S. 749 would extend these prohibitions to administrative boards concerned with the separation of members of the Armed Forces or with other personnel actions which would materially affect their status or rights.

At the outset the Department seriously questions the advisability of enlarging the Uniform Code of Military Justice to include provisions regarding administrative boards. At present, the code is concerned only with disciplinary matters. Its major purpose is to aid in the maintenance of discipline in the Armed Forces while providing protection for the rights of individual service members. On the other hand, the various administrative boards are concerned with the day-to-day management of the service. Their purpose is not disciplinary or punitive, though the results of their actions may in some cases have as adverse an impact upon an individual as the decision of a court-martial.

The court-martial and board procedures not only have different purposes, they are different in nature. A court-martial is a statutory tribunal with specific decisionmaking powers. By contrast, most of the administrative boards to which the proposed provisions would apply are not created by statute and are primarily advisory in nature, the decisionmaking power resting in the Secretary of the Treasury or the Commandant of the Coast Guard. Since the board and court procedures are fundamentally different in purpose and nature and have traditionally been kept separate in practice, the Department believes that they should also be kept separate in law. Combining the two systems could create confusion without serving any good purpose. We therefore recommend against making provisions regarding administrative boards a part of the Uniform Code of Military Justice.

Turning to the specific provisions of S. 749, it would amend article 37 of the Uniform Code by adding a new subsection (b) which would prohibit any person subject to the code from lecturing, censuring, reprimanding, or admonishing any board or its personnel if the board related to the administrative discharge or separation of a member of the Armed Forces, the type of discharge to be issued him, his demotion or reduction in grade, or to any matter materially affecting his status or rights. A new subsection (e) would also be added which would prohibit any person subject to the code from attempting to coerce or by unauthorized means influence the action of such an administrative board or its personnel or the officials reviewing or approving it.

While the Department would not object to the application of these prohibitions against command influence to administrative boards, we question the necessity for them. Coast Guard regulations provide that administrative discharges for unsuitability, unfitness, misconduct, or security reasons may only

be issued with the approval of the Commandant. Except in very limited instances they may not be issued by any local commander. Under existing regulations, a member has a right to a hearing before a board before he may be issued an undesirable discharge. At the hearing he may appear in person, be represented by counsel, and submit evidence in his own behalf. While the boards in these cases are appointed and initially reviewed by field commands, they are reviewed again by Coast Guard Headquarters prior to final action. Even after final approval and execution, the actions of these boards may be further reviewed by boards convened under 10 U.S.C. 1552 and 1553.

The Department believes that the present board procedures provide sufficient safeguards to prevent substantial injustice to members of the service. We are not aware of any cases in which complaints have been made of unlawful influence or coercion of administrative boards. Nor are we aware of any complaints that these boards or board members have been censured, admonished, or reprimanded for their actions. In brief, our experience has not shown that there is any necessity for the statutory provisions in the proposed amendments to article 37.

A second purpose of S. 749 is to prevent command influence over boards or courts-martial through use of fitness reports or other evaluations of service members. To accomplish this, the bill would amend article 37 to forbid officers preparing fitness reports from considering or evaluating the performance of duty of members of a board or court-martial. It would also forbid such officers from giving a less favorable rating or evaluation to a service member because of his zeal as defense counsel before a court or a board. In effect, these provisions merely enumerate specific means which may not be used to coerce, influence, censure, reprimand, or admonish a court or its personnel, all of which actions are already forbidden in existing law.

While the Department endorses the elimination of command control over courts and boards, it believes that the proposed prohibitions would be largely ineffectual to accomplish this purpose. If a reporting officer observes either good or bad performance by a member of a board or court, this would inevitably contribute to his opinion of that person. And this opinion would—also inevitably—be reflected in any evaluation the reporting officer makes of that member. The impression made on a reporting officer by either good or bad performance cannot be erased from his mind by a statutory provision.

As a practical matter a reporting officer ordinarily has only a limited opportunity to evaluate the performance of a member of a court or board. By statute, 10 U.S.C. 851(a), the vote of individual members of a court may not be revealed. Therefore, a superior authority would have no way of knowing whether any individual voted in accordance with the superior's desires or not. Further, the record in either a court or a board usually contains little on which an evaluation of the performance of a board or court member could be based. This correlates with the Department's experience that rarely, if ever, have reporting officers commented on an individual's performance as a member of a court or board. The Department believes that in the Coast Guard the officers who write fitness reports and evaluations do so fairly and objectively. Even if they did not, the proposed statutory provision would not be an effective deterrent. We also believe that the overwhelming majority of Coast Guard officers apply their own best independent judgment to their board and court-martial duties. For them a prohibition such as that proposed is not necessary; for the others it would not be effectual. The Department, therefore, sees no necessity for the proposed provision regarding evaluating the performance of court or board members.

As to the provision prohibiting the downgrading of a defense counsel for displaying zeal, the Department would have no objection to its enactment. The effectiveness of such a provision, however, is open to serious question. In the usual case, it would be practically impossible to determine whether a low mark given a person was because of his zeal in a given case or for some other reason. The provision, therefore, would have little value as a deterrent. It would, of course, have value as a standard of conduct and for educational purposes.

S. 749 would make two minor changes to article 37 as it applies to court-martial proceedings and as proposed for application to board proceedings. The prohibitions against censuring a court member in the present article 37 apply to any convening authority and to any commanding officer. The pro-

posed bill would apply these prohibitions to any person subject to the Uniform Code. The Department would have no objection to this change since it would in effect merely forbid a commander from doing indirectly through his staff what he is now forbidden to do directly.

The other minor change would prohibit a convening authority or other person from lecturing a court or a board. This would seem to broaden greatly the scope of this subsection. However, the Department notes that its effect would be limited by the proposed subsection (c). Since under that subsection the service could continue to provide general courses of instruction on military justice for its personnel, we would have no objection to enactment of this provision. We believe, however, that the proposed subsection (c) should include the instructions given by the president of a special court-martial which are required by 10 U.S.C. 851(c).

Section 2 of S. 749 would amend article 98 of the Uniform Code, 10 U.S.C. 898. That section is one of the punitive articles of the code. In subparagraph (2) it makes it a court-martial offense to knowingly and intentionally fail to enforce or comply with any provisions of the code regulating the proceedings before, during or after a trial. The proposed bill would expand this subparagraph so that it would also apply to any provision relating to the proceedings before the boards described in article 37 of the code. As noted above, the Department is doubtful of the necessity or efficacy of the proposed prohibitions regarding administrative boards. It naturally follows, therefore, that we see little need for a provision designed to aid in enforcement of those prohibitions.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 750

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To protect the constitutional rights of military personnel by insuring their right to be represented by qualified counsel in certain cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last sentence of section 819 (article 19) of title 10, United States Code, is amended to read as follows: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made and, except in time of war, unless the accused was represented at the trial, or afforded the opportunity to be represented at the trial, by a defense counsel with qualifica-

tions not less than those prescribed under section 827 (b) of this title (article 27 (b))."

SEC. 2. (a) Chapter 47 of title 10, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 941. Art. 141. Procedural requirements and right to counsel in certain nonjudicial proceedings

"(a) Except as provided in subsection (b) of this section, no member of the armed forces shall be administratively discharged or separated from service under conditions other than honorable unless such member has been afforded an opportunity to appear and present evidence in his own behalf before a board convened by appropriate authority for the specific purpose of determining whether such member shall be discharged or separated from service under conditions other than honorable. Any member of the armed forces with respect to whom such a board is convened shall have the right, unless waived by him, to be represented before such board by counsel whose qualifications are not less than those prescribed under section 827 (b) of this title (article 27 (b)).

"(b) The provisions of subsection (a) shall not apply in the case of any member of the armed forces discharged or dismissed from service pursuant to the sentence of a general or special court-martial, or in time of war if the Secretary

concerned suspends the operation of such subsection. Any member of the armed forces may waive his right to appear and be represented by counsel before a board convened for the purpose described in subsection (a) if such member is given notice in writing of his right to appear and present evidence in his own behalf before such board and of his right to be represented by counsel before such board, and such member is afforded an opportunity to consult with counsel, whose qualifications are not less than those prescribed under section 827(b) of this title (article 27(b)), regarding the waiver of such member's right to appear before such board."

(b) The table of sections at the beginning of subchapter XI of chapter 47 of such title is amended by adding at the end thereof a new item as follows:

"941. 141. Procedural requirements and right to counsel in certain nonjudicial proceedings."

TO PROTECT THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL TO HAVE THE ASSISTANCE OF COUNSEL AND NOT TO BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW

Background memorandum: A general court-martial has the jurisdiction to impose on a serviceman a punishment which may include a dishonorable discharge or a bad conduct discharge. In a trial before such a court-martial the accused will be offered the services of defense counsel, whose qualifications, as defined by article 27(b) of the Uniform Code, 10 U.S.C. 827(b), include graduation from an accredited law school or membership in a bar and certification of his competence by the Judge Advocate General of the armed force of which the defense counsel is a member.

A special court-martial is entitled to impose a punishment which may include a bad conduct discharge, if a verbatim record is made of the proceedings. In the special court-martial a "defense counsel" must be appointed for the accused. However, there is no statutory specification of the qualifications required of such a counsel, except in terms of the trial counsel's qualifications, and so the defense counsel may be a person with absolutely no formal legal training or experience. In the event the accused is sentenced to a bad conduct dis-

charge by a special court-martial, there will be extensive appellate review of the findings and sentence pursuant to articles 66 and 67 of the Uniform Code, 10 U.S.C. 866, 867 (see also art. 70, 10 U.S.C. 870); but this is a review "on the basis of the entire record." If evidence or information favorable to the accused has not been placed in the record by his counsel who, by reason of his lack of legal training, may not recognize what evidence would probably benefit the accused—then the appellate defense counsel are unable to take advantage thereof in the accused's behalf. A sentence to bad conduct discharge which survives the appellate review is treated as final, in the absence of a petition for new trial submitted within a 1-year period of time. See articles 73 and 76, 10 U.S.C. 873, 876.

Each armed service makes provision in its directives for administrative discharges, which may be honorable, general, or undesirable. The undesirable discharge is a discharge under other than honorable conditions and, for purposes of veterans' benefits and certain other rights, is treated like the bad conduct discharge imposed by a special court-martial. Sometimes, in fact, it may be issued for misconduct that would be cognizable by a court-martial. Usually the serviceman being considered for an undesirable discharge is provided the opportunity for a hearing before some sort of board of officers which can make findings or recommendations pertinent to the proposed hearing. While the respondent serviceman may be provided with counsel to represent him at this board hearing, the counsel may not be legally trained or experienced. Quite often the hearing before a board is waived by the serviceman after consulting with counsel; and in this instance, too, the counsel is sometimes not legally trained.

According to all available evidence the recipient of a discharge under other than honorable conditions—whether it be a bad conduct discharge or an undesirable discharge—encounters considerable difficulty in obtaining employment, is restricted from engaging in many types of activities, and is stigmatized. Thus, such a discharge has great effect on his liberty to engage in many activities and the property that he has in being allowed to enter activities which are open to other members of the community.

Therefore, the fifth amendment guarantee that no person shall "be deprived of life, liberty, or property, without due process of law" is quite relevant to the circumstances under which a serviceman may be discharged from the Armed Forces. Furthermore, since a court-martial is a form of criminal prosecution and since a sentence to a bad conduct discharge involves such severe consequences to the recipient, the sixth amendment guarantee of the "assistance of counsel" is especially significant in determining whether a special court-martial should be empowered to sentence a serviceman to a bad conduct discharge when he has not been provided with the assistance of legally trained counsel—assistance that would be mandatory if he were being prosecuted in a Federal district court. Indeed, whether the serviceman is confronting a court-martial that may sentence him to a bad conduct discharge or a board of officers that may recommend that he be issued an undesirable discharge, the availability of a legally trained counsel to advise and assist him is one of the best guarantees that he will receive due process in the proceeding.

In the light of these considerations, witnesses in the hearings of the Subcommittee on Constitutional Rights recommended that legally trained counsel should be provided for an accused serviceman as a prerequisite for a special court-martial's having the power to adjudge a bad conduct discharge (report, p. 52). The same position is taken concerning the power of a discharge board to recommend an undesirable discharge (report, draft, p. 5). Moreover, so that a serviceman will not be misadvised by a nonlegally trained counsel to waive a board hearing and the attendant procedural rights, a waiver of rights to a hearing should not be accepted or be binding unless the respondent serviceman has been given reasonable opportunity to consult with legally trained counsel (draft of report, p. 5). The requirement of counsel should be limited to time of peace (draft of report, p. 5) in line with the general position that procedures which might be infeasible in wartime should not be discarded solely on this ground if they are otherwise suitable for peacetime (draft of report, pp. 57–59). Indeed, the Uniform Code has several articles which make special provision for time of war. See arts. 35, 43, 71, 85, 90, 99, 105, 106, 113.)

To implement the purpose of guaranteeing legally trained counsel as a prerequisite for a discharge under other than honorable conditions, it would seem desirable to:

1. Amend article 19 of the Uniform Code, 10 U.S.C. 819, to add as a prerequisite for a bad conduct discharge that it not be adjudged unless a complete record has been made and "except in time of war unless accused has been provided with or been offered the services of a defense counsel who is legally qualified to serve as trial counsel or defense counsel of a general court-martial in accordance with the requirements of article 27(b) of the Uniform Code (10 U.S.C. 827(b))."

2. Add a separate article at the end of the Uniform Code or elsewhere in title 10 to provide that, "except in time of war no board of officers shall be empowered to recommend that a serviceman or officer be issued an undesirable discharge or other discharge under other than honorable conditions, or be separated under other than honorable conditions, or to make any finding which shall be used by that board or otherwise as the basis for any such recommendation or for any such discharge or separation; unless in any hearing before such board of officers that serviceman or officer has been provided with or been offered the services of a counsel who is legally qualified to serve as trial counsel or defense counsel of a general court-martial in accordance with the requirements of article 27(b) of the Uniform Code of Military Justice, 10 U.S.C. 827(b)."

3. Either as an addition to the article or section discussed immediately hereinabove, or as a separate article of the Uniform Code or a separate section of title 10, provide that "except in time of war no waiver of any statutory or other right to a hearing before a board of officers shall have, or be given, any effect whatsoever unless, prior to the execution of such a waiver, the officer, serviceman, or other person subject to the Uniform Code of Military Justice who executes the waiver has been provided or offered the opportunity to consult concerning the proposed execution of the waiver with a counsel who is legally qualified to serve as trial counsel or defense counsel of a general court-martial in accordance with the requirements of article 27(b) of the Uniform Code of Military Justice, 10 U.S.C. 827(b)."

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., April 5, 1965.

HON. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 750, a bill to protect the constitutional rights of military personnel by insuring their right to be represented by qualified counsel in certain cases, and for other purposes, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

The proposed bill would make two major changes to the Uniform Code of Military Justice (ch. 47 of title 10, United States Code). Section 1 would amend article 19 to provide that a bad conduct discharge could not be adjudged, except in time of war, unless the accused was represented, or afforded the opportunity to be represented at the trial by a lawyer defense counsel. Section 2 would add article 141 to provide that no member of the Armed Forces could be administratively discharged or separated from the service under conditions other than honorable unless such member had been afforded an opportunity to appear and present evidence in his own behalf before a special type of board. A member appearing before such a board would have the right, unless waived by him, to be represented by counsel with the same qualifications as defense counsel under section 1. These provisions would not apply in the case of a member discharged or dismissed from the service pursuant to a sentence of a general or special court-martial or in time of war if the Secretary concerned suspends the operation of the subsection.

Section 1 is of primary importance to the Department of the Navy as currently no member of an armed force, other than in the naval service, is subjected to a punitive discharge by a court-martial unless he is represented by counsel with qualifications equal to those set forth in section 1. The Army accomplished this result by not preparing a verbatim copy of the record in special court-martial cases thus precluding imposition of a bad conduct discharge in these trials. The Air Force, while permitting their special courts-martial to adjudge bad conduct discharges, as a matter of policy provides qualified counsel in 99 percent of its special court-martial trials. The reason underlying section 1 is the feeling that any serviceman should have the assistance of a qualified attorney when he is faced with a sentence having the stigma and effects of a bad conduct discharge. The U.S. Court of Military Appeals in *U.S.* v. *Culp*, decided September 5, 1963, held that the sixth amendment to the Constitution of the United States does not operate to require that an accused being tried by a special court-martial be afforded the right to the assistance of qualified counsel in his defense. The author of the principal opinion for the court reached that conclusion on the ground that the "right to counsel" provision of the sixth amendment does not apply to cases arising under military jurisprudence. The two concurring judges expressed the view that although the "right to counsel" guarantee applies to military personnel being tried by courts-martial, when interpreted in relation to the military community the term "counsel" as employed in the sixth amendment does not mean counsel "qualified in the law." Nonetheless, all three judges felt constrained to add, by way of obiter dicta, that in their opinion the practice of appointing nonlawyers as defense counsel before special courts-martial, albeit constitutional, is not particularly enlightened, and that it would be extremely desirable to assign qualified counsel in all cases involving a punitive discharge. Section 1 should, therefore, satisfy the personal opinions of the judges of the Court of Military Appeals and would represent a compromise between present practice and the

extreme position which would divest the special court-martial of the authority to award a punitive discharge.

It is considered, however, that the provisions of section 1 of S. 750 should be incorporated in and considered with provisions for the permissive appointment of law officers to special courts-martial. There is enclosed with this report a draft substitute bill which has been designed as a substitute proposal for several of the related bills concerning military justice presently pending before your committee. Section 1(4) contains the provisions of section 1 of S. 750. Also it provides, inter alia, for permissive appointment of law officers to special courts-martial. It is recommended that section 1 of S. 750 not be considered for enactment but that the proposed substitute bill be enacted.

The desirability of providing qualified lawyer counsel to represent members who appear before discharge boards with authority to recommend discharge under conditions other than honorable, as provided in section 2 of this bill, is quite apparent when it is considered that for the most part the personnel who are subject to these boards are young and relatively inexperienced in military administrative matters and have little understanding of the effects in civilian life of receiving a discharge under other than honorable conditions. This section also represents a compromise between present practice and the extreme position that would abolish all administrative boards with authority to recommend discharge under conditions other than honorable.

The Department of Defense generally is opposed to extending the provisions of chapter 47 of title 10, United States Code (Uniform Code of Military Justice) to encompass the procedures for administrative boards. It is considered fundamentally unsound to broaden the Uniform Code of Military Justice to include administrative functions which unlike courts-martial are not established by the code and do not have as their primary purpose the punishment and deterrence of criminal activity. It is recommended, therefore, that the provisions of section 2 of S. 750 be incorporated in chapter 59 of title 10, United States Code. There is enclosed with the report a second draft substitute bill which adds a new section to chapter 59 of title 10, United States Code, incorporating the objectives of section 2 of S. 750 and the amendments recommended as follows:

(*a*) The provisions of section 2 of S. 750 would preclude issuing a discharge under other than honorable conditions to individuals who are beyond military control, e.g., those in confinement in civilian institutions as a result of conviction by civilian authorities and those on unauthorized absence for a prolonged period of time. These individuals could not be separated under other than honorable conditions regardless of the offenses or the circumstances. They would not deserve honorable discharges but the only alternative would be for the services to retain them on the active rolls for excessive periods of time. It is recommended, therefore, that section 2 of the bill be revised by adding on page 2, line 10, after the word "section" the words "or unless the member is unavailable to appear because of absence resulting from his own misconduct."

(*b*) Section 2 does not clearly authorize a respondent to be represented by civilian counsel of his own selection since no provision comparable to 10 U.S.C. 838 (art. 38) applies to administrative boards. It is recommended, therefore, that the sentence beginning with the words "Any member" on line 17, page 2 of S. 750 be amended to read: "A member of the Armed Forces with respect to whom such a board is convened shall have the right, unless waived by him, to be represented before the board by civilian counsel of his own selection or by military counsel whose qualifications are not less than those prescribed under section 827(b) of this title (art. 27(b)).

(*c*) It is noted that both sections of S. 750 provide exceptions in time of war. In view of the existing and continuing "cold war" which is constantly involving U.S. forces in military engagements in different areas of the world, it is recommended that the exceptions be revised to read "in time of war, or of national emergency hereafter declared by the President or Congress". Both substitute draft bills enclosed herewith contain this recommended language.

(*d*) Subsection (b) of the proposed article 141 provides for waiver of a hearing if the member is notified in writing of his right to appear and to be represented by counsel and if "such member is afforded an opportunity to consult with counsel" regarding such waiver. The quoted phrase might be interpreted as a mandatory requirement that the member consult a lawyer, whether or not he wishes to do so. It is recommended, therefore, that page 3, lines 9 and

10 of the bill be amended by deleting the words "afforded an opportunity to consult with counsel" and substituting in lieu thereof the words "informed that, if he so requests, he will be afforded the opportunity to consult with counsel".

In view of the foregoing, it is recommended that section 2 of S. 750 not be considered for enactment but that the second proposed substitute bill enclosed herewith be enacted. It is noted, however, that enactment of the provisions contained in section 2 of S. 750 could result in a substantial increase in the requirements for military lawyers in the Department of Defense.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. KEAR, JR.,
Captain, U.S. Navy, Deputy Chief.

DEPARTMENT OF DEFENSE SUBSTITUTE PROPOSED FOR S. 750, S. 752, S. 757

89TH CONGRESS
2D SESSION

S.

IN THE SENATE OF THE UNITED STATES

JANUARY , 1966

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, providing for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial proceedings by counsel having the qualifications of defense counsel detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

(1) Section 801 (10) (article 1 (10)) is amended by inserting the words "or special" after the word "general".

(2) Section 816 (article 16) is amended to read as follows:

"§ 816. Art. 16. Courts-martial classified

"The three kinds of courts-martial in each of the armed forces are—

"(1) general courts-martial, consisting of—

"(A) a law officer and not less than five members; or

"(B) only a law officer, if before the court is assembled 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 consents thereto;

"(2) special courts-martial, consisting of—

"(A) not less than three members; or

"(B) a law officer and not less than three members; or

"(c) only a law officer, under the same conditions as those prescribed in clause (1) (b); and

"(3) summary courts-martial, consisting of one commissioned officer."

(3) Section 818 (article 18) is amended by adding the following sentence at the end thereof: "However, a general

court-martial of the kind specified in section 816 (1) (B) of this title (article 16 (1) (B)) may not adjudge the penalty of death."

(4) Section 819 (article 19) is amended by striking out the last sentence and inserting the following sentence in place thereof: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made and, except in time of war, or of national emergency hereafter declared by the President or the Congress, the accused was represented or afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827 (b) of this title (article 27 (b))."

(5) Section 825 (c) (1) (article 25 (c) (1)) is amended—

(A) by striking out the words "before the convening of the court," in the first sentence and inserting the words "before the conclusion of a session called by the law officer under section 839 (a) of this title (article 39 (a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused," in place thereof; and

(B) by striking out the word "convened" in the last sentence and inserting the word "assembled" in place thereof.

(6) Subchapter V is amended by striking out the following item in the analysis:

"826. 26. Law officer of a general court-martial."

and inserting the following item in place thereof:

"826. 26. Law officer of a general or special court-martial."

(7) The catchline and subsection (a) of section 826 (article 26) are amended to read as follows:

"§ 826. Art. 26. Law officer of a general or special court-martial

"(a) The authority convening a general court-martial shall, and, subject to the regulations of the Secretary concerned, the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for that duty by the Judge Advocate General of the armed force of which he is a member. A commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. However, no person may act as a law officer of a single-officer general court-martial unless he is specially certified to be qualified for

that duty. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

(8) Section 826(b) (article 26(b)) is amended by striking out the figures "839" and "39" and inserting the figures "839(b)" and "39(b)", respectively, in place thereof.

(9) Section 829 is amended—

(A) by striking out the words "accused has been arraigned" in subsection (a) and inserting the words "court has been assembled for the trial of the accused" in place thereof;

(B) by inserting the words ", other than a single-officer general court-martial," after the word "court-martial" in the first sentence of subsection (b); and by amending the last sentence of subsection (b) to read as follows:

"The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the law officer, the accused, and counsel.";

(C) by inserting the words ", other than a single-

officer special court-martial," after the word "court-martial" in the first sentence of subsection (c); and by amending the last sentence of subsection (c) to read as follows:

"The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused, and counsel."; and

(D) by adding the following new subsection at the end thereof:

"(d) If the law officer of a single-officer court-martial is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816 (1) (B) or (2) (C) of this title (article 16 (1) (B) or (2) (C)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."

(10) Section 835 (article 35) is amended by striking out the second sentence and inserting the following in place

thereof: "In time of peace no person may, against his objection, be brought to trial, or be required to participate by himself or counsel in a session called by the law officer under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him, or in a special court-martial case within a period of three days after the service of charges upon him."

(11) Section 838(b) (article 38(b)) is amended by striking out the words "president of the court" in the last sentence and inserting the words "law officer or by the president of a court-martial without a law officer" in place thereof.

(12) Section 839 (article 39) is amended to read as follows:

"**§ 839. Art. 39. Sessions**

"(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a law officer and members, the law officer may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

"(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

"(2) hearing and ruling upon any matter which may be ruled upon by the law officer under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

"(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

"(4) performing any other procedural function which may be performed by the law officer under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

"(b) When the members of a court-martial deliberate or vote, only the members may be present. After the members of court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of

the accused, the defense counsel, the trial counsel, and, in cases in which a law officer has been detailed to the court, the law officer."

(13) Section 840 (article 40) is amended to read as follows:

"§ 840. Art. 40. Continuances

"The law officer or a court-martial without a law officer may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."

(14) Section 841 (a) (article 41 (a)) is amended—

(A) by amending the first sentence to read as follows: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and

(B) by striking out the word "court" in the second sentence and inserting the words "law officer or, if none, the court" in place thereof.

(15) Section 842 (a) (article 42 (a)) is amended to read as follows:

"(a) Before performing their respective duties, law officers, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the

10

time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a law officer, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty."

(16) Section 845 (article 45) is amended—

(A) by striking out the words "arraigned before a court-martial" in subsection (a) and inserting the words "after arraignment" in place thereof; and

(B) by amending subsection (b) to read as follows:

"(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the law officer or by a court-martial without a law officer, a finding of guilty of the charge

or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty."

(17) Section 849 (a) (article 49 (a)) is amended by inserting after the word "unless" the words "the law officer or court-martial without a law officer hearing the case or, if the case is not being heard,".

(18) Section 851 (article 51) is amended—

(A) by amending the first sentence of subsection (a) to read as follows:

"Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot.";

(B) by amending the the first two sentences of subsection (b) to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocu-

tory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than motion for a finding of not guilty, is final and constitutes the ruling of the court.";

(C) by striking out the words "of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court" in the first sentence of subsection (c) and inserting the words "and the president of a court-martial without a law officer shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them" in place thereof; and

(D) by adding the following new subsection at the end thereof:

"(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence."

(19) Section 852 (article 52) is amended—

(A) by inserting the words "as provided in sec-

tion 845 (b) of this title (article 45 (b)) or" after the word "except" in subsection (a) (2); and

(B) by adding to the first sentence of subsection (c) the words ", but a determination to reconsider a finding of guilty or, with a view toward decreasing it, a sentence may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence."

(20) Section 854 (a) (article 54 (a)) is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President."

SEC. 2. This Act becomes effective on the first day of the tenth month following the month in which it is enacted.

61-764 O—66—pt. 2——7

SECTIONAL ANALYSIS

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, providing for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial proceedings by counsel having the qualifications of defense counsel detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes

Section 1(1) amends article 1(10), the definition of a "law officer," to include an official of a special court-martial detailed in accordance with article 26 as well as such an official of a general court-martial. This reflects the amendment of article 16 (sec. 1(2) which creates special courts-martial consisting of a law officer and members or just a law officer.

Section 1(2) amends article 16 to provide that a general or special court-martial shall consist of only a law officer if the accused, before the court is convened, so requests in writing and the convening authority consents thereto. However, before he makes such a request, the accused is entitled to know the identity of the law officer and to have the advice of counsel. Although such a procedure has not heretofore been available in any of the Armed Forces, an analogous method of disposition of criminal cases is provided in the Federal courts by rule 23 of the Federal Rules of Criminal Procedure, which provides that:

"Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government."

The adoption of such a procedure will result in an appreciable reduction in both time and manpower normally expended in trials by courts-martial. The vast majority of cases in which an accused pleads guilty would probably be tried by a single-officer court. It should be noted that the convening authority is not required to establish a single-officer court-martial but may, in his discretion, refer cases to a court-martial with members either because, with respect to special courts-martial of a shortage of legally trained personnel available to the command or for other reasons.

Article 16 is further amended by providing for a special court-martial consisting of a law officer and not less than three members. The special court-martial with a law officer and members is designed primarily for the trial of cases involving factual and legal problems which might be considered too difficult for a legally untrained special court-martial president to handle.

Section 1 (3) amends article 18 to provide that a general court-martial consisting of only a law officer may not adjudge the penalty of death.

Section 1(4) amends article 19 by providing that before a special court-martial may adjudge a bad conduct discharge the accused must be represented or afforded the opportunity to be represented at the trial by counsel who is legally qualified in the sense of article 27(b). The offered representation, of course, will be at no expense to the accused. This amendment does not limit or otherwise affect any right the accused may have to obtain counsel of his own selection under article 38(b). Also, the accused may decide not to avail himself of the opportunity to be represented by counsel qualified under article 27(b).

Section 1(5) amends article 25 to provide in subsection (c)(1) that an accused who desires that enlisted members serve on his court-martial shall make such a request before the conclusion of a session called by the law officer under article 39(a) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused. One of the purposes of the proposed amendment to article 39, infra, is to insure that the trial of the general issues will not be delayed after the members are in attendance. Under present practice, an accused can postpone his request for enlisted members until the appointed members of the court have gathered and, if enlisted persons are not then on the court, the court would be forced to adjourn until enlisted members are obtained and some of the officer members relieved.

The request for enlisted personnel may be made at any time prior to the conclusion of a session called prior to trial pursuant to the amendment to

article 39. Only one pretrial session would be called in any particular case, although that session may continue for as long as may be necessary and may be recessed, postponed, continued, or reconvened. A reconvened pretrial session does not constitute a second such session, but rather a continuation of the session first called. If no pretrial hearing is held, the procedure for requesting enlisted persons will be substantially the same as the procedure now used.

Article 25 is further amended by substituting the word "assembled" for the word "convened" in subsection (c)(1). The term "convened" as used in the present subsection (c)(1) has been considered to be a term of art which has reference to that time in the court-martial proceedings when the members, the law officer, and counsel are sworn. The amendment to article 43 contemplates that, if permitted by regulations of the Secretary concerned, the above personnel will be sworn at some time before their gathering in the courtroom. Accordingly, the term "convened" as used in the above sense might have no application under the amended procedure. Furthermore, the term "convened" is used elsewhere in the code to refer to the appointment of courts-martial, and consequently has caused some confusion in this respect. This and other amendments in this bill will obviate this confusion of terms by using the word "assembled" to refer to the gathering as distinguished from the appointment of the court.

Section 1(6) amends subchapter V by indicating in the analysis that law officers may be detailed to special as well as to general courts-martial.

Section 1(7) amends article 26(a) to provide that a commissioned officer acting as a single-officer general court-martial must have the qualifications generally specified for a law officer and, in addition, must be certified to be qualified for duty as a single-officer general court-martial by the Judge Advocate General.

The amendment also provides that a commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. The amendment will permit the establishment of a special list of individuals certified to be qualified to act as special court-martial law officers, thus making the opportunity to act in this capacity available to the younger judge advocates or legal specialists and providing a training ground for future general court-martial law officers. The detail of a law officer to a special court-martial is made subject to secretarial regulations since the supply of individuals qualified as law officers is somewhat limited and will have to be controlled.

Section 1(8) amends article 26(b) to reflect the amendment to article 39.

Section 1(9) amends article 29 to provide that no member of a general or special court-martial may be absent or excused, except for the reasons specified, after the court has been assembled for the trial of the accused, and by specifically excepting from the operation of subsections (b) and (c) single-officer general and special courts-martial. This section further amends article 29 by deleting any reference in subsections (b) and (c) to the oaths of the members so as to make it clear that it is not required that new members take their oaths at the trial. The amendment to article 42 requires that the oath must be taken at some time before a member may perform his duties. The words "evidence previously introduced before the members of the court" have been inserted in place of the present language so that only that evidence which has been introduced before the members of the court must be read to the court to which the new members have been detailed and so that all evidence, not just "testimony," will be included.

Subsection (d) is added to article 29 to provide for those instances in which the law officer of a single-officer general or special court-martial is absent, whether because of physical disability, challenge, or other good cause, and a new law officer is detailed. Just as in the case of absent court members, the trial shall proceed as if no evidence had previously been introduced unless a

verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel. The accused, knowing the identity of the newly detailed law officer and after consultation with counsel, must request in writing that the new single-officer court try his case (see sec. 1(2)). Otherwise, the charges must be returned to the convening authority for reference to a court-martial which includes members or for other disposition.

Section 1(10) amends article 35 by extending the protection of time for preparation by the defense to sessions called by the law officer under the proposed amendment to article 39.

Section 1(11) amend article 38 by providing in subsection (b) that, if the accused who has individual counsel does not desire that detailed counsel act in his behalf as associate counsel, detailed counsel shall be excused by the law officer instead of by the president when the trial is by a court-martial which includes, or may consist only of, a law officer. This change is made necessary by the provisions in this bill for single-officer courts-martial, and also by the amendment to article 39 which permits the law officer to call the court into session without the presence of the members. In the absence of the amendment to article 38(b), the law officer would not be empowered to excuse counsel at the session.

Section 1(12) amends article 39 to provide that the law officer of a court composed of a law officer and members may call the court into session without the attendance of members for the purpose of disposing of interlocutory motions raising defenses and objections, ruling upon other matters that may legally be ruled upon by the law officer, holding the arraignment and receiving the pleas of the accused if permitted by regulations of the Secretary concerned, and performing other procedural functions which do not require the presence of court members. The effect of the amendment, generally, is to conform military criminal procedure with the rules of criminal procedure applicable in the U.S. district courts and otherwise to give statutory sanction to pretrail and other hearings without the presence of the members concerning those matters which are amendable to disposition on either a tentative or final basis by the law officer. The pretrial disposition of motions raising defenses and objections is in accordance with rule 12 of the Federal Rules of Criminal Procedure. Other procedural and interlocutory matters will be presented for appropriate rulings by the law officer at pretrial sessions at his dscretion, although he may not abuse that discretion by violating or impairing in these proceedings any substantial right of the accused. This is in accordance with the principles expressed by the U.S. Court of Military Appeals in *United States* v. *Mullican* (7 USCMA 208, 21 CMR 334).

A typical matter which could be disposed of at a pretrial session is the preliminary decision on the admissibility of a contested confession. Under present practice, an objection by the defense to the admissibility of a confession on the ground that it was not voluntary frequently results in a lengthy hearing before the law officer from which the members of the court are excluded, although they must still remain in attendance. By permitting the law officer to rule on this question before the members of the court have assembled, the members are not required to spend considerable time merely waiting for a decision of the law officer. If he sustains the objection the issue is resolved, and the facts and innuendoes surrounding the making of the confession will not reach the members by inference or otherwise. If the law officer determines to admit the confession, the issue of voluntariness will normally, under civilian and military Federal practice, be relitigated before the full court.

This amendment merely provides a grant of authority to the law officer to hold sessions without the attendance of the members of the court for the purposes designated in the amendment and does not attempt to formulate rules for the conduct of these sessions or for determining whether or not particular matters not raised thereat shall be considered as waived. These are questions more appropriately resolved under the authority given to the President in article 36 to make rules governing the procedure before courts-martial. The President now prescribes rules as to motions raising defenses and objections in court-martial trials in chapter XII of the Manual for Courts Martial, as does the Supreme Court for Federal criminal trials in rule 12 of the Federal Rules of Criminal Procedure.

This amendment also provides that the law officer of a special court-martial as well as the law officer of a general court-martial may be requested to appear before the court to put the findings in proper form.

Section 1(13) amends article 40 by making it clear that when the court includes a law officer that official will decide whether or not a continuance will be granted. This has actually been the practice under the code.

Section 1(14) amends article 41(a) by specifically providing that the law officer of a special court-martial may be challenged for cause. Further, article 41(a) is amended to provide that when a court-martial includes a law officer, he, rather than the members, shall determine the relevancy and validity of challenges. The effect of this amendment is to conform procedures before courts-martial to procedures in the district courts in which the trial judge rules upon a challenge for cause against a juror.

Section 1(15) amends article 42(a) by omitting the requirement that the oath given to court-martial personnel be taken in the presence of the accused and further by providing that the form of the oath, the time and place of its taking, the manner of recording thereof, and whether the oath shall be taken for all cases or for a particular case, shall be as prescribed by regulations of the Secretary concerned. The amendment also contemplates that Secretarial regulations may permit the administration of an oath to certified legal personnel on a one-time basis as in the case of legal practitioners before civilian courts.

Section 1(16) amends article 45 to allow, if permitted by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged, the entry of findings of guilty upon acceptance of a plea of guilty without the necessity of voting on the findings. At common law and under the practice in the U.S. district courts, the court may enter judgment upon a plea of guilty without a formal finding of guilty and the record of judgment entered on such a plea constitutes a judicial determination of guilt. The amendment is intended to conform military criminal procedure with that in civilian jurisdictions, and to delete from military practice the merely ritualistic formality of requiring the assembled court to vote on the findings. The section also deletes reference in subsection (a) to "arraignment before a court-martial" to conform with the changed article 39.

Section 1(17) amends article 49(a) to provide that, when a case is being heard, the law officer or court-martial without a law officer is the appropriate authority to forbid the taking of a deposition for good cause. The intent and purpose of this change is to vest in the law officer, or in the court-martial if it does not include a law officer, the authority to rule on this interlocutory matter after trial has begun.

Section 1(18) amends article 51 to reflect the amendment to article 41 which provides that, when a court-martial includes a law officer, he is the person who rules upon all challenges for cause, and to include specifically in subsection (c) the duty of the law officer and president of a court-martial without a law officer to instruct the members of the court. This section further amends article 51 to provide that rulings of the law officer of a special, as well as a general, court-martial on all questions of law and all interlocutory questions other than the accused's mental responsibility are final and that rulings of the president of a special court-martial without a law officer on questions of law other than a motion for a finding of not guilty are also final. The power given to the law officer by this amendment is in accordance with Federal practice, and the power given to the president of a special court-martial to rule finally on questions of law is implicit in the decision of the U.S. Court of Military Appeals in *United States* v. *Bridges* (12 USCMA 96, 30 CMR 96).

Article 51 is further amended to provide that an officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence.

Section 1(19) amends article 52 to conform with the amendment to article 45 by inserting in subsection (a)(2) a provision whereby findings of guilty may be entered against a person upon his plea of guilty without the formality of a vote, if permitted by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged. Article 52 is further amended by adding to subsection (c) a provision whereby the members of the court may determine to reconsider a finding of guilty or, with

a view to decreasing it, a sentence upon any vote which indicates that reconsideration is not opposed by the number of votes required for that finding or sentence. This amendment is consistent with justice and fair procedure, for such a vote would indicate that at least one of the members who had voted for the finding or sentence now desires to reconsider the matter. A reconsideration of a finding of guilty of a lesser included offense with a view to arriving at a finding of guilty of a greater offense is actually a reconsideration of a finding of not guilty, and accordingly a majority vote is required before such a reconsideration can be undertaken. This amendment is not intended to have any effect upon the time within which a finding or sentence may be reconsidered, this being part of the rulemaking power of the President under article 36 (see pars. 74*d*(3) ad 76*c* of the *Manual for Courts-Martial* for rules now in effect).

Section 1(20) amends article 54(a) to provide for authentication of a record of trial by general court-martial by the signature of the law officer. Under the present law, the record must be authenticated by the signature of both the law offcer and the president, or, if they are unavailable for one of the reasons specified in the article, by two members. However, neither the president nor other members are present during the many hearings held out of their presence even under the present practice, and thus actually are unable to certify to the correctness of a transcription of those proceedings. The amendment further provides that if the law officer cannot, for one of the specified reasons, authenticate the record, it shall be authenticated by the signature of the trial counsel or a member. Authentication by a member, if the court has members, in this latter case may be a practical necessity despite the absence of the member from hearings conducted by the law officer. If the court has no members, then the record would have to be authenticated by the law officer or, if he was unable to do so, the trial counsel.

This amendment further amends article 54 by permitting the President to provide for summarized records of trial in general court-martial cases resulting in acquittal of all charges and specifications or, if they do not affect a general or flag officer, in sentences not involving a discharge and not in excess of a sentence that can otherwise be adjudged by special courts-martial. This amendment corrects an inconsistency which has heretofore existed, since the use of a summarized record of trial is now permitted in special court-martial cases if the sentence does not extend to a bad-conduct discharge. The reasons which justify the employment of summarized records of trial in special court-martial cases are equally applicable to the class of general court-martial cases affected by this amendment, that is, the time, effort, and expense of preparing a verbatim transcript is not justified. It is recognized, of course, that the general court-martial case will have to be fully reported in the first instance, and the amendment deals only with preparation of the record after trial.

Section 2 provides that these amendments become effective on the first day of the tenth month following the month in which enacted.

DEPARTMENT OF DEFENSE SUBSTITUTE PROPOSED FOR SECTION 2 OF S. 750

89TH CONGRESS
2D SESSION

S.

IN THE SENATE OF THE UNITED STATES

JANUARY , 1966

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To protect the constitutional rights of military personnel by insuring their right to be represented by qualified counsel in certain cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 59 of title 10, United States Code, is amended—

(1) By adding the following new section at the end thereof:

"§ 1169. Discharge or separation from service: procedural requirements and right to counsel

"(a) Except as provided in subsection (b) of this section, or unless the member is unavailable to appear because

of absence resulting from his own misconduct, no member of the armed forces shall be administratively discharged or separated from service under conditions other than honorable unless he has been afforded an opportunity to appear and present evidence in his own behalf before a board convened by appropriate authority for that purpose. A member of the armed forces with respect to whom such a board is convened shall have the right, unless waived by him, to be represented before the board by civilian counsel of his own selection or by military counsel whose qualifications are not less than those prescribed under section 827(b) of this title (article 27(b)).

"(b) The provisions of subsection (a) shall not apply in the case of any member of the armed forces discharged or dismissed from service pursuant to the sentence of a general or special court-martial, or in time of war, or of national emergency hereafter declared by the President or the Congress, if the Secretary concerned suspends the operation of such subsection. Any member of the armed forces may waive his right to appear and be represented by counsel before a board convened for the purpose described in subsection (a) if such member is given notice in writing of his right to appear and present evidence in his own behalf before such board and of his right to be represented by counsel before such board, and such member is informed

that, if he so requests, he will be afforded the opportunity to consult with counsel, whose qualifications are not less than those prescribed under section 827(b) of this title (article 27(b)), regarding the waiver of such member's right to appear before such board."; and

(2) by adding the following new item at the end of the analysis:

"1169. Discharge or separation from service: procedural requirements and right to counsel."

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 29, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 750, to protect the constitutional rights of military personnel by insuring their right to be represented by qualified counsel in certain cases, and for other purposes.

Section 1 of the proposed bill would amend article 19 of the Uniform Code of Military Justice, 10 U.S.C. 819 to provide that a special court-martial could not, except in time of war, adjudge a bad conduct discharge unless the accused was represented at the trial, or afforded the opportunity to be represented, by a defense counsel qualified under article 27(b) of the Uniform Code. To be qualified under this article a person must be either a lawyer or law school graduate.

Existing law requires that an accused be represented by qualified counsel before a general court-martial. In the case of a special court-martial, the accused is only required to be represented by qualified counsel if the Government is represented by qualified counsel. While under present law the accused has a right to obtain a lawyer at his own expense, in most cases he is not financially able to do so. The amendment proposed by section 1 of S. 750 would require the Government to provide him with qualified counsel if he desired. If an accused desired qualified counsel and one was not provided, he could not be given a bad conduct discharge.

During fiscal years 1963 and 1964, special courts-martial in the Coast Guard adjudged 41 bad conduct discharges. Of these cases, the accused was represented by a lawyer in 21 instances. There were many other cases tried where the seriousness of the offense might have warranted imposition of a bad conduct discharge. If the present bill were enacted, as a practical matter it would result in the assigning of a lawyer as defense counsel in such cases if there appeared to be a reasonable probability that the sentence would include a bad conduct discharge. This would result in lawyers being assigned to many more special courts-martial than is now the case. While this would place a considerable additional burden upon the service in providing lawyers, the Department believes that it is justified by the severe consequences of receiving a bad conduct discharge. The Department therefore would favor the enactment of section 1 of S. 750.

Section 2 of the bill would add a new article 141 to the Uniform Code. This article would provide that no member of the armed forces could be administratively discharged under other than honorable conditions unless he was given the opportunity to appear and present evidence in his own behalf to a board convened to consider his case. He would also have the right to be represented before that board by qualified counsel. The rights to appear, present evidence, and be represented by qualified counsel could be waived if the member had received notice in writing of these rights. Before executing such a waiver the member would be given the opportunity to consult with qualified counsel.

S. 750 is one of a series of bills proposing extensive amendments to the Uniform Code of Military Justice. In our comments on one of the other bills in this series, S. 749, we objected to the inclusion of provisions relating to administrative boards in the Uniform Code of Military Justice. That objection is also applicable to section 2 of S. 750 since it applies solely to administrative discharge proceedings. The Department therefore believes that these provisions should not be made a part of the Uniform Code.

Under present Coast Guard policy undesirable discharges may be given to a service member without formal board action in cases where the member has been tried and convicted in a civilian court for an offense for which the maxi-

mum penalty under the Uniform Code is confinement in excess of 1 year. There were 15 such cases in calendar years 1963 and 1964. Undesirable discharges are also given without board action in cases where the member has been absent from the service for a prolonged period. There were two cases in this category during 1963 and 1964 in the Coast Guard. In these types of cases it does not appear to the Department that the services of a lawyer are required to protect the substantial rights of the accused. Trial and conviction of a felony is civilian court or prolonged absence from the service are considered sufficient basis to issue an undesirable discharge without further formal inquiry. Additionally, in many of these cases board action is precluded because of the confinement of the member. The Department therefore would object to the application of the proposed article 141 to these two types of cases.

A total of 40 undesirable dicharges, including 7 from among the 17 discussed above, were issued by the Coast Guard during 1964. Of these, six were issued as a result of board actions at which commissioned officers were assigned as counsel to the service members involved, though these officers were usually not qualified as counsel under article 27(b). The records indicate that there were a total of 24 board actions from which a recommendation for an undesirable discharge could have been forthcoming. The Department believes that the issues before these boards are not such to require a lawyer to represent each service member brought before them. We believe that the average officer is sufficiently familiar with the service and the issues before these boards to protect the interests of service members facing them. The Department therefore would object to the requirement that legally qualified counsel be furnished before an undesirable discharge may be issued.

The Department notes that during 1963 and 1964 the majority of the undesirable discharges issued by the Coast Guard were in cases where the service member waived his right to appear before a board and be represented by counsel. The figures for these years also show that those persons who did appear before a board and were represented by counsel apparently had a better chance of avoiding an undesirable discharge than persons who waived those rights. This indicates that counsel, even though not qualified under article 27(b) of the code, are effective in aiding persons in these types of cases. It also indicates the importance of the decision to waive the rights to counsel and to appear before a board. The Department therefore would have no objection to those provisions of S. 250 which would require that a member be afforded an opportunity to consult with counsel qualified under article 27(b) of the code before waiving his rights to appear before a board considering his discharge. However, as stated earlier, we do not believe that it is necessary for counsel having these qualifications to be present at the board hearing itself.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 751

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To protect the constitutional rights of military personnel by increasing the period within which such personnel may petition for a new trial by court-martial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 873 (article 73) of title 10, United States Code, is amended to read as follows: "At any time within two years after approval by the convening authority of any court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court."

SEC. 2. The amendment made by the first section of this

Act shall be effective with respect to any court-martial sentence approved by the convening authority on and after the date of enactment of this Act and with respect to any court-martial sentence approved by the convening authority not more than one year prior to the date of the enactment of this Act.

S. 751 To Protect the Constitutional Rights of Service Personnel to Trials by Court-Martial in Accordance With Requirements of Due Process

Background memorandum: Article 73 of the Uniform Code of Military Justice, 10 U.S.C. 873, provides that, at any time within 1 year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for 1 year or more, the accused may petition the Judge Advocate General for a new trial on ground of newly discovered evidence or fraud on the court. Subject to a successful petition for new trial under article 73 and the authority of the Secretary of the Department, under article 74, to substitute an administrative discharge for an executed discharge or dismissal pursuant to court-martial sentence, the Uniform Code provides that court-martial judgments shall be final (art. 76). Thus, if a serviceman has been convicted in a trial wherein, because of some material fraud on the court-martial or otherwise, he has been deprived of due process, he will have no remedy unless the sentence involved a discharge or confinement for 1 year or more; and even if the sentence were sufficiently severe to authorize relief, he must petition for a new trial within 1 year. On the other hand, Federal Rule 33 of Criminal Procedure authorizes a petition for new trial by reason of newly discovered evidence at any time within 2 years from judgment.

Since in some instances a fraud on the court-martial may constitute a deprivation of due process or the newly discovered evidence may reveal that a conviction was obtained by means which deprived the accused of due process, and since—aside from the dubious remedy of judicial action predicated on the theory that the absence of due process deprived the court-martial of jurisdiction and made its action void—the accused is so limited in his means to remove the stigma and the other consequences of the unjust conviction, better protection of the accused's constitutional rights demands that the remedy of the petition for a new trial be expanded. In the first place, the time limit on the petition for new trial should be expanded to 2 years to conform to the requirements of Federal Rule 33 of Criminal Procedure. There is no reason that it will be easier for the serviceman than for the civilian to obtain new evidence after a trial is completed; and therefore the time limit for the serviceman should be no less liberal than for the civilian. Secondly, the petition for new trial should be made available with respect to any conviction by court-martial, irrespective of the sentence imposed.

To implement this broadening of the remedy of the petition for new trial, it would be necessary to:

1. Substitute in article 73, 10 U.S.C. 873, the words "2 years" for "1 year."
2. Rewrite article 73 to make the petition for new trial available after "approval by the convening authority of any court-martial sentence."
3. Probably this remedy should be made available retroactively to apply to any conviction by any kind of court-martial that had occurred within 2 years of the date of the proposed amendment to article 73. Certainly it would be desirable to specify in the amending legislation the extent to which it would apply to any court-martial sentences previously imposed.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, April 17, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services, U.S. Senate

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 751, 89th Congress, a bill to protect the constitutional rights of military personnel by increasing the period within which such personnel may petition for a new trial by court-martial, and for other purposes. The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

This bill would amend 10 U.S.C. 873 (art. 73) to permit a petition for a new trial to be made within 2 years (rather than 1 year as now prescribed) after approval of a court-martial sentence, and provide that the article would apply to any court-martial sentence, rather than only to a sentence extending to death, dismissal, dishonorable or bad conduct discharge, or confinement for 1 year or more.

The Department of Defense concurs in that portion of the bill that would extend the time within which a petition for a new trial could be submitted. The Judge Advocates General of the Armed Forces and the Court of Military Appeals have recommended this since 1953 (see p. 8, Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury for the period June 1, 1952, to December 31, 1953). The Department recommends, however, that section 2 of the bill, providing for retroactive effect, be amended to make the benefits of the proposal available in any case in which 2 years have not elapsed since the convening authority approved the sentence.

The Department of Defense concurs in principle with that portion of the bill that would extend the authority of the Judge Advocate General over cases other than those now covered by 10 U.S.C. 873 (art. 73). From the standpoint of the administrative burden involved, however, it would be preferable to authorize the Judge Advocate General to take direct corrective action on these additional cases, rather than to limit his authority to granting a new trial. It is therefore recommended that this additional authority be granted, by means of an appropriate amendment to 10 U.S.C. 869 (art. 69).

A substitute draft bill, embodying the recommendations contained in this report, is attached for consideration by your committee.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

EUGENE N. ZUCKERT.

DEPARTMENT OF DEFENSE SUBSTITUTE PROPOSED FOR S. 751

89TH CONGRESS
2D SESSION

S.

IN THE SENATE OF THE UNITED STATES

JANUARY , 1966

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, to authorize the Judge Advocate General to grant relief in certain court-martial cases, to extend the time within which an accused may petition for a new trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

(1) Section 869 (article 68) is amended by adding the following new sentence at the end thereof:

"Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case

which has been finally reviewed, but has not been reviewed by a board of review, may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."

(2) Section 873 (article 73) is amended by striking out in the first sentence the words "one year" the first time they appear and inserting the words "two years" in place thereof.

SEC. 2. The amendment made by section 1 (1) of this Act is effective upon the date of its enactment. The amendment made by section 1 (2) of this Act is effective with respect to a court-martial sentence approved by the convening authority on and after, or not more than two years before, the date of its enactment.

SECTIONAL ANALYSIS

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, to authorize the Judge Advocate General to grant relief in certain court-martial cases, to extend the time within which an accused may petition for a new trial, and for other purposes

Section 1(1) amends article 69 by adding a new sentence authorizing the Judge Advocate General to either vacate or modify the findings or sentence, or both, in whole or in part, in any court-martial case which has been finally reviewed, but which has not been reviewed by a board of review, because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. It has been the experience of all the services in this class of cases, particularly with respect to summary court-martial cases and those special court-martial cases not reviewable by a board of review, that some provision should be made for removing the fact of conviction, as well as granting other relief. Since the decision to remove the fact of conviction is a judicial determination based on

the traditional legal grounds mentioned in the proposed amendment, it is considered appropriate that the Judge Advocate General should be empowered to perform this function as well as to grant lesser forms of relief. This amendment would not limit the power now possessed by the Secretary concerned, acting through boards established under 10 U.S.C. 1552, to correct an error or remove an injustice.

Section 1(2) amends article 73 to extend the time within which an accused may petition the Judge Advocate General for a new trial from 1 to 2 years.

Section 2 provides that the amendment in section 1(1) becomes effective upon the date of its enactment and that the amendment in section 1(2) becomes effective with respect to a court-martial sentence approved by the convening authority on and after, or not more than 2 years before, the date of its enactment.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., March 25, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 751, to protect the constitutional rights of military personnel by increasing the period within which such personnel may petition for a new trial by court-martial, and for other purposes.

The proposed bill would amend article 73 of the Uniform Code of Military Justice, 10 U.S.C. 873, to provide that at any time within 2 years after approval by the convening authority of any court-martial sentence an accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court. Article 73 presently allows an accused to petition for a new trial only if the sentence includes death, dismissal, a dishonorable or bad conduct discharge, or confinement for 1 year or more. Article 73 further provides that the petition must be filed within 1 year after approval of the sentence by the convening authority.

The Department would have no objection to extending the time limit on a petition for a new trial from 1 to 2 years. Since the Uniform Code of Military Justice was adopted, the Department has received less than six of these petitions. Accordingly, extension of the time limit would probably not result in any increased burden on the Department and would afford additional rights for members of the Coast Guard.

Similarly, the Department would have no objection to extending the right to petition for a new trial to cases where the sentence is less than that presently specified in article 73. However, we do not believe that this right should be extended to the summary court-martial level. Considering the low sentence limitations on summary courts-martial, the right to petition for a new trial is not necessary to protect the substantial rights of service members tried by these courts. Further, the volume of summary courts-martial and the fact that verbatim records of trials are not kept in these cases make it impracticable to allow petitions for new trials by summary courts-martial.

Accordingly, the Department would have no objection to the enactment of S. 751, if it were amended to limit the right to petition for a new trial to general and special courts-martial.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 752

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, so as to provide additional constitutional protection in trials by courts-martial.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 801 (10) (article 1 (10)) of title 10, United States Code, is amended to read as follows:

"(10) 'Law officer' means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26)".

SEC. 2. Section 816 (article 16) of title 10, United States Code, is amended to read as follows:

"(a) The three kinds of courts-martial in each of the armed forces are—

"(1) general courts-martial;

"(2) special courts-martial; and

"(3) summary courts-martial.

"(b) A general court-martial consists of a law officer and not less than five members, except in any case in which the accused waives trial by court members under section 855 of this title (article 55), in which case the court consists of a law officer only.

"(c) A special court-martial consists of not less than three members, or a law officer and not less than three members, or, in any case in which a law officer has been detailed to the case and the accused waives trial by court members under section 855 of this title (article 55), the court consists of a law officer only.

"(d) A summary court-martial consists of one commissioned officer."

SEC. 3. The last sentence of section 819 (article 19) of title 10, United States Code, is amended to read as follows: "A bad conduct discharge may not be adjudged in any case tried by special court-martial unless (1) a complete record of the proceedings and testimony before the court has been made, and (2) except in time of war, a law officer was detailed to such case and was present during all trial proceedings."

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SEC. 4. (a) Subsection (a) of section 826 (article 26) of title 10, United States Code, is amended to read as follows:

"(a) The authority convening a general court-martial shall, and the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. Any officer certified as qualified to serve as law officer of a general court-martial shall be certified as qualified to serve as law officer of a special court-martial. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigative officer or as counsel in the same case."

(b) The catchline of section 826 (article 26) of title 10, United States Code, is amended to read as follows:

"§ 826. Art. 26. Law officers of general and special courts-martial"

(c) The table of sections at the beginning of subchapter V of chapter 47 of title 10, United States Code, is amended by striking out

"826. 26. Law officer of a general court-martial."

and inserting in lieu thereof

"826. 26. Law officers of general and special courts-martial."

SEC. 5. (a) Subsection (a) of section 829 (article 29)

of title 10, United States Code, is amended by striking out "No" at the beginning of such subsection and inserting in lieu thereof "Except in any case tried by a law officer without court members, pursuant to section 855 of this title (article 55), no".

(b) The first sentence of subsection (b) of such section is amended to read as follows: "Except in any case tried by a law officer without court members pursuant to section 855 of this title (article 55), a general court-martial trial may not proceed if the court is reduced below five members unless the convening authority details new members sufficient in number to provide not less than five members."

(c) Subsection (c) of such section is amended to read as follows:

"(a) Except in any case tried by a law officer without court members pursuant to section 855 of this title (article 55), a special court-martial trial may not proceed if the court is reduced below three members unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused, and counsel."

(d) Such section is further amended by adding at the end thereof a new subsection as follows:

"(d) In any case being tried by a law officer only pursuant to section 855 of this title (article 55), and the law officer is unable to proceed with the trial because of physical disability, as the result of challenge, or for other good cause, the trial shall proceed, subject to the provisions of section 55(d) of this title (article 55(d)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."

SEC. 6. The last sentence of section 838(b) (article 38(b)) of title 10, United States Code, is amended by striking out "president of the court" and inserting in lieu thereof "law officer or by the President of a court-martial without a law officer".

SEC. 7. Section 839 (article 39) of title 10, United States Code, is amended to read as follows:

"§ 839. Art. 39. Sessions

"When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court

may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which law officers have been detailed to the court, the law officer."

SEC. 8. Section 841 (a) (article 41 (a)) of title 10, United States Code, is amended—

(1) by striking out the first sentence and inserting in lieu thereof the following: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and

(2) by striking out "court" in the second sentence and inserting in lieu thereof "law officer or, if none, the court".

SEC. 9. (a) The first sentence of subsection (a) of section 851 (article 51 (a)) of title 10, United States Code, is amended to read as follows: "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot."

(b) The first and second sentences of subsection (b) of such section are amended to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court."

(c) Subsection (c) of such section is amended by striking out "the law officer of a general court-martial and the president of a special court-martial" and inserting in lieu thereof "the law officer of a court-martial, or the president of a special court-martial without a law officer,".

(d) Such section is further amended by adding at the end thereof a new subsection as follows:

"(d) Subsections (a), (b), and (c) of this section do not apply with respect to any court-martial case tried by a law officer only pursuant to section 855 of this title (article 55)."

SEC. 10. Section 852 (article 52) of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows:

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"(d) The foregoing provisions of this section, insofar as they relate to the number of votes required by members of a court-martial, shall not apply with respect to the trial of an accused who has waived trial by members of the court pursuant to section 855 of this title (article 55) and is tried by a law officer."

SEC. 11. Section 854(a) (article 54(a)) of title 10, United States Code, is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member."

SEC. 12. (a) Chapter 47 of title 10, United States Code, is amended by adding after section 854 (article 54) a new section as follows:

"§ 855. Art. 55. Waiver by accused of trial by court members

"(a) In accordance with such rules and regulations as the President shall prescribe, any accused who is to be tried by a general court-martial, or by a special court-martial to which a law officer has been detailed, shall be given the opportunity to waive his right to a trial by the members of

the court and elect instead to be tried by the law officer of such court. The accused may exercise such waiver by notifying the law officer of the court either before or after the convening of the court. If the waiver is made prior to the convening of the court, the members of the court shall not be present at any time during the trial; if the accused wishes to exercise such waiver after the court has been convened he may do so only with the consent of the trial counsel. If the trial counsel consents to the waiver the law officer shall forthwith excuse the members of the court from further participation in the trial.

"(b) In any court-martial case tried before a law officer pursuant to a waiver authorized under subsection (a) of this section, the law officer shall have authority to entertain and accept a plea of guilty from the accused, subject to the provisions of section 845 of this title (article 45). In any court-martial case tried by a law officer pursuant to a waiver under subsection (a) of this section, the law officer shall decide all questions of fact and law, make final rulings on all interlocutory questions and motions, make all findings with respect to guilt, and impose any sentence not prohibited by this chapter.

"(c) No waiver authorized by subsection (a) of this section shall be permitted by the law officer unless the accused prior to exercising his right to waiver, has been

advised by counsel with qualifications not less than those prescribed in section 827 (b) of this title (article 827 (b)) regarding such waiver.

"(d) A waiver by an accused of trial by court members may be withdrawn by him if, subsequent to exercising such waiver, a law officer different from the one to whom the waiver was submitted is detailed to act as law officer at the trial of the accused."

(b) The table of sections at the beginning of subchapter VII is amended by adding at the end thereof the following:

"855. 55. Waiver by accused of trial by court members."

SEC. 13. The amendments made by this Act shall become effective on the first day of the tenth month following the month in which enacted.

TO IMPLEMENT THE CONSTITUTIONAL RIGHT OF SERVICEMEN TO DUE PROCESS IN TRIALS BY COURT-MARTIAL

Background memorandum: Article III of the Constitution envisages that Federal crimes shall be prosecuted in district courts presided over by an independent judge who rules on all matters of law. Courts-martial, on the other hand, as Justice Black emphasised in *Toth* v. *Quarles*, 350 U.S. 11, are not presided over by a Federal judge. Although Congress has required in article 26 of the Uniform Code of Military Justice that each general court-martial have a law officer, who must be a qualified attorney, who sits apart from the court-martial members, and who does not participate with them in ruling on issues of fact, there is no provision for any lawyer to preside over special courts-martial. Yet a special court-martial is authorized by article 19 of the Uniform Code of Military Justice, 10 U.S.C. 819, to impose a sentence to a bad conduct discharge—a sentence which, according to qualified observers, creates considerable stigma for the recipient. Although the Army does not allow its special courts to impose bad conduct discharges, this is currently authorized by the Air Force and the Navy. Some records of trial indicate that the proceedings in which these discharges are imposed occasionally are replete with legal error and that the constitutional rights of the serviceman may be violated due to the absence of an experienced attorney to preside over the proceedings. In the Navy legally trained counsel seldom are provided to represent the parties, and so the special court-martial may impose a bad conduct discharge in a proceeding where no experienced attorney is present to assure that the accused's rights are protected. In Air Force special courts-martial legally trained counsel are gen-

erally provided for the Government and the accused; however, there is no impartial law officer present to advise the court members as to what is the correct rule of law and to assist them in choosing between the sometimes drastically divergent arguments of counsel for the parties.

In light of the severe consequences of a sentence to bad conduct discharge, it seems appropriate to require that a law officer be provided for a special court-martial proceeding in order for the court-martial to have the authority to adjudge a bad conduct discharge. While it may not be practicable to insist that the law officer of this special court-martial have the same professional qualifications that are now customary for the law officers of general courts-martial, the proposed law officer of the special court should have the qualifications required of counsel under article 27(b)(1) and should also be certified as qualified for such duty by the Judge Advocate General of the armed force of which he is a member. At present, the Uniform Code does not envisage a special court-martial with a law officer or "military judge." Therefore, it will be necessary to amend the code to provide for this alternative. While it may not be practicable to require that all special courts-martial have a law officer, it does seem desirable to authorize a special court-martial with a law officer to adjudicate any case that might be referred to it and whether or not a bad conduct discharge would be authorized for the offenses charged. Moreover, since waiver of jury is well recognized in the Federal district courts and has been held constitutional, there is no reason to forbid a similar waiver by the accused of trial by the members of the special court-martial (who correspond to a civilian jury). Of course, even in a general court-martial, where a law officer is presently required by statute, the sentencing is done by the court members, rather than by the law officer; and in this respect the military practice differs from that in the Federal district courts, where the judge does the sentencing. Even so, no objection can be seen to allowing the accused to consent to the law officer's finding the facts, imposing the sentence, or both, so long as this consent is given in open court. Certainly the armed services could not object since—if the law officer has been properly certified by the Judge Advocate General as competent to perform his duties—he should be able to make correct findings and impose an appropriate sentence—or, at the very least he should be as able to do so as would be the members of the court-martial.

To implement these proposals it would appear desirable to:

(a) Amend articles 16(b), 19, 39, 41, and 51 to provide that a special court-martial may be appointed which—in addition to the members required under article 16—shall have a law officer and that this law officer shall have all the authority to conduct the proceedings of a special court-martial to which he has been appointed as the law officer of a general court-martial would have under the provisions of article 51(b) (which prohibits him from consulting with the court members or voting with them) and, in addition to the qualifications required by article 27(b)(1), shall have been certified as competent to perform the duties of a special court-martial law officer by the Judge Advocate General of the armed force of which he is a member. Certification as the law officer of a general court-martial would include certification as law officer of a special court-martial.

(b) Amend article 19 of the Uniform Code, 10 U.S.C. 819, to provide that, except in time of war, a bad conduct discharge shall not be adjudged by a special court-martial unless that special court-martial shall have been provided with a law officer.

(c) Amend articles 39, 51, and 52 to authorize the accused, after having been provided with counsel who is qualified under the provisions of article 27(b), to consent that any finidngs shall be made, or any sentence imposed, or both, by the law officer of the special court-martial, without any necessity for either the concurrence or the presence of the court-martial members. At any time prior to the convening of the court, the accused shall have an absolute right to waive trial by the court members as to findings, or sentence, or both. However, after the court-martial has convened, such waiver shall only be effective with the consent of the trial counsel (who represents the Government). No waiver of trial by the court members shall be binding in the event there is a change with respect to the law officer who has been identified to the accused and his counsel as the one who will conduct the case. (This last provision is designed to avoid any switching of law officers after the accused has committed himself in reliance on the information as to who will be the law officer.)

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., April 6, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 752, a bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, so as to provide additional constitutional protection in trials by courts-martial, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

This bill would amend, and add a new section to, chapter 47, title 10, United States Code, to provide: (*a*) That a special court-martial may not adjudge a bad conduct discharge unless there is a verbatim record of the trial and, except in time of war a law officer has been detailed and is present during trial; (*b*) permissive authority to detail a law officer to a special court-martial; (*c*) trial by the law officer of a general court-martial or a special court-martial to which a law officer has been detailed if the accused, by notification to the law officer, waives his right to a trial by the members of the court.

As a technical matter, it is noted that section 12 of S. 752 adds a new section, 855, to chapter 47 of title 10, United States Code. Chapter 47 of title 10, United States Code, presently contains a section 855 prohibiting cruel and unusual punishments. The proposed new section should be designated as section 854a (art. 54a).

The concept of a one-officer court has been proposed in the past and supported by the Department of Defense. Such a proposal is presently contained in the "B" bill submitted to your committee as a part of the Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury pursuant to the Uniform Code of Military Justice for the period January 1, 1962, to December 31, 1962. Such a procedure has long been recognized in Federal district courts where the accused may waive trial by jury. Adoption of this concept for use in the Armed Forces would improve the administration of military justice and would save money and man-hours.

Section 12(a) of S. 752 grants an accused the absolute right, if his case has been referred to a general court-martial or to a special court-martial to which law officer has been assigned, to be tried by the law officer if he asserts his right prior to the convening of the court. It further provides, however, that if he exercises his waiver of trial by the members after the convening of the court, he may do so only with the consent of the trial counsel. The Government has an interest in the outcome of a trial equal to that of the accused. The convening authority may have a sound reason for determining in a particular case that the factual issue of guilt or innocence or the appropriateness of sentence, or both, should be determined by the considered judgment of more than one individual. With respect to the issue of guilt or innocence, this is precisely the position taken by rule 23 of the Federal Rules of Criminal Procedure. No reason is perceived why a different rule should be applied in court-martial trials.

The bill proposes to grant the law officer of a general court-martial sitting as a one-officer court the authority to impose the death penalty. There are many who believe that the death penalty should not be imposed at all, let alone by one man. The proposal would be a most unwise change in our system of military justice and could subject the court-martial system to public criticism. The Department of Defense, therefore, objects to this provision of the bill.

The memorandum accompanying S. 752 recognizes that it might be impracticable to require law officers on all special courts-martial. However, it appears that the bill as presently drafted with permissive authority to appoint law officers on special courts-martial and the mandatory requirement of a law officer's presence to authorize a bad conduct discharge, if enacted, would create another area of possible command influence which the Congress has constantly proscribed. Most commands have two or more regularly appointed special courts available for the trial of cases at all times. If the convening authority refers a case for trial to one of those having a law officer assigned rather than to another with no law officer assigned, the influence might be drawn that he desires a bad conduct discharge to be adjudged in that particular case.

The Department of the Navy recognizes the desirability of detailing law officers to sit on special courts-martial, especially where complicated and sophisticated issues are involved. It is believed, however, that the appointment of qualified defense counsel as provided by S. 750 plus the permissive law officer concept as provided in the "B" bill referred to above will adequately provide the constitutional safeguards which are of concern to your committee and to the Congress.

There is enclosed with this report a substitute draft bill which includes the provisions of the proposed "B" bill and of section 1 of S. 750. It has been designed as a substitute proposal for several of the related bills concerning military justice presently pending before your committee. The substitute draft bill corrects the defects mentioned above and is considered more appropriate from both a technical and practical standpoint. The Department of the Navy, on behalf of the Department of Defense, recommends that the enclosed substitute draft bill be enacted in lieu of S. 752.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. KEAR, Jr.,
Captain, U.S. Navy, Deputy Chief.

Note: See S. 750 for Department of Defense substitute proposed for S. 752.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 19, 1965.

HON. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 752, to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, so as to provide additional constitutional protection in trials by courts-martial.

The bill would amend the Uniform Code of Military Justice, 10 U.S.C. 801 et seq., by adding provisions permitting the assignment of a law officer to a special court-martial and preventing a special court-martial from adjudging a bad conduct discharge unless a law officer were assigned and a verbatim record of the trial were kept. A law officer would not be required during time of war. In addition, the bill would add a new article permitting an accused to be tried by the law officer alone of either a special or general court-martial provided that the accused, by notice to the law officer, waives his right to trial by the members of the court.

Under existing provisions of the code, questions of law arising during a special court-martial are decided by the president who may not be legally qualified. The Department has considered it anomalous to provide an accused with legally qualified counsel in serious cases because of the technical competence required for a proper defense and then to have questions of law arising during the course of this defense decided by a president who does not have legal training. As a result, the Department has consistently followed the practice of providing lawyers as presidents of special courts-martial in serious cases, whenever the needs of the service permit, so as to insure that the accused, to the maximum extent possible, receives a fair trial with full and proper consideration of all legal issues raised. Since the proposed bill is consonant with the views and practice followed in the past, the Department supports enactment of the provisions regarding the appointment of a law officer in serious special court-martial cases.

There is presently no authority for an accused to waive trial by the members of a court-martial and be tried by the law officer alone. The procedure allowing waiver of a jury trial has been a long-standing practice of the Federal district courts, and the use of this procedure in the military justice system should lead to an improvement in the administration of justice as well as the more efficient use of personnel. Accordingly, the Department supports this provision of the proposed bill.

The Department notes that the provisions of S. 752, as well as the provisions of section 1 of S. 750, were included in the recommendations of the Annual Report for 1962 and the Annual Report for 1963 of the Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Treasury Department. The 1963 report contained a draft bill which the Department believes is more appropriate for adoption of the provisions. The Department, therefore, recommends that its provisions be enacted in lieu of S. 752.

The Department notes a technical error in the bill in that it would add a new section 855 of title 10, United States Code. Since there already is a section with that number, the bill should be amended to eliminate this duplication.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 753

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To implement the constitutional rights of military personnel by providing appellate review of certain administrative board decisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (b) of section 867 (article 67) of title 10, United States Code, is amended by—

(1) striking out "all cases" at the beginning of clauses (1), (2), and (3), and inserting in lieu thereof "all court-martial cases";

(2) striking out "and" at the end of clause (2);

(3) striking out the period at the end of clause (3),

and inserting in lieu thereof a semicolon and the word "and"; and

(4) adding after clause (3) a new clause as follows:

"(4) all cases reviewed by a board established under section 1552 of this title (correction of military records) or under section 1553 of this title (review of discharges and dismissals) which the Judge Advocate General orders sent to the Court of Military Appeals for review, or in which, upon petition of the applicant and on good cause shown, the Court of Military Appeals has granted a review."

(b) Subsection (c) of such section is amended (1) by inserting "in a court-martial case" immediately after "The accused", and (2) by adding at the end thereof the following: "The applicant in any case reviewed by a board referred to in subsection (c) (4) of this section has 30 days from the time he is notified by the board of the decision in his case to petition the Court of Military Appeals for review. The court shall act upon such a petition within 60 days of the receipt thereof."

(c) Subsection (d) of such section is amended by (1) striking out the word "case" in the first, second, and third sentences and inserting in lieu thereof "court-martial case", and (2) inserting after the third sentence thereof

the following new sentences: "In any case referred to in subsection (b) (4) of this section which the Judge Advocate General orders sent to the Court of Military Appeals review, the court shall take action only with respect to the issues raised by the Judge Advocate General, and in any such case reviewed upon petition of the applicant, the court shall take action only with respect to the issues specified in the grant of review."

(d) The first sentence of subsection (e) of such section is amended by striking out "sentence," and inserting in lieu thereof "sentence of a court-martial case,".

(e) The first sentence of subsection (f) of such section is amended by striking out "case," and inserting in lieu thereof "court-martial case,".

(f) Such section is further amended by redesignating subsection (g) as subsection (h) and adding after subsection (f) the following new subsection:

"(g) After it has acted on any case referred to in subsection (a) (4) of this section, the Court of Military Appeals may, in cases sent to it by the Judge Advocate General, direct the Judge Advocate General to return the record to the appropriate board for further consideration or action in accordance with the decision of the court, or may, in cases appealed by an applicant, return the record directly to the appropriate board for further consideration or action

in accordance with the decision of the court. The Court of Military Appeals shall have exclusive jurisdiction with respect to the review of cases brought before any board referred to in subsection (b) (4) of this section."

SEC. 2. (a) Subsection (c) of section 870 (article 70) of title 10, United States Code, is amended by inserting "in a court-martial case" immediately after "shall represent the accused".

(b) Subsection (d) of such section is amended by inserting "in a court-martial case" immediately after "The accused".

(c) Such section is further amended by adding at the end thereof the following new subsections:

"(f) Appellate defense counsel shall also represent before the Court of Military Appeals an applicant whose case is before the court pursuant to the provisions of section 867 (b) (4) of this title (article 67 (b) (4))—

"(1) when he is requested to do so by the applicant;

"(2) when the civilian or military board concerned is represented by counsel; or

"(3) when the Judge Advocate General has sent such a case to the Court of Military Appeals.

An applicant has the right to be represented before the Court of Military Appeals by civilian counsel if provided by him.

"(g) In the case of a board established pursuant to section 1552 or 1553, the Judge Advocate General shall detail appellate counsel to represent the board before the Court of Military Appeals whenever the board so requests. In the case of a civilian board established pursuant to section 1552 of this title, such board may be represented before the Court of Military Appeals by its own counsel if it so elects."

TO IMPLEMENT THE CONSTITUTIONAL RIGHT OF SERVICE PERSONNEL TO DUE PROCESS

Background memorandum: Congress has established for each armed service a discharge review board, composed solely of service personnel and authorized to review certain discharges from the armed services, and a board for the correction of records, composed of civilian personnel and authorized to review discharges and other matters. In some instances applications for relief submitted to either of these boards may present complex legal issues and involve the constitutional rights of the applicant. Apparently, in some cases a legal issue will be referred by a board for consideration to the Office of the Judge Advocate General of the appropriate armed service. In the event of denial of the requested relief, the applicant may sue for back pay and allowances in the Court of Claims or may seek relief in an appropriate district court. However, the initiation of such court action may be a troublesome and cumbersome process.

At the present time, the jurisdiction of the Court of Military Appeals, as defined in article 67 of the Uniform Code of Military Justice, 10 U.S.C. 867, extends only to cases tried by court-martial. However, this court would seem qualified in terms of experience and personnel to review legal issues that might arise in connection with administrative discharges or other administrative proceedings affecting the rights or status of members of the Armed Forces. Indeed, in some instances the administrative action may be predicated on alleged misconduct, which would be cognizable under the Uniform Code of Military Justice. In order to provide a single convenient forum to review legal issues arising in connection with applications to the discharge review boards and the correction boards and in that connection to protect the constitutional rights of the serviceman, it would seem desirable to amend article 67 of the Uniform Code and extend the jurisdiction of the Court of Military Appeals to legal issues involved in matters pending before the discharge review boards or the correction boards. The review by the court would be solely on matters of law and would not embrace review of factual issues. Just as the Court of Military Appeals can obtain jurisdiction of a court-martial case under article 67 of the Uniform Code by an accused's petition for a review or by a certification from the Judge Advocate General of the appropriate armed service, the Court of Military Appeals could be petitioned by an applicant to the discharge review board or the correction board to grant review of any constitutional or other legal issue present in his case, or the Judge Advocate General of the respective service or general counsel of the appropriate department, could certify any legal issues to the court for adjudication. The court would specify rules of procedure to govern such petitions for review or certified issues; and it would be provided by statute that the Court of Military Appeals would be the exclusive forum

for the consideration thereof. There would be no mandatory jurisdiction, and accordingly the court would grant review only "on good cause shown"—the same criterion applied by article 67(b)(3) to petitions for review in court-martial cases. In the event a petition for review was granted or a certificate for review was submitted, appellate counsel would be provided both for the Government and the accussed, just as is authorized under article 70 of the Uniform Code for courts-martial. Moreover, the court would be authorized to direct that appellate defense counsel be assigned to assist in supplementing a petition for review where it considered that in the interests of justice such aid should be provided the applicant.

Possibly some amendment should be considered in the Judicial Code, title 28, with a view to making it clear that the Court of Military Appeals would have exclusive jurisdiction of all legal issues arising in connection with administrative action proposed or taken by the armed services and involving members of the Armed Forces. In this way, the authority of district courts to enjoin a contemplated administrative discharge or other administrative action would be negated, and the member of the armed services would be remanded to the discharge review board, the correction board, and the Court of Military Appeals for his relief. The relief available there, of course, would be retroactive in nature, with a view to repairing any harm that might have resulted to the serviceman from the action taken.

To implement this proposal, it would seem necessary to:

(a) Expand article 67 of the Uniform Code to expand the jurisdiction of the Court of Military Appeals and to provide a procedure for bringing legal issues to that court from either the discharge review boards and the boards for the correction of military (or naval) records.

(b) Amend article 70 to provide for appellate counsel to represent the parties with respect to legal issues brought before the Court of Military Appeals pursuant to the provisions of article 67 as expanded.

(c) Amend the statutory provisions establishing discharge review boards (10 U.S.C. 1553); and correction boards (10 U.S.C. 1552) to correspond with article 67 as amended.

(d) Amend title 28, of the Judicial Code, to any extent necessary to authorize the Court of Military Appeals to be the exclusive forum for considering the legality of any administrative action proposed or taken by the armed services affecting members of the Armed Forces. (Perhaps the wording of article 67 could adequately handle this matter without the necessity to amend the Judicial Code.)

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, April 17, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 753, 89th Congress, a bill "To implement the constitutional rights of military personnel by providing appellate review of certain administrative board decisions, and for other purposes". The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

The purpose of this bill, generally, is to authorize the Court of Military Appeals to review the proceedings of the Discharge Review Board and the Board for Correction of Military Records, established under 10 U.S.C. 1552 and 1553, respectively. It would authorize the Court of Military Appeals to review a case (1) sent to it by the Judge Advocate General of an armed force (or the General Counsel of the Department of the Treasury when the Coast Guard is not operating as a part of the Navy), or (2) submitted by an applicant, if it granted a petition for review. S. 753 also provides that legally qualified officers in the office of each Judge Advocate General (and General Counsel of the Department of the Treasury) would be detailed as appellate counsel in cases before the Court of Military Appeals, substantially as is now provided in court-martial cases.

The Department of Defense opposes this bill for the following reasons:

(a) There is no evidence to indicate that present administrative remedies whereby an individual may obtain relief from a discharge or other adverse administrative action are inadequate. The additional review contemplated by the amendment to 10 U.S.C. 867 would not appear to afford rights or benefits beyond those already available under existing statutes.

(b) Each military department has a Discharge Review Board, authorized to review and, if deemed in the interests of equity, to change, correct, or modify any discharge, except a discharge resulting from the sentence of a general court-martial. Each military department has a Board for Correction of Military Records, authorized to review discharges and other adverse administrative proceedings and make such corrections in military records as may be necessary to correct an error or remove an injustice. A former serviceman denied relief by a Discharge Review Board may apply to a Board for Correction of Military Records. If administrative remedies are exhausted without success, the individual may sue for back pay in the Court of Claims or seek relief in an appropriate district court.

(c) The memorandum accompanying S. 753 states that the review by the Court of Military Appeals "would be solely on matters of law and would not embrace review of factual issues". A Board for Correction of Military Records considers very few cases involving strictly legal issues. Questions of law for the most part have been resolved prior to application to the correction board. The vast majority of applications submitted to the board involve factual issues relating to the interpretation of service regulations, policies, and procedures. Thus, the board's decisions in most instances are predicated on general principles of fairness and justice supplementing and superseding statutes.

(d) S. 753 attempts to merge the purely administrative functions of a Secretary with the military justice functions under the direction of the Judge Advocate General. The net effect would be to require the Judge Advocate General of each armed force to reveiw every case before the Discharge Review Board and Board for Correction of Military Records in the

military department concerned, including those in which the Secretary has taken final action, to determine whether any issues existed which would warrant that the case be sent to the Court of Military Appeals. This would entail the review each year of approximately 6,000 cases in the Army, 2,800 cases in the Navy, and 5,500 in the Air Force. In this regard, it should be noted that although the explanatory memorandum accompanying the bill indicates that the proposal is directed toward discharge cases, there is no such limitation in the bill. Accordingly, the Judge Advocate General concerned would be required to examine, and appeals could be taken from, all of the numerous cases that come before a correction board, regardless of the minor legal issues involved.

(e) Boards established under 10 U.S.C. 1552 consider many cases in which applicants have not been discharged under conditions other than honorable or in which relief from a discharge is not even an issue. If a substantial number of these cases were introduced into appellate channels, confusion and chaos would be generated. A serious backlog of cases in the appellate procedure would defeat the intended purpose and impede the administration of military justice under the court-martial system.

(f) This bill would authorize the Court of Military Appeals to return a case to the appropriate board for "action in accordance with the decision of the court." A discharge review board has statutory authority under 10 U.S.C. 1553 to take action "subject to review by the Secretary concerned." In the case of a board for correction of military records, the "Secretary of a military department . . . acting through boards" is authorized under 10 U.S.C. 1552 to make corrections. It is impossible to determine from the bill what effect a direction by the Court of Military Appeals is intended to have on the discretion of a Secretary under these statutes. If it is intended that the Secretary be bound, and if, for example, the Court of Military Appeals should order reinstatement of an officer, serious constitutional questions would be raised involving the authority of the President to appoint officers in the executive branch.

(g) The amendment proposed by section 2 of S. 753 would require that legally qualified officers be assigned to serve as appellate counsel for respondents and the Government in cases before the Court of Military Appeals. Although the volume of cases that would be produced by this bill is speculative at this point, it can be anticipated that the number would be substantial. The additional requirement for legal services that would be originated by this proposal could, either alone or in conjunction with proposals embodied in other bills in this area (S. 750, S. 751, S. 752, S. 754, S. 758), impose an unacceptable demand on military manpower resources.

(h) Although the bill relates only to the review of administrative actions, it is drafted as an amendment to the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). Since the Uniform Code of Military Justice essentially contains the statutory basis for the exercise of criminal jurisdiction, it would appear undesirable to inject into it provisions governing purely administrative matters.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

EUGENE M. ZUCKERT.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 19, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 753, "To implement the constitutional rights of military personnel by providing appellate review of certain administrative board decisions, and for other purposes."

The proposed bill would amend Articles 67 and 70 of the Uniform Code of Military Justice, 10 U.S.C. 867 and 870, by adding provisions which would require review by the Court of Military Appeals in cases reviewed by a Board for Correction of Military Records established under 10 U.S.C. 1552 or a Board of Review of Discharges and Dismissals established under 10 U.S.C. 1553. This review would be required when the Judge Advocate General ordered a case sent to the court for review or when the court granted a petition of an applicant for such a review. As in the case of courts-martial, review would be limited to matters of law. The Court of Military Appeals would be empowered to return a record either directly or through the Judge Advocate General to the appropriate board for further consideration or action in accordance with the decision of the court. The bill would also provide for the appointment of appellate counsel for both the applicant and either of the boards in proceedings before the Court of Military Appeals.

S. 753 is one of a series of bills proposing extensive amendments to the Uniform Code of Military Justice. In our comments on one of the other bills in this series, S. 749, we objected to the inclusion of provisions relating to administrative boards in the Uniform Code of Military Justice. That objection is applicable to this bill as well, since it applies to the review of administrative action within the Military Justice System. The Department believes that the provisions of the bill should not be made a part of the Uniform Code if enacted, but rather, should be included in a more appropriate part of title 10, United States Code.

More fundamentally, however, the Department objects to the effect which the proposed bill's provisions would have upon the existing statutory and executive authority of the Secretary. Under 10 U.S.C. 1552, the Secretary of a military department or the Secretary of the Treasury may correct a military record when he considers it necessary to correct an error or remove an injustice. The section contemplates that he will act through boards of civilians, but there is no suggestion that anyone other than the Secretary concerned is to take the final action if he deems it appropriate. While it is not the purpose of this report to develop fully the extent to which his action is reviewable by the courts, it is noted that it is reviewable, and the Secretary cannot act in an arbitrary or capricious manner. Similarly, the Secretary, under authority of 10 U.S.C. 1553, establishes boards of review of discharge and dismissal. Under the terms of the section, the findings of such boards are subject to review only by the Secretary concerned.

The proposed bill in permitting review by the Court of Military Appeals in the manner suggested, fails to consider the position, authority and role of the Secretary in the administrative scheme established under the two sections mentioned. With respect to the Coast Guard, board actions of the type covered by the bill are regularly reviewed by the General Counsel before being acted upon by the Secretary. Under such circumstances, the Department considers it anomalous to expect that the General Counsel would make an independent decision to send a case to the Court of Military Appeals for review after the Secretary has acted.

In addition, the Court of Military Appeals is, under the terms of the bill, to return the case to the board which first acted upon it either directly or through the Judge Advocate General. This procedure completely ignores the Secre-

tary concerned who, under the sections establishing the boards, has independent responsibility in connection with the board's action and, within the standards governing administrative due process, final authority with respect to the action to be taken in individual cases.

A further consideration with respect to the proposed bill is the additional personnel burden which the armed forces will be required to assume if it should be enacted. In recent years, the numbers of court-martial cases requiring the assignment of counsel, either to petition the Court of Military Appeals or to argue a granted petition, have been very small in the Coast Guard. For example, in 1963 and 1964 with some thirty-nine cases in which a petition to the court was possible, three petitions were submitted, one of which was granted and subsequently argued. Although it would be difficult to predict the number of Coast Guard cases which would be reviewed under the provisions of this bill, it should be observed that in fiscal year 1964, nineteen cases were considered by the Board of Review of Discharges and Dismissals with favorable action being taken in six cases. In calendar year 1964, sixty-two petitions were reviewed by the Board for Correction of Military Records with favorable action in sixteen cases. These figures would indicate a substantial increase in review of cases and in petitions to the Court of Military Appeals for which counsel would have to be provided.

The Department believes it pertinent to note that actions of the Board of Review of Discharges and Dismissals are, in effect, now subject to review by the Board for Correction of Military Records. If an applicant feels that his discharge is unjust or erroneous and the Board of Review of Discharges and Dismissals does not take action favorable to him, the applicant may submit a petition to the Board for Correction of Military Records seeking the correction he deems appropriate. Thus, it appears that if review is to be provided in this area, it need be provided only for actions of the Board for Correction of Military Records.

Finally and most importantly, the Department is of the opinion that the bill is unnecessary as well as being undesirable. Inclusion of another level of review for these administrative actions when review of these matters within the existing civil-court structure is possible does not appear to be warranted. The matters with which the Board for Correction of Military Records deals are many and varied ranging well beyond the criminal jurisdiction with which the Court of Military Appeals is presently concerned. Not only is it possible for the legality of administrative separations to be reviewed in the federal district courts, but also the Court of Claims has frequently been used effectively by aggrieved members to review disability and separation procedures resulting in loss of pay by the individuals concerned. It simply does not seem appropriate to provide another review procedure from which an independent line of authority dealing with separation, pay, and disability matters will stem when the existing court machinery provides protection to the member's legal rights within well-established judicial precedents.

For the foregoing reasons, the Treasury Department is opposed to the enactment of S. 753.

As a technical matter, it is noted that the reference on page 2, line 18 to "subsection (c)(4) of this section" should read "subsection (b)(4) of this section", and similarly, the reference on page 3, line 20 to "subsection (a)(4) of this section" should read "subsection (b)(4) of this section". The section, as amended, will not contain a subsection (c)(4) and the subject matter of subsection (a)(4) does not deal with the scope of jurisdiction of the Court of Military Appeals.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

89TH CONGRESS
1ST SESSION

S. 754

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To insure due process in the case of certain administrative actions involving military personnel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 of title 10, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 941. Art. 141. Administrative separation or discharge; board proceedings

"(a) No person, except in time of war, shall be separated or discharged from the armed forces under conditions other than honorable unless (1) such person has been accorded a hearing in accordance with the provisions of this

section before a board of officers convened for the specific purpose of determining whether such person should be separated or discharged under such conditions, and (2) the board, on the basis of the testimony and evidence presented at such hearing has recommended that such person be so separated or discharged. The Secretary concerned shall have authority to promulgate rules and regulations establishing such boards and prescribing the procedures to be followed.

"(b) Any board convened for the purpose of determining whether any person should be separated or discharged from the armed forces under conditions other than honorable shall have detailed to it by the convening authority of such board a commissioned officer who shall serve as law officer of the board. The law officer of any such board shall have been certified pursuant to section 826 of this title (article 26), by the Judge Advocate General of the armed force of which such officer is a member, as competent to act as law officer of a general court-martial. The function of the law officer shall be to preside over the proceeding of the board, rule on all legal questions and on all motions made before the board, and to insure that the board proceedings are conducted in a fair and impartial manner. The law officer shall not be a member of the board. When the board

deliberates or votes only the members of the board may be present.

"(c) Any person directed to appear as respondent before a board described in subsection (a) of this section shall be informed, prior to appearing before the board, of the nature and purpose of the hearing to be conducted by the board, and shall be notified of his right to be represented by counsel appointed by the convening authority, or by civilian counsel at his own expense. Counsel appointed by the convening authority shall have qualifications not less than those prescribed in section 27 (b) of this section (article 27 (b)).

"(d) The right to a hearing as provided in subsection (a) of this section may be waived by any person if, prior to exercising such waiver, he has consulted with appointed counsel or civilian counsel regarding the advisability of such waiver."

SEC. 2. The table of sections at the beginning of subchapter XI of chapter 47 of title 10, United States Code, is amended by adding at the end thereof the following:

"941. 141. Administrative separation or discharge; board proceedings."

TO PROTECT THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL TO RECEIVE DUE PROCESS BEFORE BEING DISCHARGED OR SEPARATED UNDER OTHER THAN HONORABLE CONDITIONS

Background memorandum: The Subcommittee on Constitutional Rights hearings conducted in 1962 established that an administrative discharge under other than honorable conditions issued pursuant to the recommendations of a military board has almost the same effect on the recipient as the punitive discharge imposed by sentence of a court-martial. In either instance he may lose his veterans' benefits; in either instance he is stigmatized in the eyes of the

community. Some of the most immutable effects of a punitive discharge are reserved for cases which have been heard by a general court-martial (see 38 U.S.C. 693g) which is presided over by a qualified law officer. Nonetheless, the consequences of any discharge under other than honorable conditions are clearly serious enough with respect to the recipient's life, liberty, or property to entitle him to due process.

Unfortunately, the military boards which recommend administrative discharges under other than honorable conditions—like special courts-martial, which can adjudge a sentence to a bad conduct discharge—often find it difficult to adhere to standards of "due process" because of the absence of competent, independent, and impartial legal advice. While some of these boards may have legal advisers, their status and function is often ill defined, as the Subcommittee on Constitutional Rights learned from an examination of current military regulations in this field. Certainly, this legal adviser has not been accorded the status and responsibility of a judge; and, without his having such status, it is doubtful that he can adequately insure adherence to the due process to which the serviceman is entitled under the U.S. Constitution.

Accordingly, it seems highly desirable to require that a board empowered to recommend a discharge or separation under other than honorable conditions, or to make findings on which such a discharge or separation might be based, must have a law officer whith the qualifications required of the law officer of a general court-martial under article 26 of the Uniform Code. Just as in a general court-martial, the law officer would not retire to deliberate or vote with the board members (arts. 26(b), 39); he would rule upon interlocutory matters (art. 51 (b)); and he would instruct the board members concerning any questions of law reasonably raised by the evidence before them (art. 51(c)). This law officer would also preside over the proceedings of the board.

To implement these recommendations, it would be necessary; (a) to enact a separate article of the Uniform Code which would provide that, except in time of war, no member of the Armed Forces shall be discharged or spearated under other than honorable conditions unless he has either received a hearing before a board of officers presided over by a qualified law officer, certified as qualified of such duty (art. 26(a)) and such a board had made suitable findings and recommendations, or unless he had waived the right to such a hearing after having had the opportunity to consult with an attorney having the legal qualifications required for counsel of a general court-martial under article 27(b).

(b) As part of the same article or section provide that the law officer presiding over the board proceedings should not consult with board members, except in the presence of the respondent and his counsel nor vote with the board members and should rule on interlocutory questions and instruct the board members on any legal issues or matters of law (art. 51).

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
Washington, D.C., April 5, 1965.

Honorable RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
United States Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 754, a bill "To insure due process in the case of certain administrative actions involving military personnel," has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

This bill would add a new section to Chapter 47 of title 10, United States Code, to provide that no person, except in time of war, shall be discharged from the armed forces under conditions other than honorable unless the person has been accorded a hearing before a board of officers which recommends that he be so discharged; that a qualified general court-martial law officer shall serve as law officer of the board; that the respondent shall be informed of the nature and purpose of the hearing and shall be notified of his right to be represented by qualified lawyer counsel; that the hearing may be waived if the respondent has consulted with counsel in regard thereto. The purposes parallel those of S. 750, which, in pertinent part, would afford the same right of representation by qualified appointed counsel.

The Department of Defense is opposed generally to extending the provisions of Chapter 47 of title 10, United States Code (Uniform Code of Military Justice) to encompass administrative functions. It is considered fundamentally unsound to broaden the Uniform Code of Military Justice to include administrative boards which unlike courts-martial are not established by the Code and do not have as their primary purpose the punishment and deterrence of criminal activity. Statutory provisions concerning the operation of boards would be better placed with those other statutes which pertain to administrative matters which the boards are performing.

The provisions of the proposed Article 141(a) would preclude issuing discharges under other than honorable conditions to individuals who are beyond military control, e.g., those in confinement in civilian jurisdictions and those on unauthorized absence for a prolonged period of time. These individuals could not be separated under other than honorable conditions regardless of the offense or the circumstances. They do not deserve honorable discharge but the only alternative would be for the services to retain them on the active rolls for excessive periods of time.

The proposed 10 U.S.C. 941(c) (art. 141(c)) as contained in this bill provides essentially for the same right to counsel as would be provided by the proposed 10 U.S.C. 941(a) contained in section 2 of S. 750. The report on S. 750 reflects that the Department of Defense has no objection to affording respondents before certain administrative boards the right to legally qualified counsel.

By providing that a law officer shall be detailed to a board considering a member for separation or discharge under conditions other than honorable, this bill would establish the administrative board as a judicial or quasi-judicial body. Requiring a law officer to rule on legal questions and motions confuses legal and administrative procedures. Technical rules of evidence and criminal court procedures are not part of an administrative process. The military administrative boards which recommend the character or type of separation of a member are similar to many administrative boards throughout the Federal government which take adverse personnel actions. No instance can be found where it is required by law that a judge or lawyer be a member or preside over the proceedings of an administrative board of this type; no instance can be found where a person who presides over the proceedings of an administrative board is not a member of the board.

Current regulations of the Department of Defense require board proceedings in cases of discharge under other than honorable conditions, except where waived by the respondent. Counsel is provided the individual and, when reasonably available, a lawyer is assigned. The board makes recommendations to the Commanding Officer based on the testimony and evidence presented at the hearing. It is considered that the current procedures which parallel many of the provisions of this bill, the review afforded by the Discharge and Records Review Boards, and representation by qualified counsel as provided in S. 750 ensure adequate safeguards for the respondents appearing before administrative boards.

In view of the foregoing, the Department of the Navy, on behalf of the Department of Defense, strongly opposes enactment of S. 754.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. KEAR, Jr.,
Captain, U.S. Navy, Deputy Chief.

61-764 O—66—pt. 2——10

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 6, 1965.

The Honorable RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
United States Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 754, "To insure due process in the case of certain administrative actions involving military personnel."

The proposed bill would add a new article to the Uniform Code of Military Justice to provide that no member of the armed forces could be discharged in time of peace under conditions other than honorable unless he had first been accorded a hearing before a board which recommended such a discharge. Additional provisions would require a board convened for this purpose to have a non-voting legal officer assigned, and the respondent before the board would be provided counsel qualified under the Code or be permitted to have civilian counsel at his own expense. Finally, the member would be permitted to waive the hearing provided by the article after consultation with the appointed or civilian counsel.

S. 754 is one of a series of bills proposing extensive amendments to the Uniform Code of Military Justice. In our comments on one of the other bills of this series, S. 749, we objected to the inclusion of provisions regarding administrative boards. That objection is applicable to this bill as well since it pertains to requirements applicable to administrative hearings and provides for their review within the Military Justice System. The Department believes that the provisions of the bill should not be made a part of the Uniform Code if enacted, but rather, should be included in a more appropriate part of title 10, United States Code.

In our comments on S. 750, a bill which would require, among other things, a substantially similar procedure except as to the assignment of a law officer to the board, we noted that under current Coast Guard regulations, undesirable discharges may be given to members without formal board action where the member has been convicted of an offense in civilian courts for which the maximum penalty under the Uniform Code is in excess of one year or where the member has been absent from the service for a prolonged period. To the extent that the proposed Article 141 would prevent the issuance of discharges in these circumstances under conditions other than honorable, the Department is opposed to its enactment.

We also noted in the previous report that a number of undesirable discharges issued by the Coast Guard during 1963 were the result of board actions to which commissioned officers were assigned as counsel to the members involved though these officers were not qualified as counsel under Article 27(b) of the Code. The Department believes that the issues before these boards are not such as to require a legally trained officer to represent each service member brought before them or to require the assignment of a law officer to the board. We believe that the average officer is sufficiently familiar with the service and the issues before these boards to protect the interest of the service member and the service. The Department, therefore, objects to any requirement that qualified counsel be furnished before an undesirable discharge may be issued or that a law officer be assigned to an administrative board.

The Department would not object to those provisions of the bill which would require that a member be afforded an opportunity to consult with counsel qualified under Article 27(b) of the Code before waiving his right to appear before a board considering his separation. This procedure is, in fact, presently followed in the Coast Guard. However, the Department does not believe it is necessary to provide counsel having legal qualifications for the board hearing itself.

As a technical matter, it is noted that the reference on page 3, line 8 to "section 27(b) of this section (article 27(b))" should read "section 827(b) of this title (article 27(b))."

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

89TH CONGRESS
1ST SESSION

S. 755

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To further insure the fair and independent review of court-martial cases by prohibiting any member of a board of review from rating the effectiveness of another member of a board of review, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 866 (article 66) of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(g) No member of a board of review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other

member of the same or another board of review, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty."

To Protect the Constitutional Rights of Service Personnel To Receive Due Process and Fair and Impartial Review of Their Convictions by Court-Martial

Background memorandum: During the hearings it was testified that in Army and Air Force Boards of Review, established under article 66 of the Uniform Code of Military Justice, the chairman of the three-member boards would prepare the efficiency or fitness reports on the two junior members of the board. These reports, in turn, help determine future promotions and assignments for the number reported on. According to several witnesses, this practice would tend to inhibit the junior members in making an independent and impartial evaluation of the cases on which they are acting. In the absence of such an evaluation, the serviceman whose case is being reviewed does not receive the full measure of due process contemplated by the Constitution and by the Uniform Code. The Army has already changed its practices to eliminate this possibility; but the Air Force apparently has not yet done so. In any event it seems desirable to prohibit any such practice in the future.

Accordingly, article 66 of the Uniform Code should be amended to: (a) Prohibit specifically any practice whereby the chairman of any board of review established under that article prepares any efficiency or fitness report or rating with respect to any other member of that board or submits any document that is made a part of, or is contained in, any promotion or selection file with respect to that member, or in any way admonishes, reprimands, or otherwise seeks to control or direct the other members of the board in the performance of their judicial duties.

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
Washington, D.C., April 7, 1965.

Honorable RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
United States Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 755, a bill "To further insure the fair and independent review of court-martial cases by prohibiting any member of a board of review from rating the effectiveness of another member of a board of review, and for other purposes," has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

This bill provides that no member of a board of review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another board of review, any effectiveness, fitness, or efficiency report, or other report or document which will be used to determine the member's qualifications for advancement in grade, his assignment or transfer, or whether he should be retained on active duty.

Beginning with the earliest recording of job performance data, the military services have issued administrative regulations governing the format, the preparation, the reasons for submission, and other details relating to the evaluation of military personnel. Reporting procedures have been developed to meet the personnel management requirements of each service. These requirements change according to changes in the organizational structure of and missions assigned to a particular military service. Although uniformity of procedures exists within a service, there is no marked degree of uniformity among the several services. The Department of Defense considers that the rating of military personnel is an essential management function, the exercise of which properly is the responsibility and the prerogative of the Secretary of each military department. For this reason, the Department has not issued a directive governing the performance rating of military personnel.

The objective of S. 755 is considered sound, but the Department of Defense does not favor a legislative incursion into an essentially administrative management function. Furthermore, it would appear incongruous to establish a statutory provision affecting so limited a group of officers.

For the reasons stated above, the Department of Defense opposes enactment of S. 755.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

For the Secretary of the Navy.
Sincerely yours,

C. R. KEAR, JR.,
Captain, U.S. Navy, Deputy Chief.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, April 22, 1965.

The Honorable RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 755, "To further insure the fair and independent review of court-matrial cases by prohibiting any member of a board of review from rating the effectiveness of another member of a board of review, and for other purposes."

The bill would amend Article 66, Uniform Code of Military Justice, 10 U.S.C. 866, by prohibiting any member of a board of review from preparing or submitting any report or document used in whole or in part in the consideration of any other member's fitness for advancement in grade, retention on active duty, or assignment or transfer.

Although the bill is intended to prevent improper influence, it would also prevent any effective measurement of the capabilities and progress of members of a board of review. It would preclude the supervisor of a working group from commenting, by means of a fitness or efficiency report, on the abilities of his subordinates. This, the Department feels, is contrary to a well-established principle in the field of personnel management. Judgment of an individual's ability and progress should be determined, at least in the first instance, by his immediate supervisor who is in the best position to make a realistic and effective evaluation. The Department recognizes that there are officers who would permit personal feelings to color their official reports on junior officers. These instances would, in the Department's opinion, be extremely rare, particularly when it is recognized that those who are assigned to duty on boards of review are officer-lawyers of long service who have been schooled and experienced in the judicial process and who realize the value that judicial independence bears to our system of law and the necessity of upholding and nurturing that independence. The remote possibility that a senior may abuse his position should not make it impossible to recognize the superior performance which a junior may display on a board of review.

As a minor technical matter the Department notes that there is no time limit established as to the applicability of the prohibition contained in the bill. If it is the intention that the prohibition regarding submission of reports be applicable only while both the reporting senior and the junior being reported upon are members of the same or different boards of review, this should be set forth clearly. Otherwise, the provisions of the bill may be interpreted so as to bar a senior from ever writing a fitness report on a junior who served with him at some time on a board of review.

For the above reasons, the Department is opposed to the enactment of S. 755.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

89TH CONGRESS
1ST SESSION

S. 756

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To broaden the constitutional protection against double jeopardy in the case of military personnel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 844 (article 44) of title 10, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) No person shall be administratively discharged or separated from military service under conditions other than honorable if the grounds for such administrative action are based in whole or in part upon misconduct for which such person has been previously tried by court-martial and ac-

quitted; or for which such person has not been acquitted or convicted but for which he cannot again be tried by reason of subsection (c) of this section.

"(e) No military board shall be authorized, in the case of any person, to make any findings or recommendations or to take any actions that are less favorable to such person than the findings or recommendations made, or the actions taken, in the case of such person by any previous military board, if (1) the matter considered by both boards (or the same board in two separate proceedings) relates to whether such member should be discharged or separated from military service under conditions other than honorable, or whether such member should be reduced in grade, and (2) the evidence before the second (or subsequent) board is substantially the same as the evidence that was before a previous board."

To Implement Further the Constitutional Right to Due Process and to Protection Against Former Jeopardy

Background memorandum: The fifth amendment contains a prohibition against twice putting anyone in jeopardy of life or limb; and article 44 of the Uniform Code of Military Justice, 10 U.S.C. 844, implements this same prohibition. However, this article does not purport to apply in any way to administrative proceedings, even though these proceedings may be based principally or exclusively on alleged misconduct which would be subject to prosecution before a court-martial. Thus, it would be conceivable for an accused to be acquitted in a trial by a court-martial and then administratively discharged under other than honorable conditions for the same misconduct. Similarly, there appears to be no affirmative statutory prohibition against repeated administrative discharge hearings concerning basically the same allegations of misconduct or unfitness.

Although there is no desire to preclude the armed services from administratively discharging a member of the Armed Forces under honorable conditions for the convenience of the Government or from having more than one hearing with respect to fitness of a serviceman to remain in the Armed Forces

if he is involved in additional incidents which demonstrate his unfitness, the armed services should not be free to harass a member of the armed services by repeated trials or hearings of the same issue. Indeed, such harassment does not conform to due process concepts or to the spirit of the double jeopardy prohibition.

To implement these proposals, it would seem desirable to:

(a) Add to article 44 a prohibition against administratively discharging a member of the Armed Forces under other than honorable conditions by reason of alleged misconduct for which he has been tried and acquitted by court-martial.

(b) Either add to article 44 of the Uniform Code, or add as a separate section, a prohibition against allowing an administrative board to make any findings or recommendations that shall be less favorable to the respondent member of the Armed Forces than any findings or recommendations that have already been made concerning the same matter by some other board which had jurisdiction thereof in a proceeding wherein he was a party.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, April 17, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
United States Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 756, 89th Congress, a bill "To broaden the constitutional protection against double jeopardy in the case of military personnel". The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

S. 756 would prohibit the administrative discharge or separation of a person from military service for misconduct under conditions other than honorable if he has previously been tried by court-martial for that misconduct and acquitted, or if his case has been disposed of in such a manner as to preclude another trial. S. 756 would also prohibit an administrative board, when it is considering whether a person should be reduced in grade, or discharged or separated from military service under conditions other than honorable, from making findings or recommendations less favorable to that person than a previous board that considered substantially the same evidence.

Although this bill relates to administrative actions, it is drafted as an amendment to the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). Since the Uniform Code of Military Justice essentially contains the statutory basis for the exercise of criminal jurisdiction by the armed forces, it would appear undesirable to inject into it provisions governing purely administrative matters. Therefore, if S. 756 is considered for enactment, it is recommended that it be redrafted as an amendment to another more appropriate chapter of title 10, United States Code.

The Department of Defense concurs in principle with S. 756. Some of the safeguards proposed, particularly those contained in proposed 10 U.S.C. 844(e) (article 44(e)), are already substantially contained in current regulations and policies. If, however, this bill is considered for enactment, it is recommended that it be amended to take the following matters into consideration:

(a) The bill should make clear that the plenary authority of the Sectary of a military department, under other statutes, to release a reserve officer from active duty, to demote a regular officer from a temporary grade to his permanent grade, or to discharge an enlisted member for the convenience of the Government, would not be impaired.

(b) Proposed 10 U.S.C. 844(d) (article 44(d)), as presently drafted, is so restrictive that it would preclude discharge or separation under conditions other than honorable even if an acquittal or equivalent disposition of a court-martial case has no direct relationship to the merits thereof. For example, under the procedural rules governing trial by court-martial, the accused cannot be convicted of a crime on his confession alone. Thus, in a case depending on the testimony of one witness, an acquittal on a technicality will result if the only witness is not put on the stand for humanitarian reasons, such as extreme youth, or for medical reasons, such as the possibility of incurring lasting psychiatric injury by the experience. To provide a means for aptly characterizing a discharge, the proposed section should be expanded to authorize exceptions when an acquittal or equivalent disposition of a court-martial case is based solely on procedural or other restrictive rules generally applicable only to a criminal (as opposed to an administrative) proceeding.

(c) Proposed 10 U.S.C. 844(e) (article 44(e)) precludes a second (or subsequent) board from taking action less favorable than a preceding board

if the evidence before the later board is "substantially" the same as before the previous board. The word "substantially", as used in the context of this bill, would be subject to a variety of interpretations, none of which would be satisfactory when applied on a case-by-case basis, and could lead to prolonged litigation and difficulty of administration. It is therefore recommended that the word "substantially" be stricken. It is also recommended that this proposed section be amended to except cases in which the findings of the first board favorable to the respondent are determined to have been obtained by fraud or collusion.

This report has been coordinated within the Department of Defense in accordance with the procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

EUGENE M. ZUCKERT.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, April 29, 1965.

The Honorable RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
United States Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 756, "To broaden the constitutional protection against double jeopardy in the case of military personnel."

The proposed bill would amend Article 44 of the Uniform Code of Military Justice, 10 U.S.C. 844, by adding new subsections (d) and (e) to that article. Proposed subsection (d) would provide that no person could be administratively separated from the armed forces under conditions other than honorable if the grounds for the separation were based on misconduct for which the person had previously been tried by court-martial and the trial had either resulted in an acquittal or the proceeding had been dismissed before a finding for failure of available evidence or witnesses without any fault of the accused. Proposed subsection (e) would provide that no military board could make any findings or recommendations or take any actions that are less favorable to a person subject to the Uniform Code than the findings, recommendations or actions taken by a previous military board if the matter under consideration related to the person's separation from the service under other than honorable conditions or his reduction in grade and if the evidence before the second board was substantially the same as that before the previous board.

S. 756 is one of a series of bills proposing extensive amendments to the Uniform Code of Military Justice. In our comments on one of the other bills of this series, S. 749, we objected to the inclusion of provisions relating to administrative boards in the Uniform Code of Military Justice. That objection is also applicable to this bill since it applies to administrative discharges or separations and to the findings of administrative boards. The Department, therefore, believes that provisions included in the bill should not be made a part of the Uniform Code, but rather should be included in a more appropriate part of title 10, United States Code.

The Treasury Department has for many years followed the policy that, except in a most unusual case, a member of the Coast Guard may not be administratively discharged under conditions other than honorable for the same offense for which he was acquitted by a court-martial. Since this policy is consistent with the provisions of the proposed subsection (d) of Article 44, enactment of that subsection would not require any changes in the operations of this Department. We, therefore, have no objection in principle to this portion of S. 756.

The Department is concerned, however, that the language of this portion will be too restrictive in practice to allow the flexibility in choice of action which may be required in the unusual case. For example, there have been occasions when witnesses have been expected to testify to certain events but at the trial they did not testify either because of a contumacious refusal or because the witness' psychiatric health would be harmed if appearance was required. The remaining evidence was insufficient and the accused was acquitted. Thus, another trial was barred by subsection (c) of Article 44. In these circumstances which, though rare, do occur, it is the view of the Treasury Department that the service should be permitted to make any choice with respect to further administrative action that was available to it originally.

In the second provision of the bill, the Department foresees some difficulty to both the government and an individual before a board in determining when evidence in a second proceeding is substantially the same as that produced before a first board. The standard of "substantially the same" is not helpful in determining whether an additional witness at a second proceeding testifying as to the same occurrences as repeat witnesses is within its bounds. If the

word "substantially" is omitted, there is little doubt that the additional witness brings the case outside the prohibition. Similarly, there can be little doubt that if only the same witnesses and evidence as produced at an original proceeding are before the second or subsequent boards, then all including the individual before the board can be certain that the prohibition applies even though there be minor variations in the testimony of individuals. Deletion of the word "substantially" would, therefore, result in a more meaningful standard which could be applied in a uniform manner rather than on a case-by-case basis.

Subject to the foregoing comments, the Treasury Department supports the enactment of S. 756.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

89TH CONGRESS
1ST SESSION

S. 757

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To more effectively protect certain constitutional rights accorded military personnel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 47 of title 10, United States Code, is amended by adding after section 835 a new section as follows:

"§ 836. Art. 36. Pretrial conference

"(a) The law officer of any general court-martial case shall have authority, in accordance with such rules and regulations as may be prescribed by the President, to conduct a pretrial conference with respect to such case. The law officer

shall have authority at any such pretrial conference to entertain and make final disposition of any motion or interlocutory question with respect to which he would have authority to make final disposition of during trial. The law officer shall also have authority to entertain and accept a plea of guilty from an accused, and any such plea accepted by the law officer shall, subject to the other provisions of this title, be accepted by the court as if such plea had been made in open court. The provisions of section 845 (article 45) shall apply with respect to a plea of guilty made by an accused at a pretrial conference to the same extent such provisions apply to a plea of guilty made in open court. Pretrial conferences may also be utilized for the purpose of—

"(1) simplifying the issues;

"(2) receiving stipulations; and

"(3) considering such other matters as may aid in the fair and speedy disposition of the case.

There shall be present at any pretrial conference the law officer, the trial counsel, the defense counsel, the accused, and a reporter; members of the court shall not be present at pretrial conferences. A record of all proceedings at a pretrial conference shall be taken by the reporter. Any ruling made by the law officer at a pretrial conference may be changed by him at any time during the trial.

"(b) Any motion to suppress evidence shall be made

at a pretrial conference (if one is held) unless opportunity therefor did not exist or the accused was not aware of the grounds for the motion, but the law officer in his discretion may entertain the motion at the trial."

(b) The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by adding at the end thereof the following:

"836. 36. Pretrial conference."

SEC. 2. Section 854(a) (article 54(a)) of title 10, United States Code, is amended by adding at the end thereof the following: "The record of any pretrial conference conducted in connection with any general court-martial shall be made a part of the record of such court-martial and shall be authenticated by the signature of the law officer. If the record of the pretrial conference cannot be authenticated by the law officer, by reason of his death, disability, or absence, it shall be signed by the trial counsel."

TO BETTER PRESERVE THE CONSTITUTIONAL RIGHT OF SERVICE PERSONNEL TO A SPEEDY AND FAIR TRIAL

Background memorandum: In a civil case in a Federal district court extensive resort is had to pretrial hearings whereby the attention of the parties and of the court is focused on the real issues of the case and irrelevancies are eliminated. There have been proposals to introduce somewhat similar procedures for criminal cases in the Federal district courts, although any such proposals must be carefully prepared to avoid interfering with the defendant's right to remain silent and not provide any evidence which might be used by the Government to convict him. Even so, extensive hearings may take place in a Federal district court before a jury is selected and impaneled. For instance, motions to suppress evidence obtained by an unreasonable search and seizure or by wiretapping usually are made before the trial. Furthermore, a plea of guilty may be received without impaneling a jury.

On the other hand, in a general court-martial the law officer, who corresponds to the Federal trial judge, has no authority to conduct any pretrial pro-

ceedings. Thus, all the members of the court-martial must be assembled at the beginning of the trial before any proceedings can be conducted. Then these members may be required to remain idly at hand for hours while the law officer disposes of various motions and other matters of law. Instead of hearing motions to suppress evidence before the trial begins, the law officer must interrupt the trial to rule on objections to admissibility. Even if the accused intends to plead guilty, the law officer cannot receive this plea until all the formalities of assembling the court members have been complied with.

The necessity for assembling a number of officers to serve as court members will sometimes delay the commencement of the trial; and this, in turn, will tend to impair the accused's right to a speedy trial. On the other hand, once the court-martial members are convened, the law officer may be very reluctant to grant a motion for a continuance—however justifiable the grounds—because of the necessity in that event to reassemble the court members at some later time. Accordingly, the accused may be forced to trial at a time when his defense counsel is not completely prepared to proceed—with the resulting ill effects on the fairness of the trial.

With this in mind, it seems desirable from the standpoint of accused service personnel, as well as from the standpoint of the armed services themselves, to authorize a procedure for pretrial hearings in a case. Indeed, the Department of Defense has previously drafted proposed legislation along these very lines, which might be consulted in drafting a bill.

To implement this proposal it would seem appropriate to:

(a) Amend article 39, 10 U.S.C. 839, to authorize the law officer of a court-martial to hold proceedings outside the presence of the members of a court-martial, and either before or after the members of the court-martial have been convened or assembled, during which proceedings the law officer shall have the authority to rule on any interlocutory questions (see art. 51(b)) which he would otherwise be empowered to decide, including any motions to dismiss the charges, motions, or requests for continuances, motions to require further investigation under article 32, objections to the competency of the accused to stand trial, motions to suppress any evidence, and other motions for appropriate relief. At these same sessions the law officer of the court-martial should also have the authority to receive any appropriate stipulations. (This is phrased here in terms of the law officer of "a court-martial." At the present time only a general court-martial has a law officer; but a bill may later be introduced either to authorize or to require a law officer for special courts-martial.)

(b) Amend article 39 and perhaps article 54 to make specific the requirement that a record be made of the proceedings conducted outside of the presence of the court-martial members, including pretrial proceedings, just as a record would be made of the proceedings at the trial.

(c) Amend articles 39, 45, 51, and 52 to authorize a law officer of a court-martial (law officer of a general court-martial as the Uniform Code now stands concerning the structure of a special court-martial) to receive a plea of guilty, after suitable determination that it has not been made improvidently or through lack of understanding of the plea's meaning and effect, and to make and enter a finding of guilty thereon without any necessity or requirement that the members of the court-martial be convened or assembled.

(d) Authorize the President to promulgate reasonable regulations concerning any proceedings outside of the presence of the members of the court-martial. (In this connection it might be desirable specifically to empower the President to promulgate regulations requiring that generally motions to suppress evidence should be made prior to trial if a pretrial hearing is held to consider any motions to suppress and if the defense counsel had available at that time and knew of the facts on which he subsequently bases his motion to suppress. This might conform military procedure concerning admissibility of illegally seized evidence to the practice governing in the Federal district courts.)

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
Washington, D.C., April 6, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 757, a bill "To more effectively protect certain constitutional rights accorded military personnel," has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

This bill would amend Chapter 47, title 10, United States Code, by adding a new section to provide that the law officer of a general court-martial may conduct a pretrial conference with counsel for both sides, the accused, and a reporter present. The law officer would have authority to entertain and make final disposition of any motion or interlocutory question of which he has authority to make final disposition during trial. The pretrial conference would be used also to simplify the issues, receive stipulations, and consider other matters that would aid in fair and speedy disposition of the case. This bill further provides that the law officer may accept a plea of guilty from an accused which shall be accepted by the court as if it had been made in open court. Any motion to suppress evidence shall be made at a pretrial conference, if held, unless opportunity did not exist or the accused was not aware of the grounds for the motion, but the law officer in his discretion may entertain the motion at trial.

The Federal Rules of Criminal Procedure auhorize disposition of motions raising defenses and objections in the Federal criminal courts prior to trial. Such procedure is desirable as an aid in affording the accused a speedy trial. Also it results in savings in money and man hours.

Use of this pretrial procedure would improve greatly the administration of military justice. It would eliminate the numerous delays now encountered after the convening of a court-martial, especially those engendered by out of court hearings during which the members must remain in attendance at court while the law officer hears motions and decides issues of law. In addition the pretrial conference would permit elimination of immaterial issues before trial and the granting of continuances with no inconvenience to court members.

Section 1 of S. 757 provides for adding a new section, 836, to Chapter 47 of title 10, United States Code. Chapter 47 of title 10 presently contains a section 836 authorizing the President of the United States to prescribe rules governing procedures in court-martial cases. Also the subject matter of the proposed new section is not properly assimilated in subchapter VI, "Pre-trial Procedure", which deals solely with action to be taken before court-martial proceedings are commenced. While the new proceeding which would be authorized by section 1 is designated "pre-trial conference" that proceeding extends beyond the recognized pretrial conference and would be in effect a recorded court session conducted by the law officer without the presence of court members. It is recommended, therefore, that section 1 of S. 757 be revised to provide that it be added to subchapter VII of Chapter 47, title 10, U.S.C. either as a subsection of 10 U.S.C. 839 or as a new section 838a.

S. 757 parallels a somewhat similar legislative proposal, the "D" bill, recommended for enactment by the Committee created by 10 U.S.C. 867(g) (Art. 67(g)) composed of the Judges of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury in its Annual Report for 1962, a copy of which previously has been furnished to your Committee. The "D" bill is technically more complete than S. 757 and contains several desirable features not contained in S. 757.

Some serious defects in S. 757 are noted as follows:

(a) The bill refers to the proceedings as a "conference" but actually it is a "session" or "hearing" as all the parties to the trial other than the members of the court must be present and the proceedings must be recorded.

(b) This proposal authorizes the law officer in these proceedings to rule only on matters as to which he is authorized to make "final disposition" during trial. The terminology is subject to being interpreted as prohibiting the law officer from ruling on the admissibility of confessions.

(c) Under the provisions of this bill the law officer can accept only pleas of guilty. Pleas of not guilty and arraignment are not mentioned.

(d) By specifically authorizing the law officer to handle certain obviously appropriate matters such as "motions to suppress evidence" and "receiving stipulations", the provisions of the bill leave in doubt whether law officers may deal with the myriad of other appropriate matters which are not mentioned.

(e) The bill authorized only "pre-trial conferences" whereas there is a need for legislation dealing with all sessions or hearings held outside the presence of the members of the court.

(f) The bill authorized only law officers of a general court-martial to conduct the "pre-trial conference". S. 752, a related bill presently pending before your Committee, would provide for law officers in certain special courts-martial. If the provisions of S. 752 are considered favorably, the same "pre-trial conference" authority should be granted to special courts-martial which have a law officer assigned.

(g) There are many other articles of the Uniform Code of Military Justice not mentioned in this bill which must be amended to effect the ends sought.

(h) It is difficult to reconcile this bill in a number of instances with the memorandum accompanying the bill. For example, the memorandum states that it would be appropriate to authorize the law officer to make and enter a finding of guilty on a guilty plea, but the bill is silent with respect to this authority.

There is enclosed with this report a substitute draft bill which includes the provisions of the "D" bill referred to above. It has been designed as a substitute proposal for several of the related bills concerning military justice presently pending before your Committee. This draft bill corrects the defects in S. 757 mentioned above and is more appropriate from both a technical and practical standpoint.

The Department of the Navy, on behalf of the Department of Defense, recommends that S. 757 not be considered for enactment but that the substitute draft bill be enacted.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. KEAR, JR.
Captain, U.S. Navy, Deputy Chief.

Note: See S. 750 for Department of Defense substitute proposed for S. 757.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, May 13, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 757, to more effectively protect certain constitutional rights accorded military personnel.

The proposed bill would amend the Uniform Code of Military Justice, 10 U.S.C. 801, et seq., by adding a new article 36 which would authorize the law officer of a general court-martial to conduct a pretrial conference. At the conference the law officer could make final disposition of any motions and interlocutory questions which he would otherwise have power to make final disposition of at the trial. He could accept a plea of guilty, receive stipulations, and hear and determine such other matters as would simplify the issues at trial and aid in the fair and speedy disposition of the case. Any motion to suppress evidence would have to be made at the pretrial conference unless the opportunity therefor did not exist or the accused was not aware of the grounds for the motion. Trial counsel, defense counsel, the accused and a reporter would have to be present at the pretrial conference; members of the court could not be present. A record of the proceedings would be taken and made a part of the record of the case.

At present neither the Uniform Code nor the Manual for Courts-Martial, 1951, expressly provides for a pretrial conference and one is not generally held in military cases despite a decision by the Court of Military Appeals that a pretrial conference would not, under certain conditions, be a violation of due process, *United States* v. *Mullican* (7 U.S.C.M.A. 208 (1956)). That case indicated, however, that the procedure is unorthodox in military law and that if the services desire to adopt it, it should be provided for by way of amendment. to the code, or under the provisions of article 36(a) of the code, which gives the President authority to prescribe procedure for courts-martial.

The absence of any procedure for a pretrial conference in the court-martial system means that any motions or objections to the introduction of evidence must be made during the trial itself. At that time the law officer must excuse the members of the court and conduct an out-of-court hearing on the motion or objection. This procedure is costly to the Government in terms of manpower since usually the court members must remain immediately available while the out-of-court hearing is being held. It can also be prejudicial to the accused since in many cases the court members are exposed to the general nature of the evidence objected to or the legal defenses raised by the defense and thus even though the accused prevails on his motion or objection, the court can speculate as to its merits and may be influenced in their decision by the fact that there is evidence being withheld from them. Even if the accused prevails in all of his motions and objections, he may have alienated the court by the sheer number of them, since many persons consider motions and objections to be legal technicalities raised solely for purposes of delay.

These disadvantages to both the accused and the government could be greatly reduced by use of the pretrial conference. The settlement of preliminary matters and simplification of the issues at a pretrial conference would save the time of court members, witnesses, and counsel. Further, it would reduce the possibility of prejudice to the accused by keeping from the court knowledge of the accused's motions and objections and of evidence he may desire to suppress, thus eliminating speculation on their part as to the evidence excluded or the defenses urged. The pretrial conference might also enable

counsel for the accused to reduce the number of his objections and interruptions in the trial itself, thus lessening the possibility of prejudice to the accused on that account.

The Department believes that adoption of the pretrial conference procedure would not result in any disadvantages to the government. Nor would it result in any prejudice to the accused since, except as to evidence he desires suppressed, he need not take an active part in the conference. In reality an effective pretrial conference could not be held without the consent of the accused. This insures that his rights will not be prejudiced by use of the pretrial procedure.

We note that adoption of the pretrial conference was recommended in the Annual Report for 1964 of the Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Department of the Treasury. That report contained a draft bill which the Department believes is a better vehicle for adoption of this procedure. The Department therefore recommends that its provisions be enacted in lieu of S. 757.

The Department notes a technical error in the bill in that it would add a new section 836 of title 10, United States Code. Since there is already a section with that number, the bill should be amended to eliminate this duplication.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 758

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To provide additional constitutional protection in certain cases to members of 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 chapter 47 of title 10, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 941. Art. 141. Right to trial by court-martial

"(a) In any case in which a military department proposes action to administratively discharge or separate any member of the armed forces under conditions other than honorable on the grounds of alleged misconduct, such member shall, upon his written request and in lieu of such proposed

action, be granted a trial by general or special court-martial on such alleged misconduct. Except in any case in which a member has had no reasonable opportunity to consult with qualified counsel (counsel with qualifications not less than those prescribed in section 827 (b) of this title), a member shall be deemed to have waived his right to trial by court-martial under this section unless he makes written application for trial by court-martial within ten days after receipt of written notice of the proposed administrative action. Any notice to a member of the proposed administrative action to be taken against him shall include notice of the alleged misconduct constituting the basis for such action and such member's right to trial by court-martial on such alleged misconduct in lieu of the proposed administrative action. Notwithstanding the foregoing provisions, a member may be discharged or separated from the military service under conditions other than honorable on the grounds of misconduct if the misconduct alleged was, to a substantial degree, the basis for the conviction of a criminal offense in a State or Federal court of competent jurisdiction.

"(b) Any member of the armed forces granted a trial by court-martial pursuant to subsection (a) of this section shall be deemed to have waived the right to plead any statute of limitations applicable to any alleged misconduct with which he is charged and which constitutes the basis

for the proposed administrative action described in subsection (a) of this section. Such member shall also be deemed to have waived any right to a plea of immunity or prohibition against trial by court-martial to which he might otherwise be entitled under the terms of any statute, treaty, or executive agreement; and such member shall be deemed to have waived any plea to which he might otherwise be entitled on account of any foreign country having jurisdiction over the alleged misconduct or on account of any acquittal, conviction, or other ruling with respect to such alleged misconduct made by any court of any foreign country.

"(c) The provisions of this section may be suspended in time of war with respect to any military department by the Secretary concerned.

"(d) As used in this section the term 'misconduct' means any act or failure to act which, at the time of its commission or omission, would have constituted a violation of subchapter X of this chapter."

SEC. 2. The amendments made by this section shall be in addition to and not a substitute for the provisions of section 804 of this title (article 4).

SEC. 3. The table of sections at the beginning of subchapter XI of chapter 47 of title 10, United States Code, is amended by adding at the end thereof the following:

"941. 141. Right to trial by court-martial."

TO PROTECT CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION, COMPULSORY PROCESS, AND ASSISTANCE OF COUNSEL

Background memorandum: In 1951 Congress enacted the Uniform Code of Military Justice, which provides a number of safeguards corresponding to some of the constitutional rights protected in the Bill of Rights. Moreover, the Court of Military Appeals has enforced a requirement of military due process.

The armed services have established procedures for administrative separation or discharge of officers and servicemen; and in some instances the discharge or separation will be based on alleged misconduct and will be under conditions other than honorable. Such a discharge creates a considerable stigma, affects eligibility for veterans' benefits, and usually severly restricts the employment and other opportunities available to the ex-serviceman; thus, it pertains to his liberty and, in the broad sense, to his property. However, the administrative discharge proceedings, even when the discharge is to be predicated on alleged misconduct, are not subject to the same safeguards of due process that would apply to courts-martial. In instances where the serviceman or officer does not deny the alleged misconduct and request trial by court-martial, he is not prejudiced by the nonavailability in administrative discharge proceedings of protections that would be available in a court-marital—such as the opportunity for confrontation and cross-examination or to have compulsory process issued to secure the attendance of witnesses. On the other hand, when the misconduct is vigorously denied and trial by court-martial is specifically requested, it seems unfair for the armed services to presume guilt rather than innocence, and to discharge or separate the serviceman under other than honorable conditions by reason of the alleged misconduct, even though it has not been proved in a proceeding where the constitutional rights of the serviceman have been protected. This reasoning does not imply that the accused serviceman or officer who is not brought to trial must be retained in the armed services; instead he may still be discharged under honorable conditions for the convenience of the Government.

To avoid the bypassing of safeguards for constitutional rights provided by the Uniform Code, it would appear necessary:

1. Either by an additional article at the end of the Uniform Code of Military Justice or by addition of a new section to title 10, to require that in the event action is proposed or commenced with a view to discharge or separate a serviceman or officer under other than honorable conditions by reason of alleged misconduct and a written request is made by the serviceman or officer to be tried by court-martial for such misconduct in accordance with the Uniform Code of Military Justice and if no conviction in any State or Federal court shall have resulted from or been based in substantial part upon the alleged misconduct, or some act or omission which comprises a part or aspect of the alleged misconduct, and if the request for trial by court-martial is denied and no court-martial takes place, then no administrative discharge or separation under other than honorable conditions based solely or in part upon the same misconduct shall be recommended or issued, provided, however, that this article (section) shall in no way restrict the power and authority of the Armed Forces to separate or discharge an officer or serviceman under honorable conditions for the convenience of the Government and under regulations prescribed by the Secretary of the Department, even though the discharge or separation under honorable conditions may result from or be based solely or partly upon alleged misconduct for which the serviceman or officer shall never have been tried or convicted by court-martial or other military tribunal or by any State or Federal court or the court of any foreign country. If a serviceman or officer makes written request to be tried by court-martial for misconduct of which any foreign court has taken or may take cognizance or over which it may have or exercise jurisdiction, and if under treaty, statute or otherwise, the armed services might otherwise be precluded and barred from prosecuting such misconduct, then the request for trial by court-martial shall constitute a binding waiver of any immunity or prohibition against trial by court-martial which might otherwise exist under the terms of any such treaty, statute or otherwise, and, after having made such written request, no serviceman or officer shall be allowed to enter any plea in bar of trial by reason of any acquittal, conviction, or other proceedings in the

courts of any foreign country. (The last proviso is to take account of the situation that might otherwise exist if a serviceman asked to be court-martialed for misconduct which had been the basis of proceedings in a foreign tribunal. Under the provisions of the NATO Status of Forces Agreement and certain other treaties or agreements, an acquittal or conviction in the foreign court might preclude trial by court-martial and, therefore, constitute grounds for a plea in bar. It seems appropriate under such circumstances to prevent the serviceman from taking advantage of such a plea.)

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., April 20, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 758, a bill to provide additional constitutional protection in certain cases to members of the Armed Forces, and for other purposes, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

This proposal would add a new section 941 (art. 141, UCMJ) to chapter 47, title 10, United States Code. This new section would provide that in any case in which a military department proposes action to administratively discharge or separate any member of an armed force under conditions other than honorable on the grounds of alleged misconduct, such member would upon his written request be granted a trial by general or special court-martial. A member would be deemed to have waived his right to trial by court-martial unless he made written application for trial within 10 days after receipt of the proposed administrative action. This 10-day waiver would be inapplicable in any case in which a member had no reasonable opportunity to consult with qualified counsel (counsel with qualifications not less than those prescribed in art. 27(b), UCMJ). A member could be discharged or separated from military service under conditions other than honorable by administrative action if the misconduct alleged was the basis for a conviction of a criminal offense in a State or Federal court. Any member requesting trial by court-martial under the foregoing provisions would be deemed to have waived certain statutes of limitations, immunities, and pleas. The Secretary concerned would be authorized to suspend this new section in time of war.

The purpose underlying this measure is to prevent the Armed Forces from administratively issuing undesirable discharges as these are the only discharges given administratively "under conditions other than honorable." Undesirable discharges are utilized to separate from the Armed Forces those members whose misconduct is so gross that they have clearly demonstrated their ineligibility for retention and whose records do not warrant an honorable or general discharge. Included in this category are those whose military record shows frequent involvement of a discreditable nature with civil authorities, military authorities, or both; deserters whose trials are barred by the statute of limitations; fraudulent enlistees; and the like. The bill, except where the 10-day waiver is applicable, would prohibit the discharge of such undesirables except by court-martial or discharge under honorable conditions.

Courts-martial charges must be based on specific acts of misconduct. There are patterns of conduct which may render an individual unfit for continued military service, yet for which trial by courts-martial may be impossible or unfeasible because of jurisdictional or evidentiary limitations. For example, frequent involvement with local civil authorities of a nature to bring discredit upon the Armed Forces, habitual shirking, and repeated venereal disease infections may warrant discharge for the good of the service under other than honorable conditions although evidence admissible in a criminal tribunal is not available.

The retention of undesirable individuals in the service would be highly detrimental to morale, welfare, and efficiency. Nevertheless, such persons do not merit a discharge under honorable conditions. S. 758 would confine the Armed Forces to one or the other of the unhappy alternatives in the case of many undesirable individuals. The uniform standards and procedures for the

administrative separation of enlisted members of the Armed Forces, as established by the Department of Defense administrative discharge directive, afford protection of the rights of the individuals concerned. The directive proscribes issuance of an administrative discharge in lieu of trial by court-martial unless, in the judgment of a responsible official, the interests of both the armed force and the individual will best served by such action. Moreover, the directive precludes issuance of a discharge under conditions other than honorable except by authority of a properly approved administrative action conforming to prescribed standards which afford an individual being considered for separation the opportunity to request or waive in writing the following rights:

(*a*) To have his case heard by a board of not less than three officers;

(*b*) To appear in person before such a board if he is available;

(*c*) To be represented by counsel, who, if reasonably available, should be a lawyer;

(*d*) To submit statements in his own behalf.

Enactment of section 2 of S. 750, which is unopposed by the Department of Defense subject to minor technical revisions as reflected in the report, would strengthen the safeguards outlined above by providing the serviceman concerned the right to be represented before the board by fully qualified counsel, i.e., qualified according to 10 U.S.C. 827(b) or, if he so requests, to consult fully qualified counsel regarding waiver of the board hearing.

As a further safeguard, the Secretaries of the military departments, acting through the Discharge Review Boards and the Boards for the Correction of Military Records, may change the type of character of a discharge if warranted by the circumstances. The primary purpose of the Discharge Review Boards is to ensure that proper and equitable discharges are given. The Boards for the Correstion of Military Records were created by the Congress specifically for the purpose of recommending to the Secretary concerned the correction of military and naval records whenever a record was found to be in error or whenever the correction was required in order to remove an injustice. The Boards for the Correction of Military Records are composed of civilians of the executive part of the respective military departments.

The bill also would encourage the use of courts-martial, as opposed to punishment under 10 U.S.C. 815 (art. 15), for minor offenses. In cases warranting administrative discharge because of frequent involvement of a discreditable nature with civil and military authorities, the final incident prompting a commander to initiate discharge action seldom would be serious enough to authorize a punitive discharge in the event trial by court-martial is demanded. If, however, an accused has two or more previous convictions by courts-martial, a bad conduct discharge may be adjudged, and if he has three or more previous convictions, a dishonorable discharge may be adjudged, regardless of the maximum punishment otherwise authorized for an offense. If this bill were enacted, commanders might be encouraged to resort to courts-martial for minor offenses in order to build a record of previous convictions and thereby authorize a punitive discharge should separation action later become necessary. The net result would be to negate the beneficial effects intended by the amendments to 10 U.S.C. 815 (art. 15) enacted by the 87th Congress, and to stigmatize with criminal convictions those minor offenders who rehabilitate themselves so that separation action does not become necessary.

For the reasons expressed above, the Department of the Navy, on behalf of the Department of Defense, is strongly opposed to S. 758 and recommends against its enactment.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

For the Secretary of the Navy.

Sincerely yours,

C. R. Kear, Jr.,
Captain, U.S. Navy, Deputy Chief.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, May 11, 1965.

HON. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 758, to provide additional constitutional protection in certain cases to members of the Armed Forces, and for other purposes.

The proposed bill would amend the Uniform Code of Military Justice by adding a new section to chapter 47, title 10, United States Code. The added section would give members of the Armed Forces the right to demand trial by general or special court-martial in any case where it is proposed to discharge a member administratively under conditions other than honorable if the grounds of the proposed discharge would constitute a violation of the punitive articles of the Uniform Code. Proper notice to the member of the proposed administrative action would be required. The member would be deemed to have waived his right to trial by court-martial if he had had a reasonable opportunity to consult with qualified counsel and did not make a written application for trial within 10 days of receipt of the notice of administrative action. A member granted a trial by court-martial under this section would be deemed to have waived his rights to plead the statute of limitations, to plead immunity under a statute, treaty, or executive agreement, or to a plea based on a foreign country having jurisdiction over the offense. The right to demand trial would not apply where the proposed administrative discharge was based on a criminal conviction in a State or Federal court.

The Department understands that the proposed bill is designed to implement the recommendation of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, that a serviceman should not be issued an administrative discharge under other than honorable conditions on the basis of misconduct triable by court-martial if he has requested and been denied a court-martial for that misconduct. This recommendation is apparently based on the subcommittee's feeling that because of the wide disparity between the safeguards for the serviceman now available in courts-martial, on the one hand, and those in military administrative proceedings, on the other, and also because of the stigma resulting from an undersirable discharge, a serviceman should not receive an undesirable discharge by administrative action if he has requested and been denied trial by court-martial for the same conduct. Apparently the subcommittee also feels that the services are denying important rights to servicemen by using administrative discharge proceedings to rid themselves of undesirable members who more properly should be tried by court-martial.

The Department agrees that a considerable stigma applies to an undesirable discharge. We also agree that separation by administrative action should not be resorted to in order to avoid the procedural burdens of the court-martial process or to deny a serviceman his basic right to a fair consideration of his case. However, the Department believes that this is not presently being done with respect to Coast Guard personnel. We also believe that there are valid reasons for separating personnel in some cases by administrative action rather than by court-martial, even where the separation is for conduct constituting an offense triable by court-martial.

At the outset it may be noted that the Coast Guard has not been faced with the problem of discharge of persons who have been denied trial by court-martial. Our records do not show any cases in recent years where personnel have been separated by administrative action following a demand for trial nor any cases where such a demand for trial has been made.

In the Coast Guard most of the undesirable discharges issued are based on conduct which would be triable by court-martial and thus would be covered by S. 758. For example, in 1963, 48 out of the 61 undesirable discharges issued were in this category, and in 1964, the figures were 33 out of 40. In both years, nearly 90 percent of the discharges involved homosexual offenses. In 1963 the remaining 10 percent were almost equally divided between cases of prolonged absence, drug addiction, and indecent acts while in 1964, the remaining 10 percent were all cases of indecent acts. It is apparent, therefore, that insofar as this Department is concerned, the primary impact of S. 758 would be on homosexual cases.

Homosexual cases present one of the most difficult problem with which the Armed Forces have to deal. It has long been the policy of the Armed Forces that homosexuals be separated from the service. However, it is not always feasible to do this by court-martial, even though in most of these cases the serviceman has confessed his participation in a homosexual act. In a court-martial a person who pleads not guilty cannot be convicted on the basis of an uncorroborated confession. It is in the nature of homosexual cases that the acts forming the basis of the charge usually take place in private with no witnesses other than the participants. The participants, of course, can and usually do avail themselves of the privilege of refusing to testify in court on the grounds of self-incrimination. Further, the Department is aware of the concept that homesexuality should not be treated as a crime but rather as a condition which disqualifies a person from service in the Armed Forces. We believe that in this complex field the service should retain sufficient flexibility to accomplish the separation of homosexuals without being required to resort to court-martial or to treat them as criminal offenders in all cases.

Similarly, trial by court-martial is often not feasible in cases involving drug addiction, indecent acts, or prolonged absence from the service, even though there is ample evidence of the commission of the offense. In cases of lewd or indecent acts, there is often extreme reluctance on the part of the victim to testify. Where a child is involved its parents or doctor are often reluctant to permit additional psychological harm to the child by requiring testimony from it. In prolonged absence cases an undesirable discharge is only authorized when the unauthorized absence has continued for 1 year or more. In practice the type of case involved has been that where the person has been absent from the service for many years and where there is no question of the facts of the offense. In these types of cases the Department believes that it is neither appropriate nor practical to order trial by court-martial.

On the other hand, the Department has found that separation of persons who have committed these types of offenses can be accomplished by administrative action under conditions fair to both the service and the individual. Under regulations in effect in the Coast Guard, similar to those in the other services, when a service member is being considered for an undesirable discharge, he is informed in writing of the contemplated action, the basis for it, and the effects of such a discharge. His case is heard by a board of not less than three officers before which he may appear in person, submit evidence, cross-examine witnesses, and be represented by counsel. In these hearings the rules of evidence and standards of proof of a court-martial are not strictly applicable since the question the board is considering is not whether the serviceman committed a criminal offense but whether, on the basis of his entire record, it is desirable to retain him in the service. However, each board is reviewed, both in the field and at Coast Guard Headquarters, by a lawyer to see that there is sufficient reliable evidence to support its findings and to see that the serviceman has been accorded his rights. The reports of these boards are also reviewed by the convening authority and superior officers in the chain of command. Final action must be taken in Coast Guard Headquarters before an undesirable discharge may be issued.

While each serviceman has the right to a hearing and to counsel, he also may waive these rights and it is at this point that there is probably the greatest possibility of harm. A young serviceman is often tempted to waive his rights to counsel and a hearing in order to avoid the publicity and notoriety of that hearing. In fact, the Coast Guard's records show that over 80 percent of the men who received undesirable discharges in 1963 and 1964 for homosexual

offenses waived their rights to counsel and to a hearing before a board. Since it is at this time that the advice of counsel can be most valuable, the Department has concurred in one of the recommendations of the subcommittee, as embodied in S. 250, that a serviceman must be given the opportunity to consult with qualified counsel before waiving these rights. In fact, the Department has taken action to change its regulations to require that a person facing administrative proceedings which might result in an undesirable discharge consult with qualified counsel before deciding whether to waive his right to a hearing and to counsel. Adoption of this change insures that servicemen do not improvidently waive these valuable rights.

With implementation of the requirement for consultation with qualified counsel, the Department believes that there is not in fact a wide disparity between the safeguards available before a court-martial and those in administrative proceedings. In our view if a serviceman takes advantage of his opportunity for a hearing and counsel, his rights will be well safeguarded. The requirement that he consult with qualified counsel beforehand insures that he does not lightly forego this opportunity.

The Department believes that in the type of case discussed here that it is necessary that these persons be separated from the service and that it is not always feasible or appropriate to take court-martial action against them. The use of these administrative procedures is not a device to avoid the procedural requirements of the court-martial system. Rather, it is the use of a forum and procedure more appropriate to the nature of the case and the question to be decided. Since the Department believes these procedures are appropriate to the nature of the case and do protect the rights of servicemen, we recommend against enactment of S. 758.

The Department notes the use of the term "military department" in subsections (a) and (c) of the proposed new article 141. Under that terminology the personnel of the Coast Guard would not be affected by the proposed bill since neither the Treasury Department nor the Coast Guard are included in the definition of the term "military department" found in 10 U.S.C. 101(7). Nor would the definitions in 10 U.S.C. 801 operate to include Coast Guard personnel. On the assumption that it was intended to include the Coast Guard in S. 758, the first sentence of proposed subsection 141(a) should be amended to read as follows: "In any case in which administrative action is proposed to discharge or separate any member of the armed forces under conditions other than honorable on the grounds of alleged misconduct, the member shall, upon his written request and in lieu of that proposed action, be granted a trial by general or special court-martial on the alleged misconduct." Similarly, proposed subsection 141(c) should be amended by striking out the words "military department" and inserting in place thereof the words "armed force".

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 759

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. HRUSKA, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To afford military personnel due process in court-martial cases involving minor offenses, to insure the right of counsel in such cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 810 (article 10) of title 10, United States Code, is amended by striking out "with an offense normally tried by a summary court-martial," and inserting in lieu thereof "with an offense normally disposed of under section 815 of this title (article 15),".

SEC. 2. Section 816 (article 16) of title 10, United States Code, is amended to read as follows:

"§ 816. Art. 16. Courts-martial classified

"The two kinds of courts-martial in each of the armed forces are—

"(1) general courts-martial, consisting of a law officer and not less than five members; and

"(2) special courts-martial, consisting of not less than three members."

SEC. 3. Section 820 (article 20) and section 824 (article 24) of title 10, United States Code, are hereby repealed.

SEC. 4. The first sentence of section 837 (article 37) of title 10, United States Code, is amended by striking out "general, special, or summary court-martial," and inserting in lieu thereof "general or special court-martial,".

SEC. 5. Section 843 (article 43) of title 10, United States Code, is amended by striking out in subsections (b) and (c) "summary court-martial" wherever it appears in such subsections and inserting in lieu thereof "special court-martial".

SEC. 6. Subsection (b) of section 854 (article 54(b)) of title 10, United States Code, is amended by striking out "special and summary court-martial" and inserting in lieu thereof "special court-martial".

SEC. 7. Subsection (c) of section 865 (article 65(c)) of title 10, United States Code, is amended by striking out

"special and summary court-martial" and inserting in lieu thereof "special court-martial".

SEC. 8. (a) Section 934 (article 134) of title 10, United States Code, is amended by striking out "general, special, or summary court-martial," and inserting in lieu thereof "general or special court-martial,".

(b) Such section is further amended by substituting a comma for the period at the end thereof and adding the following: "or shall be disposed of under authority of section 815 of this title (article 15)."

SEC. 9. Subsection (a) of section 936 (article 136(a)) of title 10, United States Code, is amended by striking out paragraph (3), and by renumbering paragraphs (4) through (7) as paragraphs (3) through (6), respectively.

SEC. 10. (a) Subsection (a) of section 4711 of title 10, United States Code, is amended by striking out "shall direct a summary court-martial" and inserting in lieu thereof "shall appoint a special investigating officer".

(b) Subsections (b) and (c) of such section are amended by striking out "summary court-martial" wherever it appears in such subsections, and inserting in lieu thereof "special investigating officer".

SEC. 11. (a) Subsection (b) of section 4712 of title 10, United States Code, is amended by striking out "shall direct

a summary court-martial" and inserting in lieu thereof "shall appoint a special investigating officer".

(b) Subsection (c) of such section is amended (1) by striking out "summary court-martial" and inserting in lieu thereof "special investigating officer"; (2) by striking out "in the court's possession" and inserting in lieu thereof "in the investigating officer's possession"; and (3) by striking out "the court's final report" and inserting in lieu thereof "the investigating officer's final report".

(c) Subsections (d), (e), (f), and (g) of such section are amended by striking out "summary court-martial" wherever it appears in such subsections, and inserting in lieu thereof "special investigating officer".

(d) Subsection (f) of such section is further amended by striking out "in the court's possession" and inserting in lieu thereof "in the investigating officer's possession".

SEC. 12. (a) Subsection (a) of section 9711 of title 10, United States Code, is amended by striking out "shall direct a summary court-martial" and inserting in lieu thereof "shall appoint a special court-martial officer".

(b) Subsections (b) and (c) of such section are amended by striking out "summary court-martial" wherever it appears in such subsections, and inserting in lieu thereof "special investigating officer".

SEC. 13. (a) Subsection (b) of section 9712 of title

10, United States Code, is amended by striking out "shall direct a summary court-martial" and inserting in lieu thereof "shall appoint a special investigating officer".

(b) Subsection (c) of such section is amended (1) by striking out "summary court-martial" and inserting in lieu thereof "special investigating officer"; (2) by striking out "in the court's possession" and inserting in lieu thereof "in the investigating officer's possession"; and (3) by striking out "the court's final report" and inserting in lieu thereof "the investigating officer's final report".

(c) Subsections (d), (e), (f), and (g) of such section are amended by striking out "summary court-martial" wherever it appears in such subsections, and inserting in lieu thereof "special investigating officer".

(d) Subsection (f) of such section is further amended by striking out "in the court's possession" and inserting in lieu thereof "in the investigating officer's possession".

To Protect the Constitutional Rights of Service Personnel To Receive Due Process in the Trial of Minor Offenses and To Be Tried in a Fair and Impartial Tribunal Where They Shall Have the Right to the Assistance of Counsel

Background memorandum: Articles 20 and 24 of the Uniform Code of Military Justice (10 U.S.C. 820 and 824) authorize summary courts-martial and direct who may convene such courts. These military tribunals cannot try officers or warrant officer and may not adjudge a punishment of more than 1 month's confinement at hard labor (or 45 days hard labor without confinement or 60 days restriction) and a forfeiture of 1 month's pay. Therefore, as a practical matter the summary court-martial is used primarily for the trial of minor offenses—and thus corresponds to a police court or recorder's court. (Because of the fact that the summary court generally is used only for minor offenses, the Uniform Code in art. 10, 10 U.S.C. 810, expressly provides that one charged only with an offense normally tried by a summary court-martial shall not ordinarily be placed in pretrial confinement.) Because the summary court-martial is used for the minor offense which has not been disposed of under article 15 by nonjudicial punishment, the number of trials by summary court-

martial have usually been much greater than the trials by special or general courts-martial, which are usually reserved for more serious offense. Thus, in practice the serviceman has been much more likely to experience trial by summary court-martial. Unfortunately, if he does have such an experience he may be very unimpressed by the quality of justice meted out, and he may be outraged by lack of adherence to concepts of due process in such a court-martial.

The summary court-martial consists of a single officer, who acts as judge, jury, prosecuting attorney, and defense counsel. Occasionally he does not shine in this last role, and the combination of duties imposed on the summary courts-martial raises, in itself, some question of due process. By reason of the accused's "right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him" (art. 38), it might appear by negative implication, that an accused lacks any statutory right to retain a civilian attorney to represent him before a summary court-martial. Under this construction of the Uniform Code there is a serious question of deprivation of the right to counsel guaranteed by the sixth amendment.

As a practical matter the review of a summary court-martial is rather limited in scope, since there is no requirement that the record of trial contain any summary of the testimony given. In the event relief is requested from a discharge review board or correction board, there is some question as to the scope of the action either board may take because of the finality provisions in article 76 of the Uniform Code.

The testimony received by the subcommittee makes it clear that in light of the recent expansion of the authority to punish nonjudicially under article 15 of the Uniform Code, see Public Law 87-648, there is currently no need to retain the summary court-martial and its continued existence presents a substantial risk of defeating some of the objectives that Congress intended to achieve through Public Law 87-648 [1] (see pp. 32-44 of the draft report). Accordingly, it appears necessary to revise the Uniform Code forthwith to eliminate entirely the summary court-martial.

To effectuate the purpose of eliminating the summary court-martial, the following amendments would appear necessary:

1. Amend article 10, 10 U.S.C. 810, to provide that a person charged with an offense normally disposed of by nonjudicial punishment under article 15, ordinarily shall not be placed in confinement; and delete all reference in article 10 to the summary court-martial.

2. Rewrite article 16, 10 U.S.C. 816, to refer to two, rather than three, kinds of court-martial—namely, the general and the special court-martial; delete article 16(3) entirely.

3. Delete article 20 entirely.

4. Delete article 24 entirely.

5. In article 37, refer only to the convening authority of a general or special court-martial and eliminate any reference to the summary court-martial.

6. In articles 43 (b) and (c), substitute the word "special" for "summary" in determining what is the critical date for the operation of the 3- or 2-year statute of limitations, as provided respectively by those two subsections.

7. In article 54(b) delete all reference to the summary court-martial.

8. In article 65(c), which deals with appellate review, eliminate all reference to review of "summary court-martial records," so that the only review provided by that subsection will concern special court-martial records.

9. In article 134, 10 U.S.C. 934, delete all reference to summary courts-martial. Article 134 contains no specific reference to, or authority for, imposing nonjudicial punishment for the offenses embraced within article 134. Accordingly, it might be desirable to insert at the end of article 134 some such phrase as: "or shall be nonjudicially punished in accordance with article 134 of this code."

10. Delete article 136(a)(3). In certain instances not related directly to military justice, statutory reference is made to the summary court-martial. See 10 U.S.C. 4711, 4712, 9711, 9712. Those sections should be rewritten to provide that, instead of a "summary court-martial," an officer shall be detailed specifically to perform the functions envisaged in those sections.

[1] Indeed, the subcommittee has recently been informed by the Air Force that the expanded article 15 has virtually eliminated the summary court in many commands.

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., April 16, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for comment on S. 759, a bill to afford military personnel due process in court-martial cases involving minor offenses, to insure the right of counsel in such cases, and for other purposes, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

The proposed bill would abolish the present summary court-martial established by 10 U.S.C. 816 (art. 16, UCMJ) and remove all references to this type of court from title 10, United States Code. This proposal apparently is prompted by the passage of Public Law 87–648 approved on September 7, 1962, which greatly expanded a commanding officer's powers under 10 U.S.C. 815 (art. 15, UCMJ) and the consideration that such increase in nonjudicial punitive power results in no further need for the summary court.

It is believed that elimination of this type court may be warranted and desirable in time. However, it is believed also that, notwithstanding the expanded powers under article 15, UCMJ, the summary court-martial remains at present an important and necessary adjunct to command. Such courts have served a useful purpose in the disposition of minor offenses. It is felt that the expanded authority under article 15, which became effective on February 1, 1963, has not been utilized for a sufficient period of time to evaluate its impact upon the use or nonuse of the summary court-marital.

In addition, it would be highly undesirable to convene a special court-martial for trial of those persons who refuse non-judicial punishment and elect trial by court-martial. Provisions of law which would permit a single officer's courts-martial in appropriate cases could fill the void which would be created by abolition of the summary court-martial at this time. S. 752 now before your committee, would authorize single officer courts and the Department expects to make its recommendations on this bill in the near future.

Accordingly, the Department of the Navy, on behalf of the Department of Defense, recommends that consideration of S. 759 be deferred pending further experience with the commanding officer's broadened non-judicial punishment powers and evaluation of the one-officer courts, if legislation for this purpose is enacted.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

For the Secretary of the Navy.
Sincerely yours,

C. R. KEAR, Jr.,
Captain, U.S. Navy, Deputy Chief.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, June 7, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 759, to afford military due process in court-martial cases involving minor offenses, to insure the right of counsel in such cases, and for other purposes.

The proposed bill would abolish the summary court-martial by amending article 16 and repealing articles 20 and 24 of the Uniform Code of Military Justice, 10 U.S.C. 816, 820, and 824. The bill would also remove the references to the summary court-martial from other articles of the Uniform Code and sections 4711, 4712, 9711, and 9712 of title 10, United States Code.

There are apparently two primary reasons why elimination of the summary court-martial is proposed. One is that it is no longer necessary in view of the recent enactment of Public Law 87-648 which amended article 15 of the code, 10 U.S.C. 815, relating to commanding officer's nonjudicial punishment. As amended, article 15 now contains expanded authority under which certain commanding officers can award punishment in excess of that permitted by a summary court-martial. Therefore, it is argued that the summary court-martial can be eliminated since the commanding officer can accomplish the same thing under article 15.

A second reason given for eliminating the summary court-martial is that a conviction by it is a conviction of record. As such, it can be used to support the imposition of a bad conduct or dishonorable discharge by a special court-martial in a case where the offense would not otherwise warrant a punitive discharge but for the existence of previous court convictions. It is argued that the summary court-martial does not afford the accused the rights which he has in a special or general court-martial and that therefore it should not be treated as a previous conviction.

On the other hand, the Department believes that there are compelling reasons for retaining the summary court-martial. One is that its elimination would decrease rather than increase the substantive rights of servicemen. Secondly, its elimination would reduce the flexibility and responsiveness of the military justice system.

If the summary court-martial is abolished, as S. 759 proposes, the cases that presently go to that type of court would have to go either to a special court-martial, or be handled under article 15. As to those cases which go to a special court-martial, the accused would have greater protections but this would be counterbalanced by the increased punishment liability he would be subjected to before a special court-martial. Another result would be that minor offenses would be tried by special court-martial since that court would be handling cases where punishment under article 15 was refused; and article 15 is limited to minor offenses. In our view it is clearly neither necessary nor desirable to invoke all the protections and procedures of a special court-martial for a minor offense.

The Department recognizes the undesirability of the provision whereby summary court-martial convictions for relatively minor offenses may be considered by a subsequent special or general court-martial to authorize the imposition of a puntive discharge. However, rather than eliminate the summary court-martial for this reason, the Department recommends the summary court-martial be retained and the code amended to provide that a conviction by a summary court-martial would not be considered a conviction of record for the

purpose of increasing the authorized punishment upon conviction of any later offense. The adoption of this recommendation would remove a major objection to the summary court-martial while permitting its retention for the trial of minor offenses. In this connection, it should be pointed out that enactment of S. 759 would not correct the undesirable situation of having a record of a court-martial conviction for a relatively minor offense. For example, if the summary court-martial were eliminated, minor offenses would then be tried by a special court-martial in each case in which the service member elected to be tried by court-martial in lieu of accepting nonjudicial punishment. In effect, a minor offense could still be raised to the status of a previous conviction. We feel this is not an equitable result even if brought on by the accused in refusing nonjudicial punishment. The act approved September 7, 1962, 76 Stat. 447, gave service members the right to demand trial by court-martial in lieu of accepting nonjudicial punishment. However, enactment of S. 759 would lessen the value of this right since the only alternative for a service member would be trial by special court-martial with the consequent disadvantages noted above.

The only substantial advantage to an accused in trial by special court-martial over trial by a summary court-martial is the right to counsel. There is no provision either in law or regulation for the appointment of counsel before a summary court-martial. However, it is Treasury Department policy that military counsel for a summary court-martial will be supplied upon request if reasonably available. Further, a serviceman has the right to obtain nonmilitary counsel if he desires to do so. It is also worth noting that the great majority of cases handled by summary courts-martial are ones, such as absence cases, in which there is little question of the guilt of the accused. In these cases the absence of counsel is not likely to have a significant effect on the result of the trial. Considering the magnitude and nature of offenses triable before summary courts-martial, in most cases the real advantages to the serviceman of trial by a special court-martial would be outweighed by the disadvantages.

As to those cases now tried by a summary court-martial which would be instead handled under article 15 if S. 759 is enacted, it is difficult to see how this would result in any real increase in the serviceman's rights or protection since he has greater rights before a summary court-martial than under article 15. Each conviction by a summary court must be reviewed for correctness by two reviewing officers. Either of them may change the findings or reduce the sentence of the court. This gives the accused two opportunities to have an error or an injustice corrected or to have the sentence reduced. In brief, if the summary court is eliminated, many of the cases now handled by it would be disposed of under article 15 with less protection for the service member than he now has.

It has been argued that the review of summary courts-martial cannot be effective since no verbatim record of the trial is required. However, this would be equally applicable in a special court-martial where a bad-conduct discharge is not part of the sentence. In both instances, only a summarized trial record is used. The fact that a less elaborate record is allowed in the case of a summary court-martial is a recognition of the lesser sentencing power of that tribunal. We note in passing that while neither the existing law nor presidential regulations require a summary of the evidence in a summary court-martial case, such a summary is required by regulations of this Department in contested cases. We therefore feel that the review accorded the records of summary courts-martial in this Department is a meaningful one.

While it is correct, as pointed out in the arguments for elimination of the summary court-martial, that the punishment power contained in the new article 15 is equal to or greater than that of a summary court-martial, this is not true for all commanding officers. Those below the grade of lieutenant commander have punishment powers considerably less than those of an officer of that grade or higher. Thus, in the case of the junior officer, the need remains for a forum to handle offenses that are too serious to be handled under the article 15 procedure but not serious enough to warrant referral to a special court-martial. It appears to the Department that in this situation the summary court-martial still has an important function to serve. As stated in existing presidential regulations, paragraph 79a, Manual for Courts-Martial, United States, 1951, the function of a summary court-martial is "to exercise

justice promptly for relatively minor offenses under a simple form of procedure." As a bridge between nonjudicial punishment and the special court-martial, it adds flexibility to the military justice system.

This function of the summary court-martial and those reasons for its retention are especially applicable in the case of the Coast Guard. One feature of the Coast Guard's organization is that it has many small units which are headed by warrant officers or chief petty officers. In many cases these small units are grouped under a larger command headed by a commissioned warrant officer or a junior commissioned officer. Frequently, these groups of units and the units themselves are separated from other Coast Guard units and groups by considerable distances. Under the proposed bill if a man attached to one of these small units committed an offense which warranted greater punishment than the unit or a group commanding officer could give under article 15, he would either have to refer the case to a special court-martial or allow the offender to escape with less punishment, under article 15, than his offense warranted.

The objection to awarding a special court-martial in such a case is that in many areas the personnel necessary to constitute such a court are not reasonably available in the area. Either the court members would have to be brought to the duty station of the accused or he would have to be transported to their location. This would result in excess travel costs and also increased personnel burdens. Under existing law, however, the case can be referred to a summary court-martial convened by the group commander. The result is an expeditious disposal of the case in a forum appropriate to the magnitude of the offense.

It is not a solution to say that in those case where the unit commanding officer feels the offense warrants more punishment than he can impose the matter could be referred to the next superior authority for imposition of nonjudicial punishment. This would be satisfactory if the next superior authority were above the grade of lieutenant. But in the Coast Guard this is often not the case. In most such instances in the Coast Guard the next senior officer in the chain of command, having the full punishment power of article 15, would be the district commander. If the case were referred to him and he imposed nonjudicial punishment. An appeal from it would have to be the commandant. Such an unwieldy system could be avoided by retention of the summary court-martial.

The Department has a further modification to suggest which would remove other objections to the summary court-martial. We recommend that in cases where the commanding officer of a unit is of a grade lower than lieutenant commander, that no personnel of that unit may be tried before a summary court-martial officer who is assigned to that same unit. This recommendation would allow repeal of 10 U.S.C. 824(b) which provides that when only one commissioned officer is present with a command, he shall be the summary court-martial for that command. This change would assure a more impartial consideration of each offense since the service member's case would be heard by an officer from another unit if the unit commanding officer were of a grade lower than lieutenant commander. It would also prevent a junior officer at a unit from having more punishment power than the commanding officer over men attached to that unit. Finally, it would prevent a commanding officer from exercising greater punishment power over his men as a summary court than he could under article 15.

If the Congress believes that the summary court-martial should be surrounded with even further protection, the Department would have no objection to a provision that only commissioned officers with at least 6 years of active service would serve as a summary court-martial. This would insure that cases could not be heard by immature or inexperienced officers.

To this Department, the heart of the problem is the combination of eliminating the summary court-martial and the retention of the provision of article 15 giving the service member the right to demand trial by court-martial in lieu of nonjudicial punishment. These provisions, taken together, would seriously reduce the responsiveness and flexibility of the military justice system. The Department therefore recommends alternatively that the summary court-martial be retained with the modifications suggested above or that if it is eliminated that this provision of article 15 be repealed.

As a technical matter, it is noted that line 14 on page 3 of the bill has a typographical error in that "(1)" should be "(7)". Similarly, it is believed that the phrase "shall appoint a special court-martial officer" found at line 20 on page 4 of the bill should be "shall appoint a special investigating officer" in order to fit the context of the section in which the phrase is contained.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

89TH CONGRESS
1ST SESSION

S. 760

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1965

Mr. ERVIN (for himself, Mr. BAYH, Mr. FONG, Mr. JOHNSTON, Mr. LONG of Missouri, and Mr. WILLIAMS of New Jersey) introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To amend chapter 47 (Uniform Code of Military Justice) so as to assure the constitutional rights of confrontation and compulsory process by providing for the mandatory appearance of witnesses and the production of evidence before certain boards and officers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 846 (article 46) of title 10, United States Code, is amended to read as follows:

"Under such rules and regulations as the President may prescribe, the following shall have authority to compel witnesses to appear and testify and to compel the production of other evidence—

"(1) courts-martial;

"(2) military commissions;

"(3) courts of inquiry;

"(4) investigating officers conducting investigations pursuant to section 832 of this title (article 32);

"(5) military boards appointed for the purpose of making findings or recommendation concerning the type or kind of administrative separation or discharge any member of the armed forces should receive;

"(6) boards established pursuant to section 1552 (correction of military records) and section 1553 (review of discharges and dismissals) of this title; and

"(7) any other military courts or boards when authorized to exercise subpena power by the President. Process issued under authority of this section shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the territories, Commonwealths, and possessions. In court-martial cases the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

SEC. 2. Subsection (a)(1) of section 847 (article 47) of title 10, United States Code, is amended to read as follows:

"(1) has been duly subpenaed to appear as a witness before any body or officer described in section 846 of this title (article 46), or before any military or civil officer designated to take a deposition to be read in evidence before any such body or officer;".

SEC. 3. Subsection (a) of section 849 (article 49(a)) of title 10, United States Code, is amended by inserting immediately after "unless" the following: "the law officer or court-martial without a law officer hearing the case, or if the case is not being heard,".

TO IMPLEMENT THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL TO CONFRONTATION AND COMPULSORY PROCESS

Background memorandum: The sixth amendment requires that in all criminal prosecutions the accused shall "be confronted with the witnesses against him" and "have compulsory process for obtaining witnesses in his favor." The issuance of subpenas is, of course, the means by which prospective witnesses are compelled to come to court and testify either for the Government or for the defense; and without the subpena power it would be difficult in many instances to obtain necessary testimony.

Article 47 of the Uniform Code of Military Justice, which is implemented in paragraph 115 of the 1951 Manual for Courts-Martial, provides for the subpenaing of witnesses to appear before "any court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission, or board." However, there is no authority for the subpenaing of witnesses to testify before an investigating officer during the pretrial investigation of serious offenses required by article 32 of the Uniform Code. Therefore, if it is necessary to obtain testimony from civilian witnesses prior to trial in order to determine whether the Government has a case against the accused and if the civilians will not appear voluntarily, then the needed testimony can only be obtained through the rather cumbersome procedure of convening a court of inquiry. Also, during the 1962 hearings of the Subcommittee on Constitutional Rights, it was testified that the phrase "any other military court or board," as used in article 47, had not been interpreted to include administrative discharge or separation boards, even in cases where such boards might be considering specific allegations of misconduct.

Consequently, even though the discharge board may be making a decision which will affect the entire future of the respondent serviceman and even though the correctness of this decision may hinge on the testimony of civilians who are reluctant to testify and undergo cross-examination, the board has no process available to compel their appearance. Similarly, such a board has no authority to order civilian witnesses to appear for the taking of depositions. Furthermore, neither the Discharge Review Boards (38 U.S.C. 693h) nor the Boards for the Correction of Military (or Naval) Records (5 U.S.C. 191a) have authority to compel civilian witness to appear and testify. Accordingly, in some in-

stances a member of the Armed Forces may be discharged or separated under other than honorable conditions for alleged misconduct without having the opportunity to confront and cross-examine his accuser or to obtain the testimony of certain witnesses whose presence he may desire.

If the subpena power is to be expanded, two issues are immediately encountered: (1) How much of an expansion is feasible? and (2) What procedural mechanism should be used for such an expansion? With respect to the first issue, it should be noted that making subpenas available without any limitation whatsoever in administrative discharge proceedings might make it possible for the respondent to block prompt action by unreasonable requests for the presence of witnesses. To avoid this possibility, the subpena power should not be made available simply upon request of the respondent without some showing of necessity for the witness' presence; and the board should have the discretion to utilize depositions of witnesses if they reside a considerable distance from the place where the board will convene. In fact, the circumstances under which subpenas might be issued by military boards or by investigating officers acting under article 32 of the Uniform Code should be left for treatment by Executive order promulgated as an amendment to paragraph 115 of the present Manual for Courts-Martial.

With respect to the mechanics to be used in extending the subpena power to military boards and to officers conducting investigations under article 32, there exists some uncertainty in Federal administrative law concerning the extent to which administrative agencies and similar bodies can issue valid and enforcible subpenas without enlisting the aid of a Federal district court. On the other hand, no question has ever been raised concerning the power of courts-martial and military courts of inquiry to issue valid subpenas, disobedience of which may be punished by prosecution in a Federal district court. Thus, instead of requiring that the military board or the article 32 investigating officer go into Federal court to request the issuance of a subpena by that court, it would probably be permissible simply to amend articles 46 and 47 of the Uniform Code to authorize the issuance of subpenas by the board or investigator. Any legislation should be simply of an enabling nature.

To implement these proposals it would seem appropriate to:

1. Amend article 46 to authorize an investigating officer duly appointed under article 32 to issue subpenas for the attendance of witnesses before him incident to his investigation in the performance of his duties under article 32, or for the attendance of witnesses before any military or civil officer who has been designated to take a deposition to be used in the investigation performed pursuant to article 32, and under regulations to be prescribed by the President.

2. Amend article 46 to authorize a military discharge or separation board, or any military or naval board which is determining whether and under what circumstances to discharge or separate a member of the Armed Forces, as well as the Discharge Review Board of each Department and the Boards for the Correction of Military (and Naval) Records, to issue subpenas requiring the attendance of witnesses before the boards incident to the performance of their duties, or requiring the attendance of witnesses before any military or civil officer designated to take a deposition to be read in evidence before such board.

3. Amend article 47, which provides for punishment of the witness who fails to appear, to include failure to appear before the investigating officer, the discharge board, the Discharge Review Board, the Correction Board, or before any military or civil officer designated to take a deposition to be used or read by such officer or board.

4. Amend article 49 to allow the taking and use of depositions in connection with proceedings of military discharge and separation boards, Discharge Review Boards, Correction Boards, or any other military or naval boards, subject to regulations to be prescribed by the President (this is to be merely permissive legislation to authorize clearly the use of depositions in connection with military administrative proceedings, but not to require the use of depositions).

5. In connection with all the previous amendments, clarify that the President shall prescribe the circumstances under which subpenas shall be issued for witnesses to appear and testify including the persons who may request issuance of the subpena.

6. Clarify the procedure for the taking of depositions during a trial by amending article 49 as proposed at page 31 of the Court of Military Appeals annual report for 1962.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, July 28, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 760, 89th Congress, a bill to amend chapter 47 (Uniform Code of Military Justice) so as to assure the constitutional rights of confrontation and compulsory process by providing for the mandatory appearance of witnesses and the production of evidence before certain boards and officers, and for other purposes. The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

The purpose of this bill is to authorize administrative boards considering the separation or discharge of an individual, discharge review boards, boards for correction of military records, and officers conducting pretrial court-martial investigations to issue subpenas and compel the production of other evidence.

The Department of Defense interposes no objection to enactment of S. 760, subject to the following observations:

(*a*) Although the Supreme Court of the United States has held that members of the Armed Forces may not be entitled to all the elements of due process, it has not, so far as we are aware, specifically passed on the question of whether those persons have the constitutional rights of confrontation and compulsory process. In a trial by court-martial an accused person is granted a qualified right of compulsory process under 10 U.S.C. 846 (art. 46). This right is, of course, based on statute and there is no clear indication by the courts that the right would exist apart from the statute. The question of whether the sixth amendment rights of confrontation and compulsory process apply to court-martial proceedings is therefore a matter which should be left to determination by the courts. Accordingly, it appears that the reference in the title of the bill to "constitutional" rights in this respect is inappropriate, and the word "constitutional" should be stricken.

(*b*) With respect to granting subpena power to officers conducting investigations pursuant to 10 U.S.C. 832 (art. 32), it is noted that the investigation is a preliminary inquiry and not an adversary proceeding. The military pretrial investigation is somewhat analogous to grand jury proceedings in civil courts. The affected individual in a grand jury proceeding has no subpena rights. Extension of the power of subpena to officers conducting pretrial investigations would give the accused serviceman a right not enjoyed by the individual concerned in a grand jury proceeding.

(*c*) With respect to proceedings before discharge review boards, S. 760 would increase the complexity of the proceedings with little corresponding benefit to the applicant.

(*d*) With respect to proceedings before boards for the correction of military records, it is doubtful that the proposal is necessary. Fifteen years of operation of this board within the Department of the Air Force, for example, indicates that the demonstrated need for subpena power is almost nonexistent. This also is true in the Departments of the Army and the Navy. During that time, the question has been touched upon by an applicant or counsel in less than 10 cases.

(*e*) In connection with extending the subpena power to administrative boards, it is noted that the bill is drafted as an amendment to the Uniform Code of Military Justice (ch. 47 of title 10, United States Code). Since the Uniform Code of Military Justice contains the statutory basis for the exercise of criminal jurisdiction, it would appear undesirable to inject into it provisions

governing administrative matters. If extension of subpena powers to administrative boards is considered favorably, it is recommended that proposed 10 U.S.C. 846(5) and (6) be redrafted as amendments to the sections of title 10, United States Code, which specifically relate to the subject boards.

(*f*) Although the memorandum accompanying S. 760 recommends that 10 U.S.C. 849 (art. 49) be amended to cover administrative boards, the bill does not do so. It appears incongruous to authorize depositions under compulsory process in a court-martial proceeding while denying that right to parties in an administrative proceeding.

(*g*) Section 3 appears unrelated to the remainder of the bill. However, the substance of that section has received, previously, the indorsement of the Court of Military Appeals and the Judge Advocates General (p. 31, Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury Pursuant to the Uniform Code of Military Justice for the period January 1, 1962 to December 31, 1962). In addition, substantially the same language has been incorporated as section 1(17) of the substitute proposal recommended for enactment by the Department of Defense in place of amendments to the Uniform Code of Military Justice proposed by S. 750, S. 752, and S. 757. Accordingly, there is no objection to inclusion of this section in the bill.

(*h*) S. 760 would broaden 10 U.S.C. 846 (art. 46) to give courts of inquiry specific authority to compel witnesses to appear and testify and to compel the production of other evidence. Enactment of this legislation would obviate the necessity for 10 U.S.C. 935(f) (art. 135(f)), which authorizes witnesses to be summoned and examined before courts of inquiry "as provided for courts-martial". It is therefore suggested that if this bill is considered for enactment, it be amended to repeal 10 U.S.C. 935(f) (art. 135(f)).

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

EUGENE M. ZUCKERT.

61-764 O—66—pt. 2——13

THE GENERAL COUNSEL OF THE TREASURY,
Washington, April 29, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the recommendations of this Department on S. 760, to amend chapter 47 (Uniform Code of Military Justice) so as to assure the constitutional rights of confrontation and compulsory process by providing for the mandatory appearance of witnesses and the production of evidence before certain boards and officers, and for other purposes.

The bill would amend articles 46 and 47 of the Uniform Code of Military Justice, 10 U.S.C. 846 and 847, to extend the subpena power to administrative boards including those appointed especially to consider the separation of persons from the Armed Forces and to officers conducting pretrial investigations under article 32, Uniform Code of Military Justice. Under existing law only courts-martial and courts of inquiry have the power to subpena civilian witnesses. In addition, article 49, 10 U.S.C. 849, would be amended to permit the law officer or court-martial sitting without a law officer as well as the convening authority of a court-martial to forbid for good cause the taking of a deposition.

S. 760 is one of a series of bills, proposing extensive amendments to the Uniform Code of Military Justice. In our comments on one of the other bills in this series, S. 749, we objected to the inclusion of provisions relating to administrative boards in the code. That objection is applicable to subsections (5) and (6) of section one and section two of S. 760 since they relate solely to administrative board proceedings. The Department feels that if the bill is favorably considered, these provisions should be redrafted as amendments to the sections of title 10, United States Code, dealing with the boards for correction of military records and boards of review of discharges and dismissals, i.e., 10 U.S.C. 1552 and 1553.

The Department is of the opinion that experience has not demonstrated a need for these proposed changes. So far as the records of the Treasury Department boards and the recollection of members and staff indicate, there never has been a request that witnesses or records not otherwise in the control of the Department be subpenaed before the boards. The Treasury Department boards are most lenient in allowing, at the request of the petitioner, the use of affidavits, letters, and statements of persons unable to be present for hearings. Furthermore, the boards have had unrestricted access to any official record or department personnel desired by either the boards or the petitioners before them in performing their functions. As a result, there does not appear to be any measurable benefit that would accrue to members or former members of the Coast Guard if the proposed bill were enacted insofar as these boards are concerned.

The exercise of the subpena power by any government body imposes a burdensome obligation on the citizen. The subpena is a Government command he cannot escape, and seldom do the fee and travel expenses received adequately compensate for the disruption, inconvenience, and loss of earnings which are caused by the response to the subpena's command. The Department feels that the use of the subpena should be reserved for and limited to proceedings wherein the public interest involved outweighs other considerations. In the light of the comments made in the preceding paragraph, it is the opinion of the Department that administrative hearings of the type mentioned in the proposed bill do not meet this test.

The Department also believes that the extension of the subpena power to article 32 pretrial investigating officers is not needed. An article 32 pretrial investigation is designed primarily to establish the existence of probable cause. It is not a trial and does not establish guilt or innocence. Accordingly, it

does not seem that there is any necessity for the use of the subpena power at that stage of the proceedings. There is ample opportunity at the trial stage for the accused to subpena witnesses to produce evidence on his behalf. At the trial he may also, to the fullest measure enjoyed by civilians accused of crime, confront and cross-examine those witnesses appearing against him. Although it is true that if the pretrial investigating officer had the subpena power, he might be better able to judge the guilt or innocence of an accused, that is not the function he is to perform.

In short, extension of the subpena power to administrative bodies and the article 32 pretrial investigator would seem to impose a very great obligation upon a number of people without substantial additional benefits accruing to the administrative process involved and without any significant enhancement of the constitutional rights which a member enjoys.

The change proposed in the bill to allow the law officer or the court-martial to forbid the taking of a deposition for good cause is considered desirable since either would have more familiarity with the case and would, therefore, be in a better position than the convening authority to determine the needs of the accused at the time the case is being heard.

It is noted that, although the bill authorizes depositions in court-martial proceedings, it does not specifically authorize them in the proceedings to which the subpena power is extended in section 1 of the bill. It seems anomalous to authorize compulsory process in both administrative and criminal proceedings, but to authorize depositions only in the latter. Accordingly, although the Department, as noted above, does not favor the extension of the subpena power to administrative board proceedings and pretrial investigations, if nevertheless the bill is favorably considered, it is recommended that section 3 be amended to authorize the taking of depositions in the types of administrative proceedings enumerated in section 1.

Subject to the foregoing comments, the Treasury Department has no objection to enactment of the proposed bill.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH.
Acting General Counsel.

S. 761

SUMMARY OF BILLS

S. 761 would provide that persons who are charged with having committed certain offenses while subject to trial by courts-martial, but who were not tried for such offsense by a court-martial and who are no longer subject to such jurisdiction, may be tried upon indictment in the U.S. district court into which he is first brought, if the offense was committed outside the United States, or in any U.S. district court in which an element of the offense was committed, if the offense was committed within the United States. This jurisdiction is authorized for crimes punishable by the uniform code of military justice by confinement for 5 years or more. Persons who have been tried for the offense in a State court, or whose consent would have been needed for trial by court-martial, are not subject to this bill.

Reason the bill is proposed

Prior to the enactment of the uniform code of military justice, there was no American forum for the trial of ex-servicemen who committed crimes while in uniform which were not discovered until after the serviceman had left the service. The uniform code, in article 3, closed this jurisdictional gap by granting courts-martial jurisdiction. However, in the case of *Toth* v. *Quarles*, 350 U.S. 11, the Supreme Court said that this provision was unconstitutional. Accordingly, there is no American tribunal available for such cases.

The Supreme Court, in the *Toth* case, did not preclude congressional authorization of jurisdiction to a Federal court. Accordingly, S. 761 gives such jurisdiction to the Federal district courts. At the present time, of course, various Status of Forces treaties give to foreign countries the right to try Americans for crimes committed while in military status, in certain instances. However, this might require extradition in the case of ex-servicemen, and would subject them to criminal procedure which might not contain adequate safeguards for their rights, and, in any case, which would be unfamiliar to them.

Departmental views

The Department states that it is opposed to S. 761 because the enactment of such legislation would create burdensome administrative problems. The Department recommends that action be delayed on this proposal pending further study by various concerned Executive offices.

[S. 761, 89th Cong., 1st sess.]

A BILL To provide for compliance with constitutional requirements in the trials of persons who are charged with having committed certain offenses while subject to trial by court-martial, who have not been tried for such offenses, and who are no longer subject to trial by court-martial

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 803 (article 3) of title 10, United States Code, is amended to read as follows:

"(a) Subject to section 843 of this title (article 43), any person not subject to trial by court-martial who is charged with having committed, while in a status in which he was subject to trial by court-martial, an offense against this chapter punishable by confinement for five years or more, and who, while in such status, was not tried for such offense may be tried upon indictment for such offense—

"(1) in the United States district court for any judicial district in which any act or omission constituting an element of such offense was committed, if such offense was committed in the United States, or

"(2) in the United States district court for the judicial district in which such person is found or into which he is first brought, if such offense was committed outside the United States or on the high seas.

No person may be tried in any district court for any such offense if (1) the offense is one for which such person could not be tried by court-martial without his consent if he were in a status subject to trial by court-martial, or (2) such person has been previously tried in a State court for substantially the same offense. For the purpose of all proceedings for or ancillary to the trial of any

person for any such offense in any district court of the United States, such offense shall be considered to be an offense prohibited by and punishable under the provisions of title 18, United States Code."

SEC. 2. The amendments made by the first section of this Act shall be effective with respect to any offense committed on or after the date of enactment of this Act.

The memorandum accompanying Senate bill 761 is as follows:

PROPOSED BILL TO PROVIDE AN AMERICAN FORUM, SUBJECT TO THE U.S. CONSTITUTION, FOR TRIAL OF SERIOUS OFFENSES BY PERSONS WHO HAVE BEEN SEPARATED FROM THE ARMED SERVICES

Background memorandum: Under the articles of war no American forum existed to prosecute offenses against those articles by a serviceman who was discharged before charges had been preferred against him. As a result, World War II produced several incidents where persons who allegedly had committed serious crimes were immune from trial because they had been discharged and were no longer subject to trial by court-martial and also were not subject to trial in any American civil court. Congress attempted to close this jurisdictional loophole by enacting article 3 of the Uniform Code of Military Justice; but the Supreme Court, in the famous case of *Toth* v. *Quarles*, 350 U.S. 11, held this provision unconstitutional. In light of the *Toth* case, courts-martial lack jurisdiction to try a serviceman for predischarge violations of the Uniform Code, however serious they may be (unless the ex-serviceman later reenlists); and so frequently there is no American court which can try the accused for his crime. Of course, if the crime was committed overseas in a foreign country and if the accused either has remained there or can be extradited to that country, prosecution may still be possible; but in that event the ex-serviceman is brought to trial in a foreign court, which is not subject to the U.S. Constitution and may not furnish some of the procedural safeguards with which we are familiar.

In light of these circumstances and of the fact that the Supreme Court did not say in the *Toth* case that jurisdiction could not be granted to prosecute persons like Toth in a Federal civil court, the best solution would appear to be through amendment of article 3 to authorize trial in Federal district courts of ex-servicemen whose crimes were committed while they were in the Armed Forces and who would not otherwise be subject to trial for the offense in a State or Federal court. In this manner the jurisdictional hole can be plugged; but trial can take place in an American tribunal, where every constitutional safeguard will be present. Furthermore, in instances where the alleged crime occurred overseas, there will be considerably less occasion to deliver or extradite the ex-serviceman to a foreign court for trial, since an American court would also have the power to try for the same misconduct. On the other hand, under present laws trial by an American court is impossible; and therefore foreign prosecution is the only alternative to condoning the crime.

The armed services have been interested in the problem and legislation was studied after the *Toth* decision to help meet the problem created there. (See subcommittee hearings at 852, 910, 946.) However, somewhere along the line action apparently has bogged down.

To implement this proposal, it would seem desirable to:

(a) Amend article 3(a) of the Uniform Code to provide that, subject to the provisions of article 43 (which is the statute of limitations), any person charged with having committed, while in a status in which he was subject to the code, an offense against the Uniform Code, which, under the code and the regulations prescribed by the President and in effect at the time of the alleged offense, would be punishable by confinement of 5 years or more and for which that person cannot otherwise be tried in the courts of the United States or any State or territory thereof or the District of Columbia, shall be subject to trial for that offense in a Federal district court. If the offense occurred within the United States, then venue to try the offense shall be in any district where there occurred any of the acts or omissions complained of. If the acts or omissions all occurred on the high seas or outside the United States, then venue shall lie in the district where the defendant first comes or is brought back to the United States (the intent here being to conform the venue requirements under this article to the general venue requirements of the United States Code). Trial by a State court for substan-

tially the same act or omission which it is proposed to try under this article shall preclude trial under this article by a Federal district court. (This is designed to clarify that a person who already has been tried by a State court cannot be tried under this article in a Federal district court; this may be especially important because of the wide scope of art. 134.)

S. 762

SUMMARY OF BILL

S. 762 would provide that any person serving with, employed by or accompanying the Armed Forces outside the United States, who commits certain specified offenses, shall be tried in the U.S. district court where he is found or first brought. The statute of limitations for offenses not involving the death penalty shall be 3 years. The maximum appropriate sentence is that authorized by the Uniform Code of Military Justice for the same offense. The provisions of title 18, United States Code, shall apply with respect to the proceedings of such trial.

Reason the bill is proposed

With the end of World War II, the United States, for the first time, stationed large forces on the soil of foreign countries for an extended period of time. Accompanying these forces are large number of civilians, whether as employees or dependents of the armed forces. With minor exceptions, there is no American tribunal available to try offenses committed overseas by members of this large American civilian community. To provide such a forum, article 2(11) of the Uniform Code authorized trial by courts-martial for offenses committed by these persons. However, the Supreme Court in a number of decisions, notably that of *Kinsella* v. *Singleton*, 361 U.S. 234, ruled that the forum for such trial cannot be a court-martial.

To close this jurisdictional gap, S. 762 confers jurisdiction upon Federal district courts for such trials. It incorporates the maximum punishments set forth in the Uniform Code, and the procedural rules generally applicable in Federal criminal trials.

Departmental views

The Department states that it is opposed to S. 762 because the enactment of this legislation would create burdensome administrative problems. The Department recommends that action be delayed on this proposal pending further study by various concerned Executive offices.

[Sec. 762, 89th Cong., 1st sess.]

A BILL To provide for compliance with constitutional requirements in the trials of persons who, while accompanying the armed forces outside the United States, commit certain offenses against the United States

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 by adding after chapter 47 a new chapter as follows:

"CHAPTER 48.—TRIAL OF CERTAIN PERSONS WHO ACCOMPANY THE ARMED FORCES OUTSIDE THE UNITED STATES

"Sec.
"951. Persons subject to trial; jurisdiction of United States district courts; offenses for which persons may be tried.
"952. Statute of limitations; maximum punishment; general provisions.

"§ 951. Persons subject to trial; jurisdiction of United States district courts; offenses for which persons may be tried

"(a) Any citizen, national, or other person owing allegiance to the United States who commits any offense referred to in subsection (b) of this section while serving with, employed by, or accompanying the armed forces outside the United States shall be guilty of an offense against the United States and shall be tried for such offense in the United States district court for the judicial district in which such person is found or into which he is first brought.

"(b) The offenses for which any person described in subsection (a) of this section may be tried in a United States district court are those offenses specified in—

"(1) sections 877 through 881 of this title (articles 77–81) insofar as such sections relate to offenses referred to in clauses (2) through (5) of this subsection;

"(2) section 882 of this title (article 82);

"(3) sections 907 through 911 of this title (articles 107–111);

"(4) sections 913, 914, and 916 of this title (articles 113, 114, and 116); and

"(5) section 934 of this title (article 134) to the extent of crimes and offenses not capital.

"§ 952. Statue of limitations; maximum punishment; general provisions

"(a) An indictment may be found at any time without limitation with respect to any offense referred to in section 951(b) of this title for which the death penalty may be imposed. Except as provided in section 843(f) of this title (article 43(f)), no person shall be prosecuted, tried, or punished under this chapter for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. No person may be tried under this chapter for any offense if such person has been tried for substantially the same offense in a foreign country pursuant to a treaty or agreement to which the United States is a party.

"(b) The maximum punishment which may be imposed in the case of any person tried for an offense pursuant to this chapter shall be the same as that applicable to persons subject to trial by courts-martial for the same offense, but the provisions of chapter 47 of this title relating to the forfeiture of pay and allowances shall not be applicable in the case of any person tried under authority of this chapter.

"(c) Any offense for which a person is indicted and tried under authority of this chapter shall, for the purpose of all proceedings for or ancillary to the trial of such person, be considered to be an offense prohibited by and punishable under the provisions of title 18, United States Code.

"(d) Nothing in this chapter shall be construed as depriving court-martial, military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or law of war may be tried by courts-martial, military commissions, provost courts, or military tribunals.

"(e) As used in this chapter, the term 'outside the United States' means outside the several States, Commonwealth of Puerto Rico, Virgin Islands, Canal Zone, and the special maritime and territorial jurisdiction of the United States."

SEC. 2. (a) The table of chapters at the beginning of title 10, United States Code, is amended by inserting immediately below

"47. Uniform Code of Military Justice ---------- 801"

the following:

"48. Trial of Certain Persons Who Accompany the Armed Forces Outside the United States---------- 951"

(b) The table of chapters preceding chapter 31 of title 10, United States Code, is amended by inserting immediately below

"47. Uniform Code of Military Justice ---------- 801"

the following:

"48. Trial of Certain Persons Who Accompany the Armed Forces Outside the United States---------- 951"

The memorandum accompanying Senate bill 762 is as follows:

PROPOSED BILL TO PROVIDE AN AMERICAN FORUM, WITH FULL CONSTITUTIONAL SAFEGUARDS, TO TRY PERSONS ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES

Background memorandum: Until the present century, the United States had no large forces operating overseas, and so, with a few exceptions, American civil courts were available to try any crimes that might be committed by

civilians who were employed by, serving with, or otherwise accompanying the Armed Forces. On the other hand, the United States now maintains large military contingents overseas, where no American civil courts are available to try American civilian dependents or employees who may commit serious crimes. In a few instances, provisions of the Federal Criminal Code could be invoked as a basis for prosecuting the conduct of Americans outside the country; but, generally speaking, Federal criminal statutes were not intended to apply extraterritorially.

In order to provide an American forum for trial of civilian employees and dependents with our Armed Forces overseas, Congress enacted article 2(11) of the Uniform Code of Military Justice, which subjected to the code 'all persons serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States and without certain territories.' Thus, civilian employees and dependents of the Armed Forces overseas were made subject to trial by court-martial. Ultimately, article 2(11) was invalidated by the Supreme Court, with the result that, in most instances, there is now no American court, either military or civil, that has jurisdiction to try serious crimes committed by American civilian employees or dependents overseas. Therefore, the only courts which can prosecute those offenses are foreign courts, which are not subject to the U.S. Constitution and may not provide the safeguards available in American courts. There is no indication that the foreign courts are anxious in most instances to try crimes committed by American civilian employees or dependents overseas, but the only alternative is to let the crime go completely unpunished.

The relationship of the conduct of civilian employees and dependents to the maintenance of discipline and morale in the armed services is great enough to give considerable support to the argument made by several dissenters in the Supreme Court that article 2(11) was constitutional under Congress' power to 'make Rules for the Government and Regulation of the land and naval Forces.' Because of this relationship it seems important to provide a forum for trial of crimes committed by civilian employees and dependents overseas. If this forum is a foreign court, the civilian accused loses the benefit of the safeguards provided by the U.S. Constitution. The Supreme Court has held that this forum cannot be a court-martial. *Kinsella* v. *Singleton*, 361 U.S. 234; *Grisham* v. *Hagan*, 361 U.S. 278; *McElroy* v. *Guagliardo*, 361 U.S. 281. Therefore, virtually by a process of elimination, the Federal district courts seem to be the proper forum for the trial of such misconduct.

Prior to its hearings in 1962, the Subcommittee on Constitutional Rights was informed that the Department of Defense had prepared draft legislation to deal with this problem (hearings 848–51, 910, 946). However, this draft legislation has apparently bogged down somewhere between the Pentagon and the Department of Justice.

If jurisdiction is to be given the Federal district courts with respect to serious crimes committed overseas by civilian dependents and employees, it would seem desirable to apply the usual venue provisions governing Federal trials of offenses committed outside the United States or on the high seas. Also, since a serviceman cannot be prosecuted in a court-martial after trial by a foreign court in a country which is a party to the NATO Status of Forces Agreement, the civilian employee or dependent should receive the same protection and not be subject to trial in a Federal civil court after trial in a foreign court. Articles 107–132 of the Uniform Code of Military Justice prohibit certain acts which might be committed by a civilian employee or dependent and perhaps with disastrous consequences; in article 134 of the code there is a prohibition of 'crimes and offenses not capital' which serves to incorporate by reference the Federal Criminal Code. Accordingly, it would seem to suffice to make a civilian employee or dependent punishable in an American district court if he committed an act or is guilty of an omission for which a member of the Armed Forces, who did the same thing could be punished under articles 107–132 of the Uniform Code or under the 'crimes and offenses' provision of article 134.

To implement this proposal it seems necessary to:

(a) Amend article 2(11)—or enact a separate article—to provide that all persons serving with, employed by, or accompanying the Armed Forces without the United States, the Canal Zone, Puerto Rico, and the Virgin Islands' shall be subject to trial by a Federal district court for all acts or omissions which, on the part of a member of the Armed Forces would constitute a violation of articles 107 through 132 or 'crimes and offences not capital' within the meaning of article 134.

(b) Provide that the statute of limitations which would apply to the prosecution of a member of the armed forces under article 43 shall apply to misconduct by a civilian prosecuted in a Federal district court under this article and the maximum punishment authorized shall be that which would be authorized for the same act or omission if committed at the same time by a member of the Armed Forces.

(c) Provide that venue shall be the same as for offenses committed outside the United States under the venue provisions of the Criminal Code (18 U.S.C. 8231–8243 and especially 18 U.S.C. 8238).

(d) Provide that it shall be a defense to prosecution if the defendant has been tried for the same act or omission by the courts of a foreign country and with respect to acts or omissions which allegedly took place within the boundaries of that foreign country.

[H.R. 273 (S. 2096), 89th Cong., 1st sess.]

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, providing for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial proceedings by counsel having the qualifications of defense counsel detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

(1) Section 801(10) (article 1(10)) is amended by inserting the words "or special" after the word "general".

(2) Section 816 (article 16) is amended to read as follows:

"§ 816. Art. 16. Courts-martial classified

"The three kinds of courts-martial in each of the armed forces are—

"(1) general courts-martial, consisting of—

"(A) a law officer and not less than five members; or

"(B) only a law officer, if before the court is assembled 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 consents thereto;

"(2) special courts-martial, consisting of—

"(A) not less than three members; or

"(B) a law officer and not less than three members; or

"(C) only a law officer, under the same conditions as those prescribed in clause (1) (B); and

"(3) summary courts-martial, consisting of one commissioned officer."

(3) Section 818 (article 18) is amended by adding the following sentence at the end thereof: "However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) may not adjudge the penalty of death."

(4) Section 819 (article 19) is amended by striking out the last sentence and inserting the following sentence in place thereof: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made and, except in time of war, or of national emergency hereafter declared by Congress, the accused was represented or afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27 (b))."

(5) Section 825(c)(1) (article 25(c)(1)) is amended—

(A) by striking out the words "before the convening of the court," in the first sentence and inserting the words "before the conclusion of a session called by the law officer under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused," in place thereof; and

(B) by striking out the word "convened" in the last sentence and inserting the word "assembled" in place thereof.

(6) Subchapter V is amended by striking out the following item in the analysis:

"826. 26. Law officer of a general court-martial."

and inserting the following item in place thereof:

"826. 26. Law officer of a general or special court-martial."

(7) The catchline and subsection (a) of section 826 (article 26) are amended to read as follows:

"§ 826. Art. 26. Law officer of a general or special court-martial

"(a) The authority convening a general court-martial shall, and, subject to the regulations of the Secretary concerned, the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for that duty by the Judge Advocate General of the armed force of which he is a member. A commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. However, no person may act as a law officer of a single-officer general court-martial unless he is specially certified to be qualified for that duty. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

(8) Section 826(b) (article 26(b)) is amended by striking out the figures "839" and "39" and inserting the figures "839(b)" and "39(b)", respectively, in place thereof.

(9) Section 829 is amended—

(A) by striking out the words "accused has been arraigned" in subsection (a) and inserting the words "court has been assembled for the trial of the accused" in place thereof;

(B) by inserting the words ", other than a single-officer general court-martial," after the word "court-martial in the first sentence of subsection (b); and by amending the last sentence of subsection (b) to read as follows: "The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the law officer, the accused, and counsel.";

(C) by inserting the words ", other than a single-officer special court-martial," after the word "court-martial" in the first sentence of subsection (c); and by ammending the last sentence of subsection (c) to read as follows: "The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused and counsel,"; and

(D) by adding the following new subsection at the end thereof:

"(d) If the law officer of a single-officer court-martial is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816 (1)(B) or (2)(C) of this title (article 16 (1)(B) or (2)(C)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."

(10) Section 835 (article 35) is amended by striking out the second sentence and inserting the following in place thereof: "In time of peace no person may, against his objection, be brought to trial, or be required to participate by himself or counsel in a session called by the law officer under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him, or in a special court-martial case within a period of three days after the service of charges upon him."

(11) Section 838(b) (article 38(b)) is ammended by striking out the words "president of the court" in the last sentence and inserting the words "law officer or by the president of a court-martial without a law officer" in place thereof.

(12) Section 839 (article 39) is ammended to read as follows:

"§ 839. Art. 39. Sessions

"(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a law officer and members, the law officer may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

"(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

"(2) hearing and ruling upon any matter which may be ruled upon by the law officer under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

"(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

"(4) performing any other procedural function which may be performed by the law officer under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel and the trial counsel and shall be made a part of the record.

"(b) When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a law officer has been detailed to the court, the law officer."

(13) Section 840 (article 40) is amended to read as follows:

"§ 840. Art. 40. Continuances

"The law officer or a court-martial without a law officer may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."

(14) Section 841(a) (article 41(a)) is amended—

(A) by amending the first sentence to read as follows: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and

(B) by striking out the word "court" in the second sentence and inserting the words "law officer or, if none, the court" in place thereof.

(15) Section 842(a) (article 42(a)) is amended to read as follows:

"(a) Before performing their respective duties, law officers, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a law officer, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty."

(16) Section 845 (article 45) is amended—

(A) by striking out the words "arraigned before a court-martial" in subsection (a) and inserting the words "after arraignment" in place thereof; and

(B) by amending subsection (b) to read as follows:

"(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the law officer or by a court-martial without a law officer, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty."

(17) Section 849(a) (article 49(a)) is amended by inserting after the word "unless" the words "the law officer or court-martial without a law officer hearing the case or, if the case is not being heard,".

(18) Section 851 (article 51) is amended—

(A) by amending the first sentence of subsection (a) to read as follows: "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot.";

(B) by amending the first two sentences of subsection (b) to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than motion, for a finding of not guilty, is final and constitutes the ruling of the court.";

(C) by striking out the words "of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court" in the first sentence of subsection (c) and inserting the words "and the president of a court-martial without a law officer shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them" in place thereof; and

(D) by adding the following new subsection at the end thereof:

"(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence."

(19) Section 852 (article 52) is amended—

(A) by inserting the words "as provided in section 845(b) of this title (article 45(b)) or" after the word "except" in subsection (a) (2); and

(B) by adding to the first sentence of subsection (c) the words ", but a determination to reconsider a finding of guilty or, with a view toward decreasing it, a sentence may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence."

(20) Section 854(a) (article 54(a)) is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President."

SEC. 2. This Act becomes effective on the first day of the tenth month following the month in which it is enacted.

[H.R. 277 (S. 2097), 89th Cong., 1st sess.]

A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, to authorize the Judge Advocate General to grant relief in certain court-martial cases, to extend the time within which an accused may petition for a new trial, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

(1) Section 869 (article 69) is amended by adding the following new sentence at the end thereof: "Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a board of review, may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the

accused or the offense, or error prejudicial to the substantial rights of the accused."

(2) Section 873 (article 73) is amended by striking out in the first sentence the words "one year" the first time they appear and inserting the words "two years" in place thereof.

SEC. 2. The amendment made by section 1 (1) of this Act is effective upon the date of its enactment. The amendment made by section 1 (2) of this Act is effective with respect to a court-martial sentence approved by the convening authority on and after, or not more than two years before, the date of its enactment.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C., January 13, 1966.

Hon. SAMUEL J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: I appreciate this opportunity to present to you the views of the Federal Bar Association with regard to S. 745 to S. 762, 89th Congress, which affect administrative board proceedings and the administration of justice in the military services. The Federal Bar Association has long had an interest in keeping up with the progress that has steadily been made in the field of military law and the proposals that have been made from time to time to make further improvements. One of our committees has initiated a detailed study of the 18 Senate bills under consideration by this joint subcommittee and two related House Bills—H.R. 273 and H.R. 277, 89th Congress—and that committee's first report and recommendations concerning some of those legislative proposals have been approved by the executive council of the Federal Bar Association at its regular meeting on January 3, 1965. Attached is a copy of the report, less enclosures which are already on file, for your further consideration.

While the Federal Bar Association has not had an opportunity to complete study and coordination of all 18 bills and does not agree with some of the details of certain of the bills under consideration, we do wholeheartedly concur in the broad underlying aim to protect the constitutional rights of members of the armed forces and to improve and extend the legal protection afforded to them.

The Subcommittee on Constitutional Rights is to be commended for its tireless and fruitful efforts which produced the legislation under consideration.

Our study of the Senate bills in question and the mentioned two related House bills led us to concentrate initially on five Senate bills designated S. 747, S. 750, S. 751, S. 752, and S. 757, and two related House bills, H.R. 273 and H.R. 277, because in these bills there appear to be areas of agreement in principle and objective. We understand that the two House bills are favored by the Department of Defense and that, in fact, the Defense Department has recommended that those two bills be enacted in lieu of the five related Senate bills. In these bills we feel are legislative proposals which affect the areas of military law in which there is generally considered to be the greatest need for change. These areas include the expansion of the authority of the law officer so that his judicial stature will more closely approximate that of a civilian trial judge; authorizing the appointment in certain cases of courts-martial composed of law officers alone; permitting the law officer to conduct pretrial sessions; prohibiting a special court-martial from adjudging a bad conduct discharge unless the accused is represented by qualified legal counsel; extending the period in which new trial petitions may be filed; and authorizing a form of extraordinary relief in court-martial cases not reviewed by boards of review.

In our opinion the enactment into law of the proposals wherein there is already agreement in principle between the proponents of the Senate and House bills would result in an immediate improvement in the administration of military justice and would add significant protection to the constitutional rights of military personnel. We feel that the results being sought could best be achieved by enactment of the legislative proposals contained in H.R. 273 and H.R. 277.

We are of the view that there is a great deal of merit to some of the remaining proposals contained in the Senate bills which I will now discuss. However, it would seem that the hearings and studies on those bills, some of which contain

controversial provisions, should not delay the immediate enactment into law of legislation wherein there is seeming agreement in principle by all parties concerned.

Apart from those already mentioned, the bills which we feel have merit are S. 749 which strengthens article 37 of the Uniform Code of Military Justice to prohibit command influence under all circumstances; that portion of S. 760 which extends the power of supoena to the article 32 investigating officer; and S. 756 which prohibits "double jeopardy" in administrative proceedings by providing that no administrative discharge under other than honorable conditions may be given for misconduct as to which the person has been acquitted by court-martial.

Consideration was also given to S. 761 and S. 762, the objective of which is to fill the jurisdictional void occasioned by the decisions of the U.S. Supreme Court holding unconstitutional the provisions of the Uniform Code of Military Justice, which provided for military jurisdiction over former servicemen for offenses committed while they were in the military service and for civilians employed by, serving with, or accompanying the armed forces abroad in time of peace.

With respect to S. 762, the Federal Bar Association concurs in the view that the Federal courts established under Article III of the Constitution are the appropriate American forum for the trial of American nationals abroad who are charged with having committed offenses against the United States which are not tried by foreign tribunals. Whether such legislation should be limited to persons serving with, employed by, and accompany the Armed Forces abroad, or whether it should be extended to all Government employees and their dependents, or even to all American nationals is a question which we believe merits further consideration by your subcommittee. We note, however, that under several agreements with host states Armed Forces civilian employees and dependents are immune from host state criminal jurisdiction to the same extent as members of Embassy staffs. We strongly believe that, as a minimum, United States law should take cognizance of serious offenses committed by persons who are immune from host state law. A void in criminal responsibility as to such serious offenses as murder is incompatible with basic respect for the rule of law.

At the start of our consideration we noted that criminal statutes which are intended to protect the Government against acts directly injurious to its operations, and which are capable of perpetration without regard to locality have been construed by the Supreme Court to be applicable to American nationals wherever they may be; but Federal statutes denouncing crimes against private individuals or their property like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds which affect the peace or good order of the community are deemed to have local application only unless Congress expressly provides for a wider application (*U.S.* v. *Bowman*, 266 U.S. 94 (1922)).

Applying the rule of construction of the Bowman case, our committee found that many of the substantive offenses specifically denounced in S. 762 are now applicable to all American nationals abroad. For example, 18 USC 1001, and 1018 encompass the scope of 10 USC 907. The enumeration of offenses also includes the "crimes and offenses not capital" clause of 10 USC 934. In the Uniform Code of Military Justice this clause was intended to authorize courts-martial to take cognizance of acts and omissions which are Federal offenses committed by persons subject to military law. By including this clause within S. 762, Congress would be attempting to authorize Federal courts to try civilians for acts which are non-capital Federal crimes at the time and place committed, but it would substitute the maximum punishment prescribed by the President for that provided by Congress.

In our opinion there is no need to duplicate existing criminal statutes which now have world wide application. The committee noted with disappointment, however, that S. 762 omits the serious civil felonies such as murder, manslaughter, rape, larcency, robbery, forgery, bad checks, arson, extortion, assaults, burglary and perjury which are denounced in sections 918 to 931 inclusive of title 10. It is the absence of a U.S. forum for the disposition of such civil felonies which has created the gap which the proposed legislation seeks to cure.

Most of these offenses are included within title 18 but are limited in application to the special maritime and territorial jurisdiction of the United States. The committee recommends that consideration be given to extending the Federal penal legislation applicable in the special maritime and territorial jurisdiction to the appropriate class of persons abroad. We note also that if this

class of person were to include members of the Armed Forces as well as accompany civilians, the jurisdictional void caused by *Toth* v. *Quarles*, 350 U.S. 11, would be filled, thus fulfilling the principal objective of S. 761.

This approach would avoid the doubtful practice of applying the executive department's table of maximum punishments to Federal courts established under article III courts, as is attempted in subsection *b* of S. 762.

The Federal Bar Association is of the opinion that S. 761 and 762 in their present form are not suitable to attain the objectives sought and that additional study is required. Certain recommendations for your consideration are included in the report of the committee on military law and justice which is attached.

I regret that there has been insufficient time for the thorough study of the remaining proposals contained in the Senate bills and for their coordination among the other interested committees of the association. When the remaining studies have been completed, coordinated and approved by the executive committee, I shall transmit them to you for your further consideration.

I wish to express the appreciation of the Federal Bar Association for the opportunity to present our views.

Sincerely,

MARSHALL C. GARDNER
President.

REPORT OF THE COMMITTEE ON MILITARY LAW AND JUSTICE CONCERNING S. 745 AND S. 762, 89TH CONGRESS, AND OTHER PENDING BILLS PERTAINING TO THE ADMINISTRATION OF MILITARY JUSTICE AND ADMINISTRATIVE BOARD PROCEEDINGS

1. On November 24, 1965, the committee on military law and justice initiated a detailed study of 18 Senate bills, concerning improvements in the administration of military justice and administrative board proceedings in the armed services (S. 745 and S. 762) and related House bills. This report was approved by the committee at a special meeting held on December 28, 1965.

2. We have considered the following:

(*a*) S. 745–S. 762, 89th Congress (inclosure 1),

(*b*) H.R. 273 and H.R. 277, 89th Congress, also referred to as the "G" and "H" bills proposed by the Department of Defense (inclosure 2),

(*c*) The Annual Reports of 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 for 1963 and 1964, recommending the enactment of the "G" (H.R. 273) and "H" (H.R. 277) bills as substitute measures for those of the 18 Senate bills now designated as S. 747, S. 750, S. 751, S. 752 and S. 757.

(*d*) Resolution of the House of Delegates to the American Bar Association convention in August 1964 urging Congress to enact legislation similar to H.R. 273 and H.R. 277, now pending in the House of Representatives (enclosure 3),

(*e*) The comments of the Department of Defense on S. 745–S. 762.

3. Because of the wide range of the subject matter covered by the 18 Senate bills and the limited time available for committee consideration, first priority was given to the five Senate bills designated at S. 747, S. 750, S. 751, S. 752 and S. 757 and the two related House bills, H.R. 273 and H.R. 277. A comparative analysis of the five Senate bills and the two related House bills is attached as inclosure 4.

The committee finds in these bills, major areas of agreement in principle and objective. We find that the two House bills are favored by the Department of Defense, a majority of the members of the United States Court of Military Appeals, the judge advocates general of the armed services, the general counsel of the Department of the Treasury, and the American bar association. The Department of Defense has recommended that those bills be enacted in lieu of the five related Senate bills.

H.R. 273, the "G" bill, makes significant improvements in court-martial procedure, brings that procedure into closer accord with that of the United States district courts, and contains provisions which would increase the authority and effectiveness of the law officer by making his position more analogous to that of a civilian trial judge. For example, under H.R. 273, if enacted, the law officer could rule finally on those maters which are normally and properly de-

termined finally by a judge, whereas under existing law, rulings of the law officer on many important legal questions, including motions for a finding of not guilty, are subject to being overruled by members of the court who comprise the military jury. Under present law, the court members must even pass on challenges for cause when the basis of the challenge would affect every member.

H.R. 273 would also permit the law officer to hold open, recorded pretrial sessions to dispose of interlocutory and other procedural matters, such as objections by counsel concerning admissibility of confessions and evidence obtained by search and seizure. This would eliminate the present time-consuming trial procedure during which the members of the court must leave the courtroom, sometimes repeatedly and annoyingly, while these legal issues are being discussed by the law officer and counsel. The use of these sessions would provide additional protection for accused persons by helping to insure that members of the court are not made aware of the existence of confessions and other types of evidence determined by the law officer to be inadmissible. Under this bill, the law officer could also hold open recorded post trial sessions without members to act upon matters such as mandates issued by appellate agencies in cases remanded for further action on interlocutory matters at the trial level. This will fill a void existing under present military law and will insure that there is always a court open to act upon these matters just as there is in the civilian Federal system.

This bill would further provide additional protection for accused persons before special courts-martial by requiring that such an accused be represented by legally qualified counsel before the special court-martial can adjudge a bad conduct discharge.

Other desirable features of H.R. 273 would provide, with adequate safeguards, a procedure comparable to a jury-waived trial in the United States district courts; permit the appointment of a law officer to special courts-martial; improve the procedure for handling guilty pleas; and make other sensible and long overdue procedural changes that would result in very significant savings in time and manpower.

H.R. 277, the "H" bill, extends from one to two years the time within which a new trial may be granted in cases reviewed by a board of review. In those cases which are not reviewed by a board of review, the bill would give the judge advocate general authority to vacate or modify the findings or sentence because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. This would afford additional protection to persons convicted erroneously by special and summary courts-martial for whom there is presently no statutory provision for granting post-conviction relief.

Enactment of the legislative proposals contained in H.R. 273 and H.R. 277 would achieve the desirable objectives of S. 747, S. 750, S. 751, S. 752, and S. 757, 89th Congress, and the two House bills provide a means for immediate enactment into law of these objectives, since they embody areas in which there is apparent agreement in principle and purpose between proponents of the House and Senate bills. Accordingly, in view of the immediate need for legislation in these areas, the Committee on Military Law and Justice urges enactment of the legislative proposals contained in those two House bills.

4. The committee also finds that general agreement exists as to the merit of S. 749 which strengthens article 37 of the Uniform Code of Military Justice to prohibit improper command influence under all circumstances; that portion of S. 760 which extends the power of subpena to the article 32 investigating officer; and S. 757 which prohibits double jeopardy in administrative proceedings by providing that no administrative discharge under other than honorable conditions may be given for misconduct as to which the person has been acquitted by court-martial. The committee concurs in the principle of these proposals and recommends that the Federal Bar Association indorse them.

5. The committee also was able to consider S. 761 and S. 762. The objective of these bills is to fill the jurisdictional void occasioned by the decisions of the U.S. Supreme Court holding that 10 U.S.C. 802(11) and 803a are unconstitutional insofar as they purport to provide for trial by courts-martial of former servicemen for offenses committed while they were subject to the Uniform Code of Military Justice (*Toth* v. *Quarles*, 350 U.S. 11) and of civilians employed by, serving with, and accompanying the Armed Forces abroad. A memorandum

reflecting the considerations of the committee on S. 761 and S. 762 is attached as inclosure 5.[1]

With respect to S. 762, the committee concurs in the view that the Federal courts established under article III of the Constitution are the appropriate American forum for the trial of American nationals abroad who are charged with having committed offenses against the United States which are not tried by foreign tribunals. Whether such legislation should be limited to persons serving with, employed by, and accompanying the Armed Forces abroad, or whether it should be extended to all Government employees and their dependents, or even to all American nationals should be carefully considered by Congress. We note, however, that under several agreements with host States, Armed Forces civilian employees and dependents are immune from host State criminal jurisdiction to the same extent as members of technical and administrative staffs of the U.S. Diplomatic Missions. We strongly believe that as a minimum U.S. law should take cognizance of serious offenses committed by all persons who are immune from host State law.

At the start of our consideration we note that criminal statutes which are intended to protect the Government against acts directly injurious to its operations, and which are capable of perpetration without regard to locality have been construed by the Supreme Court to be applicable to American nationals wherever they may be; but that Federal statutes denouncing crimes against private individuals or their property like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds which affect the peace or good order of the community are deemed to have local application only unless Congress expressly provides for a wider application (*U.S.* v. *Bowman*, 260 U.S. 94 (1922)).

Applying the rule of construction of the *Bowman* case, our committee found that many of the substantive offenses specifically denounced in S. 762 are now applicable to all American nationals abroad. For example, 18 U.S.C. 1001, and 1018 encompass the scope of 10 U.S.C. 907. By the same consideration the inclusion of the "crimes and offenses not capital" clause of 10 U.S. 934 is redundant because the only crimes within the scope of that clause applicable abroad are the Federal statutes of universal territorial application. In our opinion there is no need to duplicate existing criminal statutes which now have worldwide application. The committee notes with disappointment, however, that S. 762 omits the serious civil felonies such as murder, manslaughter, rape, larceny, robbery, forgery, bad checks, arson, extortion, assaults, burglary, and perjury which are denounced in sections 918 to 931, inclusive of title 10. It is the absence of a U.S. forum for the disposition of such civil felonies which has created the gap which the proposed legislation seeks to cure.

Most of these civil felonies are included within title 18 but are limited in application to the special maritime and territorial jurisdiction of the United States. The committee recommends that consideration be given to extending the Federal penal legislation applicable in the special maritime and territorial jurisdiction to the appropriate class of persons abroad. We note also that if this class of person were to include members of the Armed Forces as well as accompanying civilians, the jurisdictional void caused by *Toth* v. *Quarles*, 350 U.S. 11, would be filled, thus fulfilling the principal objective of S. 761.

This approach would avoid the doubtful practice of applying the executive department's table of maximum punishments to U.S. district courts established under article III of the Constitution, as is attempted in subsection *b* of S. 762.

The committee also urges that consideration be given to legislation providing authority for U.S. officials, with the concurrence of foreign officials to apprehend, restrain, and to provide for the return to the United States for trial of persons accused, upon probable cause, of having committed an offense against U.S. law; and that the use of depositions taken with due regard to the right of confrontation be made admissible in Federal courts where the attendance of foreign witnesses is not compellable.

The committee is of the opinion that S. 761 or S. 762 in their present form are not suitable to attain the objective sought and that additional study is required.

6. The committee will continue its study of the remaining Senate bills and will report to the association thereon at a later date.

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[1] The memorandum appears at p. 837.

7. In view of the foregoing, the Committee on Military Law and Justice, recommends that the Federal Bar Association:

(*a*) Urge early enactment of H.R. 273 and H.R. 277, 89th Congress, in lieu of S. 747, S. 750, S. 751, S. 752, and S. 757.

(*b*) Endorse S. 749, S. 756, and so much of S. 760 as extends the power to issue subpenas to article 32 investigating officers.

(*c*) Oppose the enactment of S. 761 and S. 762 in their present form but express its concurrence in the attainment of the objective of these two bills and offer appropriate recommendations for the further consideration of the Congress.

(*d*) Take necessary action to communicate these views to the Congress.

WALDEMAR A. SOLF,
Colonel, JAGC Chairman.

COMPARATIVE ANALYSIS

Inclosure 4

The following are brief notes on differences between the Ervin Proposals and the G and H Bills as an aid to a critical reading of the proposed legislation.

S. 757	H.R. 273
Pretrial proceedings in general courtmartial cases, to be called "conferences," during which law officer may rule on matters as to which he is authorized to make "final disposition," and during which law officer may accept pleas of guilty only, and dispose of other preliminary matters which are specifically listed.	Authorizes pre and post-trial proceedings for the purpose of disposing of matters which may be disposed of without the members of the court-martial. At the pretrial sessions the law officer may rule on motions of counsel raising defenses and objections to the admissibility of confessions or evidence obtained by search and seizure and other such matters, in a manner similar to that provided for by Rule 12, FRCP. In addition the law officer would be authorized to accept pleas of guilty and not guilty, and to enter findings of guilty pursuant to pleas of guilty. At the post-trial sessions, the law officer would be authorized to dispose of matters raised by appellate agencies out of the presence of the members of the court-martial. For example, questions concerning jurisdiction, venue, speedy trial, or mental competency are often remanded by appellate agencies for further action at the trial level.
The following defects in S. 757 are indicated: (1) the name of the pretrial proceeding should reflect that it is a session or hearing at which all parties to the trial are present except the court-martial members; (2) the bill should authorize law officer at special court-martial to conduct pretrial proceedings as well, in view of S. 752 providing for law officer at special courtmartial in certain cases; (3) the term "final disposition" is capable of a construction which would exclude law officer rulings on admissibility of confesssions; (4) the law officer should be permitted to accept pleas of not guilty as well as pleas of guilty at this pretrial proceeding; (5) the listing of specific matters that the law officer may dispose of may result in judicial interpretation restricting scope of the pretrial proceedings unnecessarily; (6) the bill does not make necessary amendments of other sections of the Uniform Code of Military Justice; and (7) the memorandum accompanying the bill mentions advisability of authorizing law officer to enter findings of guilty pursuant to acceptance of a plea of guilty, but the bill itself fails to confer this authority on the law officer.	

COMPARATIVE ANALYSIS—Continued

S. 752	H.R. 273
Authorizes appointment of law officer to special court-martial and gives accused absolute right to waive "jury" trial in both special court-martial and general court-martial by notification to law officer. In one-officer general court-martial law officer could impose death penalty where otherwise authorized. Two defects are noted: (1) the accused's right to waive jury trial should be conditioned on approval by the convening authority, *Cf.*, Rule 23a FRCP recently upheld by the Supreme Court of the United States in *Singer* v. *United States*, decided 1 March 1965; (2) the law officer should not be authorized to impose the death penalty sitting as a one-officer general court-martial.	Provides authority whereby an accused may request trial by a law officer sitting without a member panel. Such a one-officer trial would be authorized provided the convening authority consented. This procedure is comparable to waiver of trial by jury with the consent of the trial judge in the Federal courts. In such cases, the bill authorizes appointment of law officer for special court-martial.
S. 750	H.R. 273
Bad conduct discharge cannot be adjudged by special court-martial unless accused is represented by a lawyer. No administrative discharge under conditions other than honorable may be given without lawyer counsel and board proceedings, etc. It is suggested that it is inappropriate to incorporate administrative discharge proceedings into the Uniform Code of Military Justice.	Requires that before an accused may be discharged with a bad conduct discharge by a special court-martial he must be represented or afforded the opportunity to be represented at the trial by counsel who is legally qualified. In addition to overcoming the objections to S. 757, S. 752 and S. 750 listed opposite, H.R. 273 would accomplish the following objectives: The law officer would be empowered to rule finally on motions for not guilty, and challenges for cause, as is now the practice in the Federal courts. These changes have been recommended by the United States Court of Military Appeals in its reported decisions and in the annual reports. The proposal also would improve the procedures for administering oaths and granting continuances, for rulings on the taking of depositions, the authentication of records of trial, and the preparation of records of trial in acquittal cases.

COMPARATIVE ANALYSIS—Continued

S. 751

Would amend Article 73 to permit a petition for new trial to the Judge Advocate General within two years (rather than one year as now prescribed) after approval of the court-martial sentence, and would further amend that article so that it would apply to any court-martial sentence, rather than only to a sentence extending to a punitive discharge, dismissal, confinement at hard labor for one year or more, or death, as is now provided. It would be better to authorize the service Judge Advocate General to set aside convictions by summary and special courts-martial, and by general court-martial not reviewed by boards of review, in addition to authorizing him to order new trials.

S. 747

Would create a single "super" civilian "Board for the correction of Military Records" within Department of Defense, which would have the autority to correct any military record, including authority to correct the finding and sentence of a court-martial not reviewed by a board of review. There is no reason to create a single board to do what the service boards for correction of military records now do, and further, that the power to review summary and special courts-martial, and general court-martial not reviewed by boards of review would be more appropriately given to the Service Judge Advocate Generals.

H.R. 277

Would give to the Judge Advocate General of each service the authority to review summary, special and general courts-martial not reviewed by boards of review, and the power to vacate or modify convictions or sentences because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. The bill would also extend the time for filing a petition for a new trial to two years, the time provided in the federal civilian courts, in cases reviewed by the boards of review.

STATEMENT OF BRIG. GEN. JAMES D. HITTLE, USMC (RET.), DIRECTOR OF NATIONAL SECURITY AND FOREIGN AFFAIRS, VETERANS OF FOREIGN WARS OF THE UNITED STATES

My name is Brig. Gen. James D. Hittle, USMC (Ret.), director of national security and foreign affairs, Veterans of Foreign Wars of the United States. This statement is being presented to you at the direction of and with the approval of Mr. Andy Borg, national commander in chief of the Veterans of Foreign Wars of the United States.

At the outset let me state, Mr. Chairman, that I have not attempted to examine the legislative proposals under your consideration from the point of view of a lawyer. I have examined them as a citizen who has the honor to represent a great organization of knowledgeable, responsible citizens—the Veterans of Foreign Wars, an organization of about one million, three hundred thousand overseas combat veterans.

The Veterans of Foreign Wars is extremely proud of its record of service to veterans and their dependents and its record of strong support of our armed services and their individual members who are fighting to protect us today. We render service on a day-to-day basis to those veterans who feel they have been unjustly treated. We feel we can speak from broad experience in the matter before you.

As you know, representatives of the Veterans of Foreign Wars appeared before the Subcommittee on Constitutional Rights during the hearings conducted in 1962. It is a pleasure to be able to say that through decisions of the Court of Military Appeals, and administrative action by the Department of Defense and the military services, there has been significant improvement in many areas of the administration of military justice. The Department of Defense has issued new regulations governing the procedures to be used in administrative discharges. Some of the changes reflected in these new regulations were placed in effect by the services before the directive was issued. We feel that this new directive will serve to correct many inequities that existed. As an example, in our testimony in 1962 we pointed out the unfairness in using offenses that are widely separated in point of time as a basis for an undesirable discharge. The new Department of Defense directive prohibits such action. Another example of praiseworthy change in the new directive is the provision which protects a respondent from vindictive action by any discharge authority. The discharge authority may set aside the findings and recommendations and refer the case to a new board only if he finds prejudice to the substantial rights of the respondent. If he does refer the case to a new board, the respondent cannot be prejudiced by this action, for the discharge authority may not approve findings or recommendations less favorable to the respondent than those rendered by the previous board.

We are happy to note the changes which have been made and to commend the Subcommittee on Constitutional Rights for the influential role it has played in promoting more liberal policies and procedures.

We recognize the long-lasting effects of a discharge under other than honorable conditions. These tragedies in the life of an individual often materially affect his future, his ability to secure employment, and his standing in his community. We share your concern that appropriate safeguards exist to ensure fair treatment of our service personnel. However, as responsible citizens, we recognize that there are other factors to be considered and that your efforts should be balanced by due concern for the efficiency and morale of our military forces and for the preservation of fair and just recognition for those who serve honorably and well.

With these observations as prolog, the following comments refer to specific legislative proposals before you. The Veterans of Foreign Wars fully supports enactment of S. 751, which would extend the time in which an accused can petition for a new trial, and S. 757, which would authorize pretrial conferences to dispose of motions and interlocutory questions prior to convening the court. The effort to enhance the stature of the law officer by changing his title to "military judge" as proposed in S. 745 appears to us to be sound and desirable. We suggest that a logical extension of your efforts to increase the prestige of the officers who perform this duty would be a modification of the law to permit trial of special and general courts by this military judge sitting alone, whenever the accused and the Government both agree to such procedure. We are doubtful, however, of the desirability of designating civilians as military judges. These officials must perform their function all over the world, often in combat areas, and it seems inevitable that great discrepancies and inequities would arise between the compensation of the military officers and the civilians performing the same function.

We also warmly support your efforts to weed out any possibility of the use of unlawful influence in military courts or administrative boards. It seems appropriate, however, to point out that some of the provisions of S. 749 are so broad they may work to the advantage of the very persons you are trying to protect. Specifically, we refer to the provision that prohibits any consideration or evaluation of the performance or conduct of military personnel when they are acting as members of, or counsel before, a military court or administrative board. We recognize that the aim of this provision is to ensure that such individuals can perform their duties free from fear of retaliation by a senior who may disagree with the actions of the board or court. However, many military officers, lawyers in particular, are assigned to serve as counsel before courts and boards as their principal duty. If this prohibition is enacted into law, there would be no basis for recording and recognizing excellent work by officers assigned to such duty and this fact would work to their disadvantage under any promotion system, be it military or civilian. Further, we do not concur that an

objective view of the administration of our military forces today will support the need for such a restrictive provision.

As you know, we frequently provide expert assistance and representation to veterans and service personnel who seek correction of their military records before the boards established to hear such cases. Giving due weight to the advantages and disadvantages, we recommend against the establishment of a single civilian "board for the correction of military records" within the Department of Defense as S. 747 would do.

Our views are influenced by two principal considerations: (1) A single board in the Department of Defense would deprive the Secretary of each military department of the only means he has to inquire into and correct administrative errors and their resulting injustices within his department. We believe that such erosion of the powers of the Secretaries of the military departments would effectively gut the military Secretary's authority to administer his department as the law requires him to do. The Veterans of Foreign Wars must strongly oppose any proposal which would diminish the authority of the Secretaries of the military departments. We have a mandate to do so under a resolution number 23 which was adopted unanimously at our 66th National Convention in August 1965. Resolution number 23 includes the following concise statement at paragraph 7, "We support strong and meaningful military services under their respective Secretaries." He is charged by law with the responsibility for the administration of his department. He must have the tools to do the job.

(2) As proposed in S. 747, the central board in the Department of Defense would be a completely autonomous body responsible to no higher authority for its performance. Such autonomy may be appropriate in the courts of our judicial system, but it is not consistent with our Governmental philosophy with respect to administrative bodies and executive power.

We believe, however, that the respective Secretaries of the military departments should issue necessary directives to insure that staff personnel do not preempt the authority to grant or deny records correction board hearings. Based on experience, we believe such action to be vital and urgent.

The proposal to change the title of "boards of review" to "court of review" which is incorporated in S. 748 has merit and we recommend it; however, the bill contains other provisions we feel you should reject. Specifically, I refer to that portion of S. 748 which would require that the chief judge of any panel of the court of review must be a civilian. We do not agree that a lawyer, or any other individual, becomes tainted by military service, or that his perception, professional ability, or sense of fairness and justice, become warped as a result of military service. Although we recognize such an implication was not intended, it exists in this provision of the bill.

The legal requirement for lawyer defense counsel and law officers in special courts-martial and in administrative discharge boards which would be imposed by S. 750, S. 752, and S. 754 would increase in some respects the protection now afforded to an accused or a respondent, but we feel there are matters you should consider before imposing this requirement. We would not recommend passage of these measures without a careful assessment of their impact upon morale, discipline, and administration of the Armed Forces. Specifically, we suggest inquiry into whether these requirements can be met by the armed services in the combat zones. We would not want to put our combat commanders in a position where they could not take effective action against the serious offender, nor does it appear desirable to reward an offender with a transfer from the rigors and perils of combat in order to be tried for dereliction of duty.

We believe that enactment of S. 759, which would abolish the summary court, would work to the disadvantage of the individual serviceman in many instances. This court has very limited punishment powers and is used only for minor offenses. Since the law provides that an accused may refuse nonjudicial punishment, if the summary court is abolished the accused must then exercise his option to accept or refuse nonjudicial punishment with the realization that he must face a special court-martial. The special court-martial has about six times the punishment power of a summary court. In other words, by abolishing the summary court, you increase the jeopardy facing a man who must choose between nonjudicial punishment and trial by court-martial.

If enacted, this would impose upon the average serviceman, unsophisticated in the technicalities of jurisprudence, a decision with respect to his own interests and well being which, by training and experience, he is frequently unqualified

to make. Furthermore, although they may not be technically comparable, philosophically and structurally the summary court and the police court or magistrate's court of civil life perform for their respective systems of jurisprudence comparable and useful roles.

The right to demand trial provided in S. 758 is disarming in its simplicity and in its appeal to one's sense of justice; yet, if enacted, it would create far more injustices than it would correct. It would place our military commanders in the position of retaining some very bad apples, to have their predictable effect upon the rest of the barrel, or of discharging them with an honorable discharge. The provisions of S. 758 would effectively preclude a discharge under other than honorable conditions of the freely admitted moral pervert whose trial is effectively precluded by either the protections afforded to his co-actors by the Fifth Amendment or by humanitarian concerns for the future well being of his victims. A discharge under honorable conditions for such persons could only be labeled a travesty, yet the only alternative would be to retain such persons and thus destroy morale and expose their shipmates and barracksmates to their perverted desires.

We deeply appreciate the delicate task inherent in balancing the equities involved in a fair and just administration of military justice and the discharge of persons who, for one reason or another, are unfit or unsuitable for military service. We share your interest and applaud your determination to protect the rights of our service personnel; however, we ask, too, that your deliberations give due weight to two considerations that may be easily overlooked in this area: (1) we would not wish to see procedures imposed that are so restrictive as to impair the discipline and combat efficiency of our forces; and (2) we would ask you to preserve the integrity of the honorable discharge.

When an individual has demonstrated his unfitness for military service and he can only be retained at the risk of seriously impairing the morale and discipline of his organization, he must be separated. If the only recourse left to the Secretary of the military department or the senior military commander is to award an honorable discharge, he will do so. But we ask you not to confront him with this Hobson's choice, for he will act for the good of the service and in so doing must demean and besmirch one of the most cherished rewards of citizenship our Nation can bestow—an honorable discharge from the armed forces of the United States.

The honorable discharge is a powerful encouragement to faithful, diligent service. The Veterans of Foreign Wars is deeply conscious of the millions of men and women who have served their country honorably and well, often under the most desperate circumstances, whose only testimonial of service faithfully discharged is the honorable discharge they proudly display. The laudable objective of preservation of individual rights should not, and need not, result in debasing the honor and integrity of the honorable discharge.

We would also ask you in your deliberations to consider the great responsibility we all have to the parents of the young men and women we encourage to serve our country. In the close confines of our barracks and ships, the inadequate personality, the pervert, the confirmed recalcitrant, and the physically unclean, are more than a mere social problem. They can and do eat at the vital heart, the morale, of a military organization. Their shipmates or barracksmates cannot avoid association with them and we have no right to ask those who serve honorably and well to live in close association with such individuals. Nor would it be just to devalue the honorable discharge by separating the unfit with the same type of discharge we grant to those who serve honorably, faithfully, and bravely.

As we understand the law and regulations of the Department of Defense, separation of an individual under other than honorable conditions may be accomplished in one of two ways: (1) As the result of the judicial process established by Congress in the Uniform Code of Military Justice, or (2) by administrative processes established by the Secretary of Defense and the Secretaries of the military departments acting pursuant to powers delegated to them by the President as Commander in Chief. It is important to maintain a clear distinction between the judicial and the administrative processes, for they stem from two different sources of governmental power and they serve separate and distinct purposes in the administration of the Military Establishment.

The present procedures for administrative separations appear to compare very favorably with those provided in any administrative proceeding of a similar

nature within Government service or private industry. Appellate review bodies, entirely divorced from the control or influence of the discharge authorities and of the convening authorities of courts-martial, are provided for those who feel their separation was unfair or unjust under either the administrative or judicial processes.

Within the judicial process, each sentence that includes a discharge, whether suspended as an act of clemency or not, is reviewed in detail by a lawyer within the command where trial is held. His review and recommendations become a permanent part of the record. The case then leaves the control of the commander entirely. It is sent to a board of review composed of three lawyers of extensive experience, who may be either military officers or civilians. This review is automatic, no appeal need be filed. The accused is represented by a lawyer, and he may retain a civilian lawyer at his own expense. If discharge is still included in the sentence approved by the board of review, the accused then may appeal to the Court of Military Appeals, a court composed of three civilian judges.

Within the administrative process, discharge may be directed under other than honorable conditions only by the Secretaries of the military departments or by an officer who has the power to convene general courts-martial. Except in a few isolated and unusual circumstances, this is a flag or general officer in command. Every individual who considers his discharge an injustice has the right to appeal to a board of review of discharges and dismissals at the seat of government, and then to a board for the correction of records, which is composed entirely of civilians.

The safeguards presently provided in the law and regulations governing the separation of an individual under either the judicial or administrative process, while not perfect, are impressive and are more readily available to an aggrieved individual than they are in any comparable situation in civilian life. They should be carefully weighed in determining what further protections may be necessary to prevent injustice.

In summary, the Veterans of Foreign Wars wholeheartedly shares your concern that our soldiers, sailors, airmen, and marines receive fair and just treatment in both judicial and administrative proceedings. You have our warm support in your efforts to insure such fair and just treatment. We commend your labors and submit the matters set forth in this statement for your consideration. We hope, as responsible citizens, that the fruit of your deliberations will reflect a just and equitable balance of the measures needed to adequately protect the rights of the individual accused or respondent along with the necessity to preserve the integrity of the honorable discharge and the morale and discipline of our Armed Forces.

STATEMENT OF C. WAYNE LOUDERMILCH, ESQ., ATTORNEY, MOBILE, ALA.

Anyone who has served on active duty in the Armed Forces most assuredly has definite impressions of military justice and its administration. Many of these impressions, of course, would undoubtedly provoke debate. One that should not is the fundamental concept that justice must be impartially administered so as to protect the rights and privileges of all citizens. Until recent years, however, this concept had only limited application to military personnel.

In 1951 a major step was made to safeguard the rights of servicemen with the passage of the Uniform Code of Military Justice. Among the many laudable features of this legislation, perhaps the most significant were the creation of an independent tribunal, the Court of Military Appeals, presided over by civilian jurists, the appellate government and defense counsel system, and the requirement that an accused in a general courts-martial be represented by an attorney. The latter feature might be said to have placed the military ahead of the civilian bar in this area by predating the Supreme Court's decision in the case of *Gideon* v. *Wainwright*.

The Armed Forces, particularly the Army, took numerous steps in order to constructively adapt to the tremendous changes wrought by the Uniform Code of

Military Justice. The Army, for example, undertook a massive training program to acquaint its members with the operation of the Uniform Code and their rights accorded thereunder. Even today each enlisted man and officer in the Army must receive periodic instruction in military justice. The Army also initiated the field judiciary program to assure the impartiality and expertise of its law officers and to insulate them from command influence. It has accomplished these objectives so successfully that it is the subject of Senate bill 745, which would require each branch of the service to have such a program.

While considerable progress has been made in the field of military justice, there is still much to be done. Senate bills 745–762 are a recognition of this fact and would afford servicemen with additional and necesary protections. Accordingly, I would hope for passage of the proposed legislation in its present form with the exception of bills 749 and 750. My objection to bills 749 and 750 is not to the intent of the bills but rather to their limitations. In my opinion, neither bill in its present language goes far enough and furthermore, bill 749 is seemingly unenforceable.

It is well acknowledged that the record as well as the type of discharge that a serviceman receives is a valuable property right. A serviceman, for example, who receives either a punitive discharge or an administrative discharge under other than honorable conditions is stigmatized and deprived of various Federal and State benefits. He can also expect to encounter serious difficulty in obtaining civilian employment. In spite of these harsh facts, a serviceman does not have a right to be represented by a lawyer qualified under article 27(b) of the Uniform Code before either a special court-martial or a board proceeding. Such a situation is contrary to fundamental fairness and even raises a question of whether our servicemen are being accorded due process.

Bill 750 will provide some protection against this situation by prohibiting an administrative discharge under other than honorable conditions by a board and a bad-conduct discharge by a special court-martial unless the serviceman is afforded the opportunity to be represented by an attorney certified in accordance with article 27(b) of the Uniform Code. While the necessity of this legislation is readily apparent, it provides only half of the protection that is needed. It is submitted that the bill should go further and provide for legal representation before all boards and special court-martial proceedings.

In support of the bill in its present form the point has been advanced that the availability of a legally trained counsel to an accused is one of the best guarantees that he will receive due process. Stated more bluntly, without legally trained counsel an accused serviceman is more often than not, denied the benefit of evidence or information favorable to him and thus denied an adequate defense to the charge against him. This applies with equal force to a special court-martial where a punitive discharge is not sought but where nonetheless a serviceman can receive a sentence of 6 months confinement at hard labor and a forfeiture of two-thirds pay for a like period. I respectfully submit that the power to impose such a sentence without affording a serviceman the opportunity of legal representation violates due process under the Constitution of the United States. Accordingly, I urge that the subcommittee give consideration to broadening the scope of bill 750.

The purpose of bill 749 is to prohibit command influence in courts-martial and certain other proceedings. A key provision of this bill is paragraph D which reads as follows:

"In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the Armed Forces is qualified to be advanced in grade or in determining the assignment or transfer of a member of the Armed Forces, or in determining whether a member of the Armed Forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or as a member of any board described in subsection (b) of this section, or (2) give a less favorable rating or evaluation of any member of the Armed Forces because of the zeal with which such member, as defense

counsel, represented any accused before a court-martial, or any respondent before a board described in subsection (b) of this section."

I submit that the above section is unenforceable. Assume, for example, a situation where a defense counsel's rating officer is displeased with the zeal with which he has defended certain cases. All that a rating officer would have to do to vent his displeasure would be to simply lower the counsel's point rating without alluding to his court-martial activities in the comment section of the efficiency report. A more subtle method would be to give the counsel a few points less than his average rating and then describe the manner in which he performs his duties with a term such as "satisfactory." Depending on the intelligence of the rating officer, there are endless variations in which he can reduce a counsel's efficiency report and not subject himself to a provable charge of command influence.

While bill 749 could not be enforced, it does point up that a major problem exists with regard to inhibiting defense counsel through the medium of their efficiency reports. In my opinion, this is the most serious, single problem of military justice.

Under the present system a defense counsel is under the command of and is rated by a staff judge advocate who is aligned with the prosecutorial branch of military justice. This is not only intellectually incongrous but it also forces defense counsel to balance conflicting interests in each case, i.e., the duty of complete, undivided loyalty that he owes his client against the possible consequences of incurring the wrath or displeasure of either the staff judge advocate or the convening authority by the assertion of an unpopular defense. A defense counsel who is placed in this position appreciates the fact that his staff judge advocate may subject him to petty harrassments and punitive measures or even ruin his career by reducing his efficiency reports.

The danger of the present system is that, perhaps, far too often a defense counsel will balance the conflicting interests of his client and the staff judge advocate in favor of the latter because of a fear of possible reprisal. Such a situation may, as a practical matter, deprive an accused serviceman of his constitutional right to the full assistance of counsel. In view of the seriousness of the problem, I would like to respectfully propose, as an alternative to bill 749, that the subcommittee consider the advisability of a bill whereby defense counsel would be placed under a system akin to the field of judiciary program. Such a program would eliminate the last major stronghold of command influence and, more than any other measure, would assure the impartial administration of military justice.

ALEXANDRIA, VA., *January 26, 1966.*

Hon. SAM ERVIN, Jr.,
Chairman, Subcommittee on Military Justice,
Senate Committee on the Armed Services,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: I am attaching herewith a statement for your inclusion in the record of your current hearings in regard to the legislative program now before the U.S. Senate designed to further safeguard the constitutional rights of our Nation's servicemen and women.

Thanking you very kindly for your attention to this matter, I am

Very truly yours,

LEONARD S. BROWN, Jr.,
Member, D.C. Young Democrats Club.

STATEMENT OF LEONARD S. BROWN, JR., MEMBER OF THE YOUNG DEMOCRATS CLUB OF THE DISTRICT OF COLUMBIA

GENTLEMEN: I wish to avail myself here, as a private citizen, of the opportunity, I suppose available to me, to give a small testimony in support of the so-called military justice legislative program (S. 746 through S. 762) as submitted

by the Honorable Sam Ervin, Jr., and the Senate Committee on the Judiciary's Subcommittee on Constitutional Rights to further safeguard the constitutional rights of our Nation's servicemen and women.

This is not the first time I have had the opportunity to avail myself of the opportunity to be heard by your members in regard to the matter of military justice and the constitutional rights of military personnel. I have had some experience in these matters for the last 12 years.

I should like to say that while I am interested in having all 18 bills of the legislative program enacted into law this 2d session of the 89th Congress, I have particular interest in seeing that 8 of the bills become law this session, if none others. The 8 bills of the legislative program I strongly support are S. 747, S. 749, S. 750, S. 753, S. 754, S. 755, S. 756, and S. 760.

Furthermore, I should like to see the legislative program before you amended in such ways as to provide the following, if not already provided for:

1. Immediate conformity of all service branch departments with the Department of Defense directive on Administrative Discharges, dated January 14, 1959 (No. 1332.14), if there is evidence that there has been noncompliance in some quarters;

2. The provision that no commanding officer can set aside any action of a board or award an inferior discharge certificate without giving in writing sufficient reasons and/or convening another board for such purposes;

3. That qualified counsel be provided (and be mandatory) in all proceedings involving a serviceman's or woman's constitutional rights. I am especially interested here in making it imperative that counsel be mandatory in all board proceedings involving service personnel application for review of discharges and correction of military records. I note that presently if the serviceman (or woman) cannot afford counsel he is told on the discharge review application (DD form 293) form that he may contact veteran organizations in regard to furnishing him (or her) counsel. It is, however, not mandatory that applicants have counsel to assist them in these proceedings. This is particularly the case when one makes application with the Boards for the Correction of Military Records. (Cf. item No. 10 of the attached exhibit No. 1 and item No. 9 of the attached exhibit No. 2).

The fact is that DD form 149 (application for correction of military or Naval Record), or exhibit No. 2 here, advises the applicant of the following in the "Instructions" contained on the reversed side of the form:

> * * * Personal appearance of you and your witnesses at hearing or representation by counsel is not required to insure full and impartial consideration of application which qualify for hearing. Such appearances and representations are permitted, at no expense to the Government when a hearing is authorized.

It is my position that review and records correction hearings are equal to board hearings, or proceedings, in the military service during active duty, where the service personnel is required to appear in person and request the assistance of counsel. Counsel should be mandatory in these proceedings, as the proceedings may have a tremendous bearing on the service personnels' constitutional rights for the rest of his or her life.

4. Moreover, I believe that there ought to be specifications that counsel, physicians, and other professionals and specialists involved in military judicial and quasi-judicial (administrative) proceedings be persons required to have had several years of experience prior to being permitted to deal privately with service personnel wherein matters of constitutional rights are concerned. I believe that the use of lawyers and doctors, fresh out of professional schools, and without experience of several years in civilian and military life, in military board proceedings only further jeopardizes service personnel's constitutional rights. Such use of unexperienced professionals may affect one's rights for the rest of his life. I can conceive of the fresh graduates of professional schools serving apprenticeships in the military until such time as they have gained experience, but I cannot conceive of them being permitted to go on their own, with a person's rights, upon fresh entry into the military service. No fresh-out-of law-school lawyer ought to be permitted to represent any service person-

nel in board proceedings; no fresh-out-of-medical-school doctor ought to be permitted to medically evaluate any personnel or give medical testimony in board proceedings.

II. Military Justice

THE THREE KINDS OF COURTS-MARTIAL UNDER THE UCMJ

[Subcommittee summary]

Article 16 establishes three kinds of courts-martial: in descending order of jurisdiction, the general, special, and summary court-martial.

I. The General Court-Martial

A. Composition

At least five members, and a law officer to rule and instruct on legal questions (art. 16(1)).

B. Jurisdiction and sentencing authority

1. Can try any person subject to code for any offense punishable under the code or by law of war (art. 18).
2. Can impose any punishment authorized by code including death, life imprisonment, dishonorable discharge, or bad conduct discharge (art. 18).

C. Counsel

1. *Trial counsel.*—
   (*a*) A trial counsel must be detailed who is a law graduate or licensed attorney certified as competent for duty by JAG (art. 27).
   (*b*) His duties are to prosecute in name of the United States and prepare record (art. 38(a)).
   (*c*) There may be assistant trial counsel (art. 38(d)).
2. *Defense counsel.*—
   (*a*) Defense counsel must be assigned, without necessity of request by accused, and must have same qualifications as trial counsel (art. 27).
   (*b*) Accused can request other or additional military counsel, or may hire civilian counsel at his expense (art. 38(b)).
   (*c*) Assistant defense counsel may be detailed (art. 38(e)).

D. *Law officer*

1. *Qualifications.*—Must be lawyer certified as competent for law officer duty by Judge Advocate General. Cannot have conflict of interest arising from earlier participation in case (art. 26(a)).
2. *Duties.*—
   (*a*) Acts much like civilian judge. Rules on interlocutory questions and motions, except challenges to members (e.g., he rules on admissibility of evidence) (art. 51(b)). Instructs court members on questions of law and charges court as to elements of offense, presumption of innocence, standard and burden of proof, etc. (art. 51(c)).
   (*b*) All rulings, except on motion for finding of not guilty or question of accused's sanity, are final and cannot be reversed by members (art. 51(b)).
   (*c*) Does not deliberate with members of court and does not vote (art. 26(b)).

E. *President*

Senior member presides, more or less, but his role is minor. Announces findings and sentence and authenticates record. (Manual for Courts-Martial, par. 82f.)

F. *Recorder*

There must be a verbatim record (art. 54) and so a reporter is detailed to record the proceedings (art. 28).

G. *Who may convene general court-martial*

1. Army and Marine Corps: commander of division or superior unit.
2. Navy: commander of fleet or station.

II. The Special Court-Martial

A. *Composition*

At least three members (art. 16(2)). No law officer.

B. *Jurisdiction and sentencing authority*

1. Can try any person subject to code for noncapital offenses (and for capital offenses under regulations by President) (art. 19).
2. Can impose any punishment authorized by code *except* death, dishonorable discharge, dismissal (of officer), confinement for over 6 months, hard labor for more than 3 months, forfeiture of more than two-thirds pay for 6 months (art. 19).
3. Can impose bad conduct discharge if verbatim record kept (art. 19), but not used for this purpose in Army.

C. *Counsel*

1. Has trial counsel and defense counsel, and assistants if necessary (art. 27(a)).
2. Neither counsel must be a lawyer, but if trial counsel is a lawyer, defense counsel must also be a lawyer (art. 27(c)).
3. Accused may have additional or other military counsel upon request, if reasonably available, and may hire civilian counsel (art. 38(b)).

D. *President*

1. Senior member (who need not be a lawyer) presides and rules on interlocutory questions (art. 51(b)). His rulings may be reversed by other court members.
2. President instructs court on elements of offense, presumption of innocence, burden of proof, etc. (art. 51(c)). (Usually helped along by trial counsel.)
3. Being a member, he does vote on findings and sentence.

E. *Who may convene* (art. 23)

1. Anyone who can convene a general court-martial, and
2. Any officer above level of commander of battalion, squadron, vessel or similar unit.

III. The Summary Court-Martial

A. *Composition*

One commissioned officer (art. 16(3)).

B. *Jurisdiction and sentencing authority*

1. Can try any person subject to Code, *except* officers, warrant officers, cadets or midshipman, for any *noncapital* offense punishable under Code (art. 20).
2. Can impose reduction in grade, confinement for up to 1 month, restriction for up to 2 months and forfeiture of two-thirds of 1 month's pay (art. 20).
3. Note: Article 20 provides that no person can be tried by summary court-martial if he objects, unless he has been offered and has declined nonjudicial punishment under Article 15. Such persons must be given special or general court-martial.

C. *Duties of summary court officer*

1. Investigates charges.
2. Acts as judge and jury.
3. Acts as trial and defense counsel.
4. Keeps skimpy record.

D. *Rights of accused*

1. Cross-examine witnesses.
2. Introduce evidence and call witnesses in own behalf.
3. Make statement or remain silent (art. 31).

E. *Who may convene* (art. 24)

1. Anyone who can convene general or special court-martial.
2. Commander of company or equivalent unit.
3. Air Force: commander of wing or superior unit.
4. By the President, Service Secretary, or others so empowered by President.

APPELLATE REVIEW OF COURT-MARTIAL CASES UNDER THE UCMJ

I. Record of Trial

A. *Nature of record*

1. Verbatim for general courts-martial and special courts-martial imposing bad conduct discharge (BCD).
2. Summarized record of other special courts.
3. Very skimpy record of summary courts—usually just charge sheet with notations of summary court officer.

B. *Record transmitted to convening authority*

II. Action by Convening Authority

A. *Reconsideration by court*

Convening authority may return record to court-martial for reconsideration (art. 62(a)).

1. Record can be reconsidered to correct error or omission or improper or inconsistent finding or sentence (art. 62(b)).
2. No reconsideration of finding of not guilty (art. 62(b)(1)).
3. No reconsideration can result in increased sentence unless mandatory under code (art. 62(b)(3)).

B. *Action by convening authority if no reconsideration*

1. May *approve or disapprove* any finding (except not guilty) and all or part of sentence, depending on whether correct in law and fact (art. 64).
2. May *suspend sentence*, except death sentence (art. 71(d)).
3. May *order rehearing* on disapproved findings or sentence, except where there's lack of sufficient evidence in record (art. 63(a)).
4. Must *dismiss charges* if he disapproves findings and sentence and does not order rehearing (art. 63(a)).
5. May *order approved sentence into execution* in appropriate cases (art. 71).

C. *Transmittal of records to officer with general court-martial jurisdiction*

All records of court-martial (general, special, and summary) are sent by convening authority to the officer who exercises general court-martial jurisdiction over the accused.

III. Action by Officer with General Court-Martial Authority

A. *Records of general courts-martial*

(This will be first review since he's the convening authority.)

1. *Review by Staff Judge Advocate.*—Written legal review will be prepared by staff judge advocate—the chief legal advisor to general court-martial authority (art. 61). This review will summarize findings, note legal issues and errors, if any, and contain information on sentencing or clemency recommendation.
2. Record and review forwarded to Judge Advocate General of the service for further review by board of review (art. 65(a)).

B. *Records of special courts*

1. If sentence of special court includes BCD which has been approved by convening authority, it's handled exactly like general court record: Staff judge advocate prepares written review and sends it and record to Judge Advocate General for further review (art. 65(b)).

2. If sentence does not include approved BCD, it will be reviewed for legal error in the office of the general court-martial authority by any judge advocate (or law specialist in Navy) (art. 65(c)). This is final review; sentence is then executed, if no error, and records disposed of according to departmental directives.

C. *Records of summary courts*

1. After action by convening authority, charge sheet sent to officer with general court-martial jurisdiction. (No means provided for defendant to cite error.)
2. Reviewed by a judge advocate or law specialist (art. 65(c)).
3. This is final review. Sentence is executed and records disposed of according to departmental directives (art. 65(c)).

IV. Review by Boards of Review (art. 66)

A. *Composition of boards of review* (art. 66(a))

1. Located in office of JAG.
2. Made up of at least three members who are trained lawyers.
3. Army and Air Force use all military officers. Navy and Coast Guard use some civilians.

B. *Cases reviewed*

(All records of general courts, and special courts involving BCD approved by convening authority and general court-martial authority, are referred to Judge Advocate General, as noted above (art. 65(a) and (b).)

1. JAG must refer case to board of review if (art. 66(b))—
   (*a*) Sentence affects a general or flag officer.
   (*b*) Sentence extends to death, dismissal (of officer), dishonorable discharge, BCD, confinement for year or more.
2. All other cases are reviewed in the office of the JAG and, if legal error is found or he otherwise deems it necessary, record will be sent to board of review (art. 69). But note: There's no right to further review by Court of Military Appeals.

C. *Duties and powers* (art. 66(c)(4))

1. Passes on both findings and sentence.
2. Decides issues of law and fact.
3. Can weight evidence and judge credibility of witnesses.
4. Restricted to record (including staff judge advocate's review).
5. If board sets aside findings or sentence—
   (*a*) if because of insufficient evidence in record, charges must be dismissed.
   (*b*) if for reason other than insufficiency of evidence, may order rehearing or may dismiss charges.
6. Lacks power to suspend or commute sentence.

D. *Counsel*

1. JAG must detail appellate Government counsel to represent U.S. before boards of review if appropriate (art. 70(a)(b)).
2. Accused must be represented by military appellate defense counsel if he requests, or if U.S. is represented by counsel. (art. 70(c)).
3. Accused may hire civilian counsel at his expense. (art. 70(d)).

E. *Opinion*

Board renders written opinion in each case to the JAG.

F. *Action by JAG or Departmental Secretary after review by board of review*

1. If authorized by the Secretary of the service, JAG can remit (cancel) or suspend (postpone) any part of approved sentence still unexecuted (art. 74(a)).
2. If not so authorized, JAG will forward his recommendation to the Secretary and he can remit or suspend.
3. The Secretary may substitute an administrative discharge for one executed by sentence of court-martial (art. 74(b)).

V. Appeal from Board of Review to Court of Military Appeals (art. 67)

A. *Organization of the court* (art. 67(a))

1. Three civilian judges appointed by President for 15-year terms.
2. One judge designated by President as chief judge.
3. Court located for administrative purposes in Department of Defense.

B. *Cases reviewed by court*

1. All cases in which sentence, as affirmed by a board of review, affects a general or flag officer or extends to death (art. 67(b)(1)).
2. All other cases reviewed by a board of review which the JAG orders sent to court (art. 67(b)(2)).
3. All cases reviewed by a board of review accepted for review by court upon petition of the accused (art. 67(b)(3)):

(*a*) The accused has 30 days after board's decision during which to petition court for review and the court then has 30 days to rule on petition (art. 67(c)).

(*b*) In all cases by general court-martial which the JAG is not required to send to a board of review under art. 66(b), but which he sends to a board on his own motion, the accused has no right to petition the court for review. There can be no review of such cases by the court unless the JAG so directs under art. 67(b)(2), (art. 69).

C. *Extent of review by court of Military Appeals*

1. Can act only with respect to matters of law; cannot weigh evidence or appropriateness of sentence (art. 67(d)).
2. If it finds error in some or all of findings, it must set those findings aside and—

(*a*) Order a rehearing by a new court-martial of erroneous findings and imposition of new sentence, unless setting aside is based on lack of sufficient evidence in record (art. 67(e)).

(*b*) Order redetermination of propriety of sentence by board of review (art. 67(f)).

(*c*) Permit JAG to choose between rehearing by new court-martial or re-reference to board of review (art. 67(f)).

(*d*) Order dismissal of charges affected by erroneous findings, and must do so if setting aside of findings is based on lack of sufficient evidence (art. 67(e)).

VI. Action After Review by Court of Military Appeals

A. Sentences extending to death or involving general or flag officer must be approved by President before executed. (art. 71(a)). He may suspend or commute any sentence.

B. Sentence extending to dismissal of officer (other than general or flag) must be approved by Departmental Secretary. (art. 71(b)). He may suspend or commute the sentence.

C. Other sentences are ordered executed by the convening authority immediately after review by Court of Military Appeals. (art. 67(f)).

COLLATERAL ATTACK ON COURT-MARTIAL ACTION

I. Petition for New Trial (Art. 73)

A. Accused may petition for new trial if sentence extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for year or more.
B. Time limit: One year after approval of sentence by convening authority.
C. Grounds: Newly discovered evidence or fraud on the court.
D. Who passes on petition:
1. If case is under review by Broad of Review or COMA, the board or court passes on petition.
2. Otherwise, JAG passes on petition.

II. Discharge Review Boards

A. Each service has board created under 10 U.S.C. 1553 for review of discharges or dismissals.
B. Time limit: 15 years after discharge.
C. May not review sentence of general court, so, in effect, may review only a BCD adjudged by special court.

III. Boards for Correction of Military Records

A. Each Service Secretary must establish a civilian board authorized to correct military records to "correct an error or remove an injustice." 10 U.S.C. 1552.
B. Request must be filed wtihin 3 years after discovery of error or injustice.
C. Created to provide administrative substitute for private relief bills.
D. Boards can substitute honorable administration discharge for dishonorable or BCD. Can award back pay, etc. But there's question as to whether they can erase the record of the earlier discharge of a court-martial in light of article 76 provision that sentences and findings of courts-martial are final after appellate review.

IV. Habeas Corpus

V. Writ of Error Coram Nobis (Military or Civilian)

VI. Suit in Court of Claims

Comparison of H.R. 277 (S. 2097) and H.R. 273 (S. 2096); and S. 750, S. 751, S. 752, S. 757, and S. 760; and the Uniform Code of Military Justice

[Subcommittee memo]

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article 1	H.R. 273, Section 1	S. 752, Section 1
(10) "Law Officer" means an official of a general court-martial detailed in accordance with section 826 of this title (art. 26).	(1) Section 801(10) (art. 1(10)) is amended by inserting the words "or special" after the word "general".	That section 801(10) (art. 1(10)) of title 10, United States Code, is amended to read as follows: "(10) 'Law officer' means an official of a general or special court-martial detailed in accordance with section 826 of this title (art. 26)".
Article 16. Courts-martial classified The three kinds of courts-martial in each of the Armed Forces are— (1) general courts-martial, consisting of a law officer and not less than five members; (2) special courts-martial, consisting of not less than three members; and (3) summary courts-martial, consisting of one commissioned officer.	(2) Section 816 (art. 16) is amended to read as follows: "§ 816. Article 16. Courts-martial classified: "The three kinds of courts-martial in each of the Armed Forces are— "(1) general courts-martial, consisting of— "(A) a law officer and not less than five members; or "(B) only a law officer, if before the court is assembled 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 consents thereto; "(2) special courts-martial, consisting of—	SEC. 2. Section 816 (art. 16) of title 10, United States Code, is amended to read as follows: "(a) The three kinds of courts-martial in each of the Armed Forces are— "(1) general courts-martial; "(2) special courts-martial; and "(3) summary courts-martial. "(b) A general court-martial consists of a law officer and not less than five members, except in any case in which the accused waives trial by court members under section 855 of this title (art. 55), in which case the court consists of a law officer only. "(c) A special court-martial consists of not less than three members, or a law officer and not less than three members, or, in any case in which a law officer has

"(A) not less than three members; or

"(B) a law officer and not less than three members; or

"(C) only a law officer, under the same conditions as those prescribed in clause (1)(B); and

"(3) summary courts-martial, consisting of one commissioned officer."

been detailed to the case and the accused waives trial by court members under section 855 of this title (art. 55), the court consists of a law officer only.

"(d) A summary court-martial consists of one commissioned officer."

SEC. 12. (a) Chapter 47 of title 10, United States Code, is amended by adding after section 854 (art. 54) a new section as follows:

"§ 855. Article 55. Waiver by accused of trial by court members:

"(a) In accordance with such rules and regulations as the President shall prescribe, any accused who is to be tried by a general court-martial, or by a special court-martial to which a law officer has been detailed, shall be given the opportunity to waive his right to a trial by the members of the court and elect instead to be tried by the law officer of such court. The accused may exercise such waiver by notifying the law officer of the court either before or after the convening of the court. If the waiver is made prior to the convening of the court, the members of the court shall not be present at any time during the trial; if the accused wishes to exercise such waiver after the court has been convened he may do so only with the consent of the trial counsel. If the trial counsel consents to the waiver the law officer shall forthwith excuse the members of the court from further participation in the trial.

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article 18. Jurisdiction of general courts-martial: Subject to section 817 of this title (art. 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.	H.R. 273, Section 1 (3) Section 818 (art. 18) is amended by adding the following sentence at the end thereof: "However, a general court-martial of the kind specified in section 816(1)(B) of this title (art. 16(1)(B)) may not adjudge the penalty of death."	(No equivalent provision.)
Article 19. Jurisdiction of special courts-martial Subject to section 817 of this title (art. 17), special courts-martial have jurisdiction to try persons subject to this chapter for and noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, 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. A bad-conduct	(4) Section 819 (art. 19) is amended by striking out the last sentence and inserting the following sentence in place thereof: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made and, except in time of war, or of national emergency hereafter declared by Congress, the accused was represented or afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (art. 27(b))."	S. 752 SEC. 3. The last sentence of section 819 (art. 19) of title 10, United States Code, is amended to read as follows: "A bad conduct discharge may not be adjudged in any case tried by special court-martial unless (1) a complete record of the proceedings and testimony before the court has been made, and (2) except in time of war, a law officer was detailed to such case and was present during all trial proceedings." S. 750, section 1 That the last sentence of section 819 (art. 19) of title 10, United States Code, is amended to read as follows: "A bad conduct discharge may not be adjudged un-

discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

Article 25. Who may serve on courts-martial

* * * * *

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

* * * * *

(5) Section 825(c)(1) (art. 25(c)(1)) is amended—

(A) by striking out the words "before the convening of the court," in the first sentence and inserting the words "before the conclusion of a session called by the law officer under section 839(a) of this title (art. 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused," in place thereof; and

(B) by striking out the word "convened" in the last sentence and inserting the word "assembled" in place thereof.

less a complete record of the proceedings and testimony before the court has been made and, except in time of war, unless the accused was represented at the trial, or afforded the opportunity to be represented at the trial, by a defense counsel with qualifications not less than those prescribed under section 827(b) of this title (art. 27(b))."

(No equivalent provision.)

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS H.R. 273, section 1	SENATE BILLS S. 752
Article 26. Law officer of a general court-martial: (a) The authority convening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case. (b) The law officer may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (art. 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.	(7) The catchline and subsection (a) of section 826 (art. 26) are amended to read as follows: "§ 826. Article 26. Law officer of a general or special court-martial: "(a) The authority convening a general court-martial shall, and, subject to the regulations of the Secretary concerned, the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for that duty by the Judge Advocate General of the armed force of which he is a member. A commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. However, no person may act as a law officer of a single-officer general court-martial unless he is specially certified to be qualified for that duty. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."	SEC. 4(a) subsection (a) of section 826 (art. 26) of title 10, United States Code, is amended to read as follows: "(a) The authority convening a general court-martial shall, and the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. Any officer certified as qualified to serve as law officer of a general court-martial shall be certified as qualified to serve as law officer of a special court-martial. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigative officer or as counsel in the same case."

Article 29. Absent and additional members

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

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

Article 29

(c) Whenever a special court-martial is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

(9) Section 829 is amended—

(A) by striking out the words "accused has been arraigned" in subsection (a) and inserting the words "court has been assembled for the trial of the accused" in place thereof;

(B) by inserting the words ", other than a single-officer general court-martial," after the word "court-martial" in the first sentence of subsection (b); and by amending the last sentence of subsection (b) to read as follows: "The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the law officer, the accused, and counsel.";

H.R. 273, section 1(9)

(C) by inserting the words ", other than a single-officer special court-martial," after the word "court-martial" in the first sentence of subsection (c); and by amending the last sentence of subsection (c) to read as follows: "The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused and counsel,"; and

SEC. 5(a). Subsection (a) of section 829 (art. 29) of title 10, United States Code, is amended by striking out "No" at the beginning of such subsection and inserting in lieu thereof "Except in any case tried by a law officer without court members, pursuant to section 855 of this title (art. 55), no".

(b) The first sentence of subsection (b) of such section is amended to read as follows: "Except in any case tried by a law officer without court members pursuant to section 855 of this title (art. 55), a general court-martial trial may not proceed if the court is reduced below five members unless the convening authority details new members sufficient in number to provide not less than five members."

S. 752, section 5

(c) Subsection (c) of such section is amended to read as follows:

"(a) Except in any case tried by a law officer without court members pursuant to section 855 of this title (art. 55), a special court-martial trial may not proceed if the court is reduced below three members unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused, and counsel."

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
(No equivalent provision.)	(D) by adding the following new subsection at the end thereof: "(d) If the law officer of a single-officer court-martial is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816 (1)(B) or (2)(C) of this title (art. 16 (1)(B) or (2)(C)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."	(d) Such section is further amended by adding at the end thereof a new subsection as follows: "(d) In any case being tried by a law officer only pursuant to section 855 of this title (art. 55), and the law officer is unable to proceed with the trial because of physical disability, as the result of challenge, or for other good cause, the trial shall proceed, subject to the provisions of section 55(d) of this title (art. 55(d)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."
Article 35. Service of charges The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial before a general court-martial within a period of 5 days after the service of the charges upon him, or before a special court-martial with a period of 3 days after the service of the charges upon him.	(10) Section 835 (art. 35) is amended by striking out the second sentence and inserting the following in place thereof: "In time of peace no person may, against his objection, be brought to trial, or be required to participate by himself or counsel in a session called by the law officer under section 839(a) of this title (art. 39(a)), in a general court-martial case within a period of 5 days after the service of charges upon him, or in a special court-martial case within a period of 3 days after the service of charges upon him."	(No equivalent provision.)

Article 38. Duties of trial counsel and defense counsel

* * * * *

(b) The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 827 of this title (art. 27). 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 president of the court.

(11) Section 838(b) (art. 38(b)) is amended by striking out the words "president of the court" in the last sentence and inserting the words "law officer or by the president of a court-martial without a law officer" in place thereof.

SEC. 6. The last sentence of section 838 (b) (art. 38(b)) of title 10, United States Code, is amended by striking out "president of the court" and inserting in lieu thereof "law officer or by the president of a court-martial without a law officer".

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS H.R. 273, Section 1	SENATE BILLS S. 757, Section 1
(No equivalent provision.)	(12) Section 839 (art. 39) is amended to read as follows: "§ 839. Article 39. Sessions "(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a law officer and members, the law officer may, subject to section 835 of this title (art. 35), call the court into session without the presence of the members for the purpose of— "(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty; "(2) hearing and ruling upon any matter which may be ruled upon by the law officer under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court; "(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and "(4) performing any other procedural function which may be performed by the law officer under this chapter or under rules prescribed pursuant to section 836 of this title (art. 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense	That (a) chapter 47 of title 10, United States Code, is amended by adding after section 835 a new section as follows: "§ 836. Article 36. Pretrial conference "(a) The law officer of any general court-martial case shall have authority, in accordance with such rules and regulations as may be prescribed by the President, to conduct a pretrial conference with respect to such case. The law officer shall have authority at any such pretrial conference to entertain and make final disposition of any motion or interlocutory question with respect to which he would have authority to make final disposition of during trial. The law officer shall also have authority to entertain and accept a plea of guilty from an accused, and any such plea accepted by the law officer shall, subject to the other provisions of this title, be accepted by the court as if such plea had been made in open court. The provisions of section 845 (art. 45) shall apply with respect to a plea of guilty made by an accused at a pretrial conference to the same extent such provisions apply to a plea of guilty made in open court. Pretrial conferences may also be utilized for the purpose of— "(1) simplifying the issues; "(2) receiving stipulations; and "(3) considering such other matters as may aid in the fair and speedy disposition of the case.

Article 39. Sessions

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

counsel, and the trial counsel and shall be made a part of the record.

"(b) When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a law officer has been detailed to the court, the law officer."

There shall be present at any pretrial conference the law officer, the trial counsel, the defense counsel, the accused, and a reporter; members of the court shall not be present at pretrial conferences. A record of all proceedings at a pretrial conference shall be taken by the reporter. Any ruling made by the law officer at a pretrial conference may be changed by him at any time during the trial.

"(b) Any motion to suppress evidence shall be made at a pretrial conference (if one is held) unless opportunity therefor did not exist or the accused was not aware of the grounds for the motion, but the law officer in his discretion may entertain the motion at the trial."

S. 752

SECTION. 7. Section 839 (art. 39) of title 10, United States Code, is amended to read as follows:

"§ 839. Article 39. Sessions:

"When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which law officers have been detailed to the court, the law offiecr."

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article 40. Continuances	H.R. 273, section 1	
A court-martial may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.	(13) Section 840 (art. 40) is amended to read as follows: "§ 840. Article 40. Continuances: "The law officer or a court-martial without a law officer may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."	(No equivalent provision.)
Article 41. Challenges		S. 752
(a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. (b) Each accused and the trial counsel is entitled to one preemptory challenge, but the law officer may not be challenged except for cause.	(14) Section 841(a) (art. 41(a)) is amended— (A) by amending the first sentence to read as follows: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and (B) by striking out the word "court" in the second sentence and inserting the words "law officer or, if none, the court" in place thereof.	SECTION. 8. Section 841(a) (art. 41(a)) of title 10, United States Code, is amended— (1) by striking out the first sentence and inserting in lieu thereof the following: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and (2) by striking out "court" in the second sentence and inserting in lieu thereof "law officer or, if none, the court".

Article 42. Oaths

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

(b) Each witness before a court-martial shall be examined on oath.

(15) Section 842(a) (art. 42(a)) is amended to read as follows:

"(a) Before performing their respective duties, law officers, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a law officer, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty."

(No equivalent provision.)

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article 45. Pleas of the accused		
(a) If an accused arraigned before a court-martial makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.	(16) Section 845 (art. 45) is amended— (A) by striking out the words "arraigned before a court-martial" in subsection (a) and inserting the words "after arraignment" in place thereof; and	(No equivalent provision.)
(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.	(B) by amending subsection (b) to read as follows: "(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the law officer or by a court-martial without a law officer, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty."	
Article 49. Depositions	H.R. 273, Section 1	S. 760, Section 3
(a) At any time after charges have been signed as provided in section 830	(17) Section 849(a) (art. 49(a)) is amended by inserting after the word "un-	Subsection (a) of section 849 (art. 49 (a)) of title 10, United States Code, is

of this title (art. 30), any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

Article 51. Voting and rulings

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

(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (art. 52) beginning with the junior in rank.

less" the words "the law officer or court-martial without a law officer hearing the case or, if the case is not being heard,".

(18) Section 851 (art. 51) is amended—

(A) by amending the first sentence of subsection (a) to read as follows: "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot.";

(B) by amending the first two sentences of subsection (b) to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than motion for a finding of not guilty, is final and constitutes the ruling of the court.";

amended by inserting immediately after "unless" the following: "the law officer or court-martial without a law officer hearing the case, or if the case is not being heard,".

S. 752

SEC. 9. (a) The first sentence of subsection (a) of section 851 (art. 51(a)) of title 10, United States Code, is amended to read as follows: "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a law officer upon questions of challenge, shall be by secret written ballot."

(b) The first and second sentences of subsection (b) of such section are amended to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court."

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court— (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt; (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted; (3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.	(C) by striking out the words "of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court" in the first sentence of subsection (c) and inserting the words "and the president of a court-martial without a law officer shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them" in place thereof; and	(c) Subsection (c) of such section is amended by striking out "the law officer of a general court-martial and the president of a special court-martial" and inserting in lieu thereof "the law officer of a court-martial, or the president of a special court-martial without a law officer,".
(No equivalent provision.)	(D) by adding the following new subsection at the end thereof: "(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence,"	(d) Such section is further amended by adding at the end thereof a new subsection as follows: "(d) Subsections (a), (b), and (c) of this section do not apply with respect to any court-martial case tried by a law officer only pursuant to section 855 of this title (art. 55)." [New art. 55] Sec. 12(a) "(b) In any court-martial case tried before a law officer pursuant to

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Article 52. Number of votes required	H.R. 273, Section 1	(No equivalent provision.)
(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.	(19) Section 852 (art. 52) is amended—	
(2) No person may be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.	(A) by inserting the words "as provided in section 845(b) of this title (art. 45(b)) or" after the word "except" in subsection (a)(2); and	
[Art. 45. Pleas of the accused (b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.]		a waiver authorized under subsection (a) of this section, the law officer shall have authority to entertain and accept a plea of guilty from the accused, subject to the provisions of section 845 of this title (art. 45). In any court-martial case tried by a law officer pursuant to a waiver under subsection (a) of this section, the law officer shall decide all questions of fact and law, make final rulings on all interlocutory questions and motions, make all findings with respect to guilt, and impose any sentence not prohibited by this chapter.

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article 52. Number of votes required		
(b) (1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death. (2) No person may be sentenced to life imprisonment or to confinement for more than 10 years, except by the concurrence of three-fourths of the members present at the time the vote is taken. (3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.	(No changes contemplated.)	(No changes contemplated.)
(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.	(B) by adding to the first sentence of subsection (c) the words ", but a determination to reconsider a finding of guilty or, with a view toward decreasing it, a sentence may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence."	(No equivalent provision.)
	(No equivalent provision.)	S. 752 SEC. 10, Section 852 (art. 52) of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows: "(d) The foregoing provisions of this section, insofar as they relate to the num-

Article 54. Record of trial

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

H.R. 273, Section 1

(20) Section 854(a) (art. 54(a)) is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President."

ber of votes required by members of a court-martial, shall not apply with respect to the trial of an accused who has waived trial by members of the court pursuant to section 855 of this title (art. 55) and is tried by a law officer."

S. 752

SEC. 11. Section 854(a) (art. 54(a)) of title 10, United States Code, is amended to read as follows:

"(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member."

S. 757

SEC. 2. Section 854(a) (art. 54(a)) of title 10, United States Code, is amended by adding at the end thereof the following:

"The record of any pretrial conference conducted in connection with any general court-martial shall be made a part of the record of such court-martial and shall be authenticated by the signature of the law officer. If the record of the pretrial conference cannot be authenticated by the law officer, by reason of his death, disability, or absence, it shall be signed by the trial counsel."

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS H.R. 273, section 1	SENATE BILLS S. 752
(No equivalent provision.)	(2) Section 816 (art. 16) is amended to read as follows: "§ 816. Art. 16. Courts-martial classified "The three kinds of courts-martial in each of the armed forces are— "(1) general courts-martial, consisting of— * * * * * "(B) only a law officer, if before the court is assembled 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 consents thereto; "(2) special courts-martial, consisting of— * * * * * "(C) only a law officer, under the same conditions as those prescribed in clause (1)(B);"	SEC. 12. (a) Chapter 47 of title 10, United States Code, is amended by adding after section 854 (art. 54) a new section as follows: "§ 855. Art. 55. Waiver by accused of trial by court members "(a) In accordance with such rules and regulations as the President shall prescribe, any accused who is to be tried by a general court-martial, or by a special court-martial to which a law officer has been detailed, shall be given the opportunity to waive his right to a trial by the members of the court and elect instead to be tried by the law officer of such court. The accused may exercise such waiver by notifying the law officer of the court either before or after the convening of the court. If the waiver is made prior to the convening of the court, the members of the court shall not be present at any time during the trial; if the accused wishes to exercise such waiver after the court has been convened he may do so only with the consent of the trial counsel. If the trial counsel consents to the waiver the law officer shall forthwith excuse the members of the court from further participation in the trial.

(No equivalent provision.)	(18) (D) by adding the following new subsection at the end thereof:	"(b) In any court-martial case tried before a law officer pursuant to a waiver authorized under subsection (a) of this section, the law officer shall have authority to entertain and accept a plea of guilty from the accused, subject to the provisions of section 845 of this title (art. 45). In any court-martial case tried by a law officer pursuant to a waiver under subsection (a) of this section, the law officer shall decide all questions of fact and law, make final rulings on all interlocutory questions and motions, make all findings with respect to guilt, and impose any sentence not prohibited by this chapter.
	"(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence."	"(c) No waiver authorized by subsection (a) of this section shall be permitted by the law officer unless the accused prior to exercising his right to waiver, has been advised by counsel with qualifications not less than those prescribed in section 827 (b) of this title (art. 827(b)) regarding such waiver.
(No equivalent provision.)	(No equivalent provision.)	"(d) A waiver by an accused of trial by court members may be withdrawn by him if, subsequent to exercising such waiver, a law officer different from the one to whom the waiver was submitted is detailed to act as law officer at the trial of the accused."

PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE—Continued

UNIFORM CODE OF MILITARY JUSTICE	HOUSE BILLS	SENATE BILLS
Article. 69. Review in the office of the Judge Advocate General	H.R. 277, Section 1	
Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by section 866 of this title (art. 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with section 866 of this title (art. 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (art. 67(b)(2)).	(1) Section 869 (art. 69) is amended by adding the following new sentence at the end thereof: "Notwithstanding section 867 of this title (art. 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a board of review, may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."	(No equivalent provision.)
Article 73. Petition for a new trial		S. 751, Section 1
At any time within 1 year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for 1 year or more,	(2) Section 873 (art. 73) is amended by striking out in the first sentence the words "one year" the first time they appear and inserting the words "two years" in place thereof.	That the first sentence of section 873 (art. 73) of title 10, United States Code, is amended to read as follows: "At any time within 2 years after approval by the convening authority of any court-martial

the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the board or court, as the case may be, for action. Otherwise the Judge Advocate General shall act upon the petition.	[Proposed technical amendment.] (2) The first sentence of section 873 (art. 73) is amended to read as follows: "At any time within 2 years after approval by the convening authority of a court-martial sentence which has been referred to a board of review, the accused may petition the Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court."	sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court."
(No equivalent provision.)	H.R. 277, Section 2 The amendment made by section 1(1) of this act is effective upon the date of its enactment. The amendment made by section 1(2) of this act is effective with respect to a court-martial sentence approved by the convening authority on and after, or not more than 2 years before, the date of its enactment.	S. 751, Section 2 The amendment made by the first section of this act shall be effective with respect to any court-martial sentence approved by the convening authority on and after the date of enactment of this act and with respect to any court-martial sentence approved by the convening authority not more than 1 year prior to the date of the enactment of this act.

(Sectional analyses of H.R. 273 and the proposed technical amendment to H.R. 277, annexes to the statement of General Hodson, follow:)

Proposed Substitute Bill for S. 750 (sec. 1); S. 752; S. 757, 89th Congress, 1st Session

A BILL

To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, providing for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial proceedings by counsel having the qualifications of defense counsel detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

EXISTING LAW	THE BILL	NOTES AND COMMENTS
Title 10, United States Code		
§ 801. Art. 1. Definitions: (10) "Law officer" means an official of a general court-martial detailed in accordance with section 826 of this title (art. 26).	(1) Section 801(10) (article 1(10)) is amended by inserting the words "or special" after the word "general".	SEC. 1(1) amends article 1(10), the definition of a "law officer", to include an official of a special court-martial detailed in accordance with article 26 as well as such an official of a general court-martial. This reflects the amendment of article 16 (sec. 1(2)) which creates special courts-martial consisting of a law officer and members or just a law officer.
§ 816. Art. 16. Courts-martial classified: The three kinds of courts-martial in each of the Armed Forces are— (1) general courts-martial, consisting of a law officer and not less than five members;	(2) Section 816 (article 16) is amended to read as follows: "§ 816. Article 16. Courts-martial classified: "The three kinds of courts-martial in each of the Armed Forces are— "(1) general courts-martial consisting of— "(A) a law officer and not less than five members; or "(B) only a law officer, if before the court is assembled the accused, knowing the identity of the law officer and after consultation with	SEC. 1(2) amends article 16 to provide that a general or special court-martial shall consist of only a law officer if the accused, before the court is convened, so requests in writing and the convening authority consents thereto. However, before he makes such a request, the accused is entitled to know the identity of the law officer and to have the advice of counsel. Although such a procedure has not heretofore been available in any of the Armed Forces, an analogous method of disposition of criminal cases is provided in the Federal

(2) special courts-martial, consisting of not less than three members; and

(3) summary courts-martial, consisting of one commissioned officer.

counsel, requests in writing a court composed only of a law officer and the convening authority consents thereto;

"(2) special courts-martial, consisting of—

"(A) not less than three members; or

"(B) a law officer and not less than three members; or

"(C) only a law officer, under the same conditions as those prescribed in clause (1) (B); and

"(3) summary courts-martial, consisting of one commissioned officer."

courts by rule 23 of the Federal Rules of Criminal Procedure, which provides that:

"Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government."

This rule was upheld in the recent case of *Singer* v. *U.S.*, 380 U.S. 24, decided on March 1, 1965, wherein the Supreme Court of the United States held that a defendant's right to waive a jury trial could be conditioned on consent of the Government and the court.

The adoption of such a procedure will result in an appreciable reduction in both time and manpower normally expended in trials by courts-martial. The vast majority of cases in which an accused pleads guilty would probably be tried by a single-officer court. It should be noted that the convening authority is not required to establish a single-officer court-marital but may, in his discretion, refer cases to a court-martial with members either because, with respect to special courts-martial, of a shortage of legally trained personnel available to the command or for other reasons.

Article 16 is further amended by providing for a special court-martial consisting of a law officer and not less than three members. The special court-martial with a law officer and members is designed primarily for the trial of cases involving factual and legal problems which might be considered too difficult for a legally untrained special court-martial president to handle.

Proposed Substitute Bill for S. 750 (sec. 1); S. 752; S. 757, 89th Congress, 1st Session—Continued

EXISTING LAW	THE BILL	NOTES AND COMMENTS
§ 818. Art. 18. Jurisdiction of general courts-martial: Subject to section 817 of this title (art. 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.	(3) Section 818 (art. 18) is amended by adding the following sentence at the end thereof: "However, a general court-martial of the kind specified in section 816(1)(B) of this title (art. 16(1)(B)) may not adjudge the penalty of death."	SEC. 1(3) amends article 18 to provide that a general court-martial consisting of only a law officer may not adjudge the penalty of death.
§ 819. Art. 19. Jurisdiction of special courts-martial: Subject to section 817 of this title (art. 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, 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 more than 6	(4) Section 819 (art. 19) is amended by striking out the last sentence and inserting the following sentence in place thereof: "A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made and, except in time of war, or of national emergency hereafter declared by Congress, the accused was represented or afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (art. 27(b))."	SEC. 1(4) amends article 19 by providing that before a special court-martial may adjudge a bad-conduct discharge, the accused must be represented or afforded the opportunity to be represented at the trial by counsel who is legally qualified in the sense of article 27(b). The offered representation, of course, will be at no expense to the accused. This amendment does not limit or otherwise affect any right the accused may have to obtain counsel of his own selection under article 38(b). Also, the accused may decide not to avail himself of the opportunity to be represented by counsel qualified under article 27(b).

months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

§ 825. Art. 25. Who may serve on courts-martial:

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(5) Section 825(c)(1) (article 25(c)(1)) is amended—

(A) by striking out the word "before the convening of the court," in the first sentence and inserting the words "before the conclusion of a session called by the law officer under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused," in place thereof; and

(B) by striking out the word "convened" in the last sentence and inserting the word "assembled" in place thereof.

SEC. 1(5) amends article 25 to provide in subsection (c)(1) that an accused who desires that enlisted members serve on his court-martial shall make such a request before the conclusion of a session called by the law officer under article 39(a) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused. One of the purposes of the proposed amendment to article 39, *infra*, is to insure that the trial of the general issues will not be delayed after the members are in attendance. Under present practice, an accused can postpone his request for enlisted members until the appointed members of the court have gathered and, if enlisted persons are not then on the court, the court would be forced to adjourn until enlisted members are obtained and some of the officer members relieved.

The request for enlisted personnel may be made at any time prior to the conclusion of a session called prior to trial pursuant to the amendment to article 39. Only one pretrial session would be called in any particular case, although that session may continue for as long as may be necessary and may be recessed, postponed, continued, or reconvened. A reconvened pretrial session does not constitute a second such session, but rather a continuation of the session first called. If no pretrial hearing

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		is held, the procedure for requesting enlisted persons will be substantially the same as the procedure now used. Article 25 is further amended by substituting the word "assembled" for the word "convened" in subsection (c)(1). The term "convened" as used in the present subsection (c)(1) has been considered to be a term of art which has reference to that time in the court-martial proceedings when the members, the law officer, and counsel are sworn. The amendment to article 43 contemplates that, if permitted by regulations of the Secretary concerned, the above personnel will be sworn at some time before their gathering in the courtroom. Accordingly, the term "convened" as used in the above sense might have no application under the amended procedure. Furthermore, the term "convened" is used elsewhere in the code to refer to the appointment of courts-martial, and consequently has caused some confusion in this respect. This and other amendments in this bill will obviate this confusion of terms by using the word "assembled" to refer to the gathering as distinguished from the appointment of the court.
§826. Art. 26. Law officer of a general court-martial: (a) The authority convening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of	(6) Subchapter V is amended by striking out the following item in the analysis: "826. 26. Law officer of a general court-martial"	SEC. 1(6). Amends subchapter V by indicating in the analysis that law officers may be detailed to special as well as to general courts-martial. Experience has

the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

and inserting the following item in place thereof:

"826.26. Law officer of a general or special court-martial"

(7) The catchline and subsection (a) of section 826 (article 26) are amended to read as follows:

"§ 826. Art. 26. Law officer of a general or special court-martial

"(a) The authority convening a general court-martial shall, and, subject to regulations of the Secretary concerned, the authority convening a special court-martial may, detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for that duty by the Judge Advocate General of the armed force of which he is a member. A commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a lawer officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. However, no persons may act as a law officer of a single-officer general court-martial unless he is specially certified to be qualified for that duty. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

shown that in many special court-martial cases, questions of both fact and law are so complex that the legally untrained presidents of these courts are unable to perform their judicial functions properly and effectively. The need for permitting the detail of a law officer in such cases has thus become evident.

SEC. 1(7). Amends article 26(a) to provide that a commissioned officer acting as a single-officer general court-martial must have the qualifications generally specified for law officer and, in addition, must be certified to be qualified for duty as a single-officer general court-martial by the Judge Advocate General.

The amendment also provides that a commissioned officer who is certified to be qualified for duty as a law officer of a general court-martial is also qualified for duty as a law officer of a single-officer or other special court-martial. A commissioned officer who is certified to be qualified for duty as a law officer of a special court-martial is qualified for duty as a law officer of any kind of special court-martial. The amendment will permit the establishment of a special list of individuals certified to be qualified to act as special court-martial law officers, thus making the opportunity to act in this capacity available to the younger judge advocates or legal specialist and providing a training ground for future general court-martial law officers. The detail of a law officer to a special court-martial is made subject to Secretarial regulations since the supply of individuals qualified as law officers is somewhat limited and will have to be controlled.

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(b) The law officer may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.	(8) Section 826(b) (article 26(b)) is amended by striking out the figures "839" and "39" and inserting the figures "839-(b)" and "39(b)", respectively, in place thereof.	SEC. 1(8). Amends article 26(b) to reflect the amendment to article 39.
§ 829. Art. 29. Absent and additional members: (a) No member of a general or special court-martial may be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause. (b) Whenever a general court-martial is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. When the new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel. (c) Whenever a special court-martial is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if	(9) Section 829 is amended— (A) by striking out the words "accused has been arraigned" in subsection (a) and inserting the words "court has been assembled for the trial of the accused" in place thereof; (B) by inserting the words ", other than a single-officer general court-martial," after the word "court-martial" in the first sentence of subsection (b); and by amending the last sentence of subsection (b) to read as follows: "The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the law officer, the accused, and counsel."; (C) by inserting the words ", other than a single-officer special court-martial," after the word "court-martial" in the first sentence of subsection (c); and by amending the last sentence of subsection (c) to read as follows: "The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members	SEC. 1(9). Amends article 29 to provide that no member of a general or special court-martial may be absent or excused, except for the reasons specified, after the court has been assembled for the trial of the accused, and by specifically excepting from the operation of subsections (b) and (c) single-officer general and special courts-martial. This section further amends article 29 by deleting any reference in subsections (b) and (c) to the oaths of the members so as to make it clear that it is not required that new members take their oaths at the trial. The amendment to article 42 requires that the oath must be taken at some time before a member may perform his duties. The words "evidence previously introduced before the members of the court" have been inserted in place of the present language so that only that evidence which has been introduced before the members of the court must be read to the court to which the new members have been detailed and so that all evidence, not just "testimony", will be included.

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

§ 835. Art. 35. Service of charges:

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

of the court or a stipulation thereof is read to the court in the presence of the law officer, if any, the accused and counsel,"; and

(D) by adding the following new subsection at the end thereof:

"(d) If the law officer of a single-officer court-martial is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new law officer as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel."

(10) Section 835 (article 35) is amended by striking out the second sentence and inserting the following in place thereof: "In time of peace no person may, against his objection, be brought to trial, or be required to participate by himself or counsel in a session called by the law officer under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him, or in a special court-martial case within a period of three days after the service of charges upon him."

Subsection (d) is added to article 29 to provide for those instances in which the law officer of a single-officer general or special court-martial is absent, whether because of physical disability, challenge, or other good cause, and a new law officer is detailed. Just as in the case of absent court members, the trial shall proceed as if no evidence had previously been introduced unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new law officer, the accused, and counsel. The accused, knowing the identity of the newly detailed law officer and after consultation with counsel, must request in writing that the new single-officer court try his case (see sec. 1(2)). Otherwise, the charges must be returned to the convening authority for reference to a court-martial which inlcudes members or for other disposition.

SEC. 1(10). Amends article 35 by extending the protection of time for preparation by the defense to sessions called by the law officer under the proposed amendment to article 39.

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§ 838. Art. 38. Duties of trial counsel and defense counsel: (b) The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 827 of this title (art. 27). 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 president of the court.	(11) Section 838(b) (article 38(b)) is amended by striking out the words "president of the court" in the last sentence and inserting the words "law officer or by the president of a court-martial without a law officer" in place thereof.	SEC. 1(11). Amends article 38 by providing in subsection (b) that, if the accused who has individual counsel does not desire that detailed counsel act in his behalf as associate counsel, detailed counsel shall be excused by the law officer instead of by the president when the trial is by a court-martial which includes, or may consist only of, a law officer. This change is made necessary by the provisions in this bill for single-officer courts-martial, and also by the amendment to article 39 which permits the law officer to call the court into session without the presence of the members. In the absence of the amendment to article 38(b), the law officer would not be empowered to excuse counsel at the session.
§ 839. Art. 39. Sessions: When a general or special court-martial deliberates or votes, only the members of the court may be present. After a general court-martial has finally voted on the findings, the court may request the law officers and the reporter to appear before the court to put the findings in proper form, and those proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.	(12) Section 839 (article 39) is amended to read as follows: "§ 839. Article 39. Sessions "(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a law officer and members, the law offiecr may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of— "(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty; "(2) hearing and ruling upon any mat-	SEC. 1(12). Amends article 39 to provide that the law officer of a court composed of a law officer and members may call the court into session without the attendance of members for the purpose of disposing of interlocutory motions raising defenses and objections, ruling upon other matters that may legally be ruled upon by the law officer, holding the arraignment and receiving the pleas of the accused if permitted by regulations of the Secretary concerned, and performing other procedural functions which do not require the presence of court members. The effect of the amendment, generally, is to conform military criminal procedure with the rules of criminal procedure applicable in the

ter which may be ruled upon by the law officer under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

"(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

"(4) performing any other procedural function which may be performed by the law officer under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

"(b) When the members of a court-martial deliberate or vote, only the members may be present. After the members of a court-martial which includes a law officer and members have finally voted on the findings, the president of the court may request the law officer and the reporter, if any, to appear before the members to put the findings in proper form, and these proceedings shall be on the record. All other proceedings, including any other consultation of the members of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a law officer has been detailed to the court, the law officer."

United States district courts and otherwise to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the law officer. The pretrial disposition of motions raising defenses and objections is in accordance with Rule 12 of the Federal Rules of Criminal Procedure. Other procedural and interlocutory matters will be presented for appropriate rulings by the law officer at pretrial sessions at his discretion, although he may not abuse that discretion by violating or impairing in these proceedings any substantial right of the accused. This is in accordance with the principles expressed by the United States Court of Military Appeals in *United States* v. *Mullican*, 7 USCMA 208, 21 CMR 334.

A typical matter which could be disposed of at a pretrial session is the preliminary decision on the admissibility of a contested confession. Under present practice, an objection by the defense to the admissibility of a confession on the ground that it was not voluntary frequently results in a lengthy hearing before the law officer from which the members of the court are excluded, although they must still remain in attendance. By permitting the law officer to rule on this question before the members of the court have assembled, the members are not required to spend considerable time merely waiting for a decision of the law officer. If he sustains the objection, the issue is resolved, and the facts and innuendoes surrounding the

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		making of the confession will not reach the members by inference or otherwise. If the law officer determines to admit the confession, the issue of voluntariness will normally, under civilian and military Federal practice, be relitigated before the full court. This amendment merely provides a grant of authority to the law officer to hold sessions without the attendance of the members of the court for the purpose designated in the amendment and does not attempt to formulate rules for the conduct of these sessions or for determining whether or not particular matters not raised thereat shall be considered as waived. These are questions more appropriately resolved under the authority given to the President in article 36 to make rules governing the procedure before courts-martial. The President now prescribes rules as to motions raising defenses and objections in court-martial trials in Chapter XII of the Manual for Courts-Martial, as does the Supreme Court for Federal criminal trials in Rule 12 of the Federal Rules of Criminal Procedure. This amendment also provides that the law officer of a special court-martial as well as the law officer of a general court-martial may be requested to appear before the court to put the findings in proper form.

§ 840. Art. 40. Continuances:

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

§ 841. Art 41. Challenges:

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

(13) Section 840 (article 40) is amended to read as follows:

"§ 840. Art. 40. Continuances:

"The law officer or a court-martial without a law officer may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."

(14) Section 841(a) (article 41(a)) is amended—

(A) by amending the first sentence to read as follows: "The law officer and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court."; and

(B) by striking out the word "court" in the second sentence and inserting the words "law officer or, if none, the court" in place thereof.

SEC. 1(13). Amends article 40 by making it clear that when the court includes a law officer that official will decide whether or not a continuance will be granted. This has actually been the practice under the code.

SEC. 1(14). Amends article 41(a) by specifically providing that the law officer of a special court-martial may be challenged for cause. Further, article 41(a) is amended to provide that when a court-martial includes a law officer, he, rather than the members, shall determine the relevancy and validity of challenges. The effect of this amendment is to conform procedures before courts-martial to procedures in the district courts in which the trial judge rules upon a challenge for cause against a juror. As recently as February 5, 1965, in the case of *U.S.* v. *Cleveland*, 15 USCMA 213, 35 CMR 185, the Court of Military Appeals reaffirmed its recommendation (made in the 1960 Annual Report to Congress) that legislation be enacted to empower the law officer to rule upon the validity of challenges for cause. Prior expressions of this position may be found in *U.S.* v. *Talbott*, 12 USCMA 446, 31 CMR 32 (1961); *U.S.* v. *Deain*, 5 USCMA 44, 17 CMR 44 (1954); and *U.S.* v. *Adamiak*, 4 USCMA 412, 15 CMR 412 (1954).

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§ 842. Art. 42. Oaths: (a) The law officer, interpreters, and, in general and special courts-martial, members, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, and reporters shall take an oath in the presence of the accused to perform their duties faithfully.	(15) Section 842(a) (article 42(a)) is amended to read as follows: "(a) Before performing their respective duties, law officers, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a law officer, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty."	SEC. 1(15). Amends article 42(a) by omitting the requirement that the oath given to court-martial personnel be taken in the presence of the accused and further by providing that the form of the oath, the time and place of its taking, the manner of recording thereof, and whether the oath shall be taken for all cases or for a particular case, shall be as prescribed by regulations of the Secretary concerned. The amendment also contemplates that Secretarial regulations may permit the administration of an oath to certified legal personnel on a one-time basis as in the case of legal practitioners before civilian courts.

§ 845. Art. 45. Pleas of the accused:

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

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

(16) Section 845 (article 45) is amended—

(A) by striking out the words "arraigned before a court-martial" in subsection (a) and inserting the words "after arraignment" in place thereof; and

(B) by amending subsection (b) to read as follows:

"(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the law officer or by a court-martial without a law officer, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty."

SEC. 1(16). Amends article 45 to allow, if permitted by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged, the entry of findings of guilty upon acceptance of a plea of guilty without the necessity of voting on the findings. At common law and under the practice in the United States district courts, the court may enter judgment upon a plea of guilty without a formal finding of guilty and the record of judgment entered on such a plea constitutes a judicial determination of guilt. The amendment is intended to conform military criminal procedure with that in civilian jurisdiction, and to deplete from military practice the merely ritualistic formality of requiring the assembled court to vote on the findings. The section also deletes reference in subsection (a) to "arraignment before a court-martial" to conform with the changed article 39.

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EXISTING LAW	THE BILL	NOTES AND COMMENTS
§ 849. Art. 49. Depositions: (a) At any time after charges have been signed as provided in section 830 of this title (art. 30), any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.	(17) Section 849(a) (article 49(a)) is amended by inserting after the word "unless" the words "the law officer or court-martial without a law officer hearing the case or, if the case is not being heard,".	SEC. 1(17) amends article 49(a) to provide that, when a case is being heard, the law officer or court-martial without a law officer is the appropriate authority to forbid the taking of a deposition for good cause. The intent and purpose of this change is to vest in the law officer, or in the court-martial if it does not include a law officer, the authority to rule on this interlocutory matter after trial has begun.
§ 851. Article 51. Voting and rulings: (a) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.	(18) Section 851 (article 51) is amended— (A) by amending the first sentence of subsection (a) to read as follows: "voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court martial without a law officer upon questions of challenge, shall be by secret written ballot."; 	SEC. 1(18) amends article 51 to reflect the amendment to article 41 which provides that, when a court-martial includes a law officer, he is the person who rules upon all challenges for cause, and to include specifically in subsection (c) the duty of the law officer and president of a court-martial without a law officer to instruct the *members* of the court. This section further amends article 51 to provide

(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (art. 52), beginning with the junior in rank.

(B) by amending the first two sentences of subsection (b) to read as follows: "The law officer and, except for questions of challenge, the president of a court-martial without a law officer shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any question of law or any interlocutory question other than the mental responsibility of the accused, or by the president of a court-martial without a law officer upon any question of law other than motion for a finding of not guilty, is final and constitutes the ruling of the court."

that rulings of the law officer of a special, as well as a general, court-martial on all questions of law and all interlocutory questions other than the accused's mental responsibility are final and that rulings of the president of a special court-martial without a law officer on questions of law other than a motion for a finding of not guilty are also final. The power given to the law officer by this amendment is in accordance with Federal practice, and the power given to the president of a special court-martial to rule finally on questions of law is implicit in the decision of the United States Court of Military Appeals in *United States* v. *Bridges* (12 USCMA 96, 30 CMR 96).

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(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court— (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt; (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted; (3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.	(C) by striking out the words "of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court" in the first sentence of subsection (c) and inserting the words "and the president of a court-martial without a law officer shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them" in place thereof; and	
	(D) by adding the following new subsection at the end thereof: "(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer court-martial. An officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and if the accused is convicted, adjudge an appropriate sentence."	Article 51 is further amended to provide that an officer who is detailed as a single-officer court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence.

§ 852. Art. 52. Number of votes required:

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

* * * * *

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

(19) Section 852 (article 52) is amended—

(A) by inserting the words "as provided in section 845(b) of this title (article 45(b)) or" after the word "except" in subsection (a) (2); and

(B) by adding to the first sentence of subsection (c) the words ", but a determination to reconsider a finding of guilty or, with a view toward decreasing it, a sentence may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence."

SEC. 1(19) amends article 52 to conform with the amendment to article 45 by inserting in subsection (a) (2) a provision whereby findings of guilty may be entered against a person upon his plea of guilty without the formality of a vote, if permitted by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged.

Article 52 is further amended by adding to subsection (c) a provision whereby the members of the court may determine to reconsider a finding of guilty or, with a view to decreasing it, a sentence upon any vote which indicates that reconsideration is not opposed by the number of votes required for that finding or sentence. This amendment is consistent with justice and fair procedure, for such a vote would indicate that at least one of the members who had voted for the finding or sentence now desires to reconsider the matter. A reconsideration of a finding of guilty of a lesser included offense with a view to arriving at a finding of guilty of a greater offense is actually a reconsideration of a finding of not guilty, and accordingly a majority vote is required before such a reconsideration can be undertaken. This amendment is not intended to have any effect upon the time within which a finding or sentence may be reconsidered, this being part of the rule making power of the President under Article 36 (see pars. 74*d* (3) and 76*c* of the Manual for Courts-Martial for rules now in effect).

Proposed Substitute Bill for S. 750 (sec. 1); S. 752; S. 757, 89th Congress, 1st Session—Continued

EXISTING LAW	THE BILL	NOTES AND COMMENTS
§ 854. Art. 54. Record of trial: (a) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and the record shall be authenticated by the signatures of the president and the law officer. If the record cannot be authenticated by either the president or the law officer, by reason of his death, disability, or absence, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for any of those reasons, the record shall be authenticated by two members.	(20) Section 854(a) (article 54(a)) is amended to read as follows: "(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the law officer. If the record cannot be authenticated by the law officer by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or a member. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President."	SEC. 1(20) amends article 54(a) to provide for authentication of a record of trial by general court-martial by the signature of the law officer. Under the present law, the record must be authenticated by the signature of both the law officer and the president, or, if they are unavailable for one of the reasons specified in the article, by two members. However, neither the president nor other members are present during the many hearings held out of their presence even under the present practice, and thus actually are unable to certify to the correctness of a transcription of those proceedings. The amendment further provides that if the law officer cannot, for one of the specified reasons, authenticate the record, it shall be authenticated by the signature of the trial counsel or a member. Authentication by a member, if the court has members, in this latter case may be a practical necessity despite the absence of the member from hearings conducted by the law officer. If the court has no members, then the record would have to be authenticated by the law officer or, if he was unable to do so, the trial counsel.

SEC. 2. This Act becomes effective on the 1st day of the 10th month following the month in which it is enacted.

This amendment further amends article 54 by permitting the President to provide for summarized records of trial in general court-martial cases resulting in acquittal of all charges and specifications or, if they do not affect a general or flag officer, in sentences not involving a discharge and not in excess of a sentence that can otherwise be adjudged by special courts-martial. This amendment corrects an inconsistency which has heretofore existed, since the use of a summarized record of trial is now permitted in special court-martial cases if the sentence does not extend to a bad-conduct discharge. The reasons which justify the employment of summarized records of trial in special court-martial cases are equally applicable to the class of general court-martial cases affected by this amendment, that is, the time, effort, and expense of preparing a verbatim transcript is not justified. It is recognized, of course, that the general court-martial case will have to be fully reported in the first instance, and the amendment deals only with preparation of the record after trial.

SEC. 2 provides that these amendments become effective on the 1st day of the 10th month following the month in which enacted.

TECHNICAL AMENDMENT TO PROPOSED SUBSTITUTE FOR S. 747 AND S. 751

Replace lines 16–18 with the following:

(2) The first sentence of section 873 (article 73) is amended to read as follows: "At any time within two years after approval by the convening authority of a court-martial sentence which has been referred to a board of review, the accused may petition the Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court."

STATE BAR OF GEORGIA 1965–66,
December 23, 1965.

Hon. RICHARD B. RUSSELL,
Chairman, Committee on Armed Services, U.S. Senate, Washington, D.C.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATORS: The military law section of the State Bar of Georgia has taken a keen interest in legislation introduced in Congress relating to the administration of military justice in the Armed Forces and has studied thoroughly certain legislation now pending in Congress. Since this legislation vitally affects those members of the Georgia State Bar who practice law in the Armed Forces as well as those citizens of Georgia whose lives are governed by military law while they are serving in the Armed Forces, it is considered appropriate for the results of our studies and actions to be communicated to the Congress.

At a meeting held on December 1, 1965, in conjunction with the annual midyear meeting of the State Bar of Georgia, the military law section voted unanimously to urge enactment of H.R. 273 and H.R. 277, 89th Congress. Upon receiving a report of this action, together with the recommendations of the military law section, the Board of Governors of the State Bar of Georgia by vote taken on December 3, 1965, authorized the military law section to endorse H.R. 273 and H.R. 277, 89th Congress, and to take the necessary action to communicate that endorsement to the Congress.

Prior to voting its approval of H.R. 273 and H.R. 277, thorough consideration was given by the military law section to related legislation, specifically those bills pending in the Senate as S. 745 through S. 762. Because of the vast range of subject matter covered by those bills, it was decided that our studies would be concentrated on those areas of military justice which are considered by the military law section to be in the most need of immediate improvement. In keeping with this objective, special consideration was given to five of the Senate bills, S. 747, S. 750, S. 751, S. 752, and S. 757, 89th Congress, and the aforementioned two House bills, H.R. 273 and H.R. 277. Although there is a divergence in the scope of the two sets of proposals, our examination reveals a substantial identity of purpose and substance in the military justice aspects of the mentioned Senate and House bills.

In particular, we note that there are significant areas of agreement on the following subjects: Expanding the authority of the military law officer so as to constitute him a true trial judge; the establishment of courts-martial consisting only of a law officer; authorizing pretrial proceedings; furnishing of the accused with qualified counsel at special courts-martial as a condition to the authority for that forum to adjudge a punitive discharge; and providing for the granting of extraordinary relief with respect to erroneous inferior courts-martial.

Our studies indicate that the two mentioned House bills would achieve the desirable objectives of the Senate bills, while better grouping together similar matters, eliminating or improving certain undesirable features of the Senate bills, and adding certain needed improvements in military justice which are not included in any of the Senate bills.

In our opinion, the enactment into law of the proposals wherein there is already agreement in principle between the proponents of the Senate and House bills would result in an immediate improvement in the administration of military justice and would add significant protection to the constitutional rights of military personnel. We feel that the results being sought could best be achieved by enactment of the legislative proposals contained in H.R. 273 and H.R. 277.

We are of the view that there is a great deal of merit to some of the remaining proposals contained in the Senate bills. However, it would seem that the pending hearings and studies on those bills should not delay the immediate enactment into law of legislation encompassing the aforesaid areas of agreement in principle.

It is hoped that the views of the military law section of the State Bar of Georgia will be of assistance in the forthcoming hearings on the legislation under discussion, and it is requested that this letter be inserted in the record of these hearings.

Sincerely yours,

GEORGE J. POLATTY, Sr.,
Chairman.

AMERICAN BAR ASSOCIATION,
SPECIAL COMMITTEE ON MILITARY JUSTICE,
Chicago, Ill.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Senate Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I appreciate your letter of November 22, 1965, in which you invite me to appear as a witness at the joint hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a special subcommittee of the Senate Committee on Armed Services, scheduled to begin on January 18, 1966, to consider 18 bills pertaining to the administration of military justice and administrative board proceedings.

The American Bar Association's Special Committee on Military Justice, of which I am chairman, has had the subject bills under study since they were first introduced as S. 2002–S. 2019 in the 88th Congress. However, because the members of the committee are widely scattered throughout the country, our meetings necessarily have been infrequent and subject to rather rigid time limitations. For this reason, after preliminary consideration of the wide range of subject matter covered by the 18 bills in question, and 2 related bills introduced in the House of Representatives, the committee concluded that it would be necessary to restrict its study to a consideration of those bills relating to matters considered by the committee to be most in need of attention in the field of court-martial practices. As a result, the committee's study was brought to focus on H.R. 10048 and H.R. 10050, 88th Congress, which, in their 1963 annual report to Congress pursuant to article 67(g) of the Uniform Code of Military Justice, 10 U.S.C. 867(g), the Judge Advocates General of the three services, the General Counsel of the Department of the Treasury, and a majority of the judges of the Court of Military Appeals, recommended as substitute measures for those of the 18 Senate bills now designated as S. 747, S. 750, S. 751, S. 752, and S. 757, 89th Congress.

The studies by my committee led ultimately to recommendations that resulted in the adoption of resolutions by the house of delegates to the American Bar Association Convention in New York City in August 1964, urging Congress to enact H.R. 10048 and H.R. 10050, 88th Congress, or similar legislation. The text of these resolutions was communicated to you in a letter from the secretary of the American Bar Association, dated September 17, 1964. In a letter to you on August 3, 1965, I indicated our continued support of these bills, now pending in the House of Representatives as H.R. 273 and H.R. 277, 89th Congress.

As chairman of the special committee on military justice of the American Bar Association, I am not authorized to speak on behalf of the association beyond the scope of the resolutions passed by the house of delegates. Thus, if I were to appear as a witness at the scheduled joint hearings, my testimony would necessarily be limited to a statement in support of the legislative proposals embodied in H.R. 273 and H.R. 277. For this reason, and because the position of the American Bar Association has been made clear in the mentioned resolutions and in various letters to you and to other members of Congress, I do not believe that a personal appearance by me at the hearings would serve any useful purpose. However, it is requested that the enclosed statement be inserted into the record of the hearings.

Sincerely yours,

HAROLD C. WARNER,
Chairman.

STATEMENT OF HAROLD C. WARNER ON BEHALF OF THE AMERICAN BAR ASSOCIATION

I am Harold C. Warner, a professor of law at the University of Tennessee Law School in Knoxville, Tenn. I am the chairman of the special committee on military justice of the American Bar Association.

In their 1963 annual report to Congress, the Judge Advocates General of the three services, the General Counsel of the Department of the Treasury, and a majority of the judges of the Court of Military Appeals, recommended enactment of two proposed bills, designated for reference as the "G" and "H" bills, as substitute legislation for five Senate bills now designated S. 747, S. 750, S. 751, S. 752, and S. 757, 89th Congress, which are among the 18 bills now under consideration by your committees. The "G" and "H" bills were introduced in the House of Representatives as H.R. 10048 and H.R. 10050, 88th Congress. At the August 1964 convention of the American Bar Association in New York City, the house of delegates, upon the recommendation of the special committee on military justice, passed resolutions urging Congress to enact H.R. 10048 and H.R. 10050. The American Bar Association continues to support these bills, which are presently pending in the House of Representative as H.R. 273 and H.R. 277, 89th Congress, and we urge the Senate to enact the legislative proposals contained in those bills.

H.R. 273, the "G" bill, makes significant improvements in court-martial procedure, brings that procedure into closer accord with that of the U.S. district courts, and contains provisions which would increase the authority and effectiveness of the law officer by making his position more analogous to that of a civilian trial judge. For example, under H.R. 273, if enacted, the law officer could rule finally on those matters which are normally and properly determined finally by a judge, whereas under existing law, rulings of the law officer on many important legal questions, including motions for a finding of not guilty, are subject to being overruled by members of the court who comprise the military jury. Under present law, the court members must even pass on challenges for cause when the basis of the challenge would affect every member.

H.R. 273 would also permit the law officer to hold open, recorded pretrial sessions to dispose of interlocutory and other procedural matters, such as objections by counsel concerning admissibility of confessions and evidence obtained by search and seizure. This would eliminate the present time-consuming trial procedure during which the members of the court must leave the courtroom, sometimes repeatedly and annoyingly, while these legal issues are being discussed by the law officer and counsel. The use of these pretrial sessions would provide additional protection for accused persons by helping to insure that members of the court are not made aware of the existence of confessions and other types of evidence determined by the law officer to be inadmissible. Under this bill, the law officer could also hold open recorded post trial sessions without members to act upon matters such as mandates issued by appellate agencies in cases remanded for further action on interlocutory matters at the trial level. This will fill a void existing under present military law and will insure that there is always a court open to act upon these matters just as there is in the civilian Federal system.

This bill would further provide additional protection for accused persons before special courts-martial by requiring that such an accused be represented by legally qualified counsel before the special court-martial can adjudge a bad conduct discharge.

Other desirable features of H.R. 273 would provide, with adequate safeguards, a procedure comparable to a jury-waived trial in the U.S. district courts; permit the appointment of a law officer to special courts-martial; improve the procedure for handling guilty pleas; and make other sensible and long overdue procedural changes that would result in a very significant savings in time and manpower.

H.R. 277, the "H" bill, extends from 1 to 2 years the time within which a new trial may be granted in cases reviewed by a board of review. In those cases which are not reviewed by a board of review, the bill would give the Judge Advocate General authority to vacate or modify the findings or sentence because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. This would afford additional protection to persons convicted erroneously by special and summary courts-martial for whom there is presently no statutory provision for granting extraordinary relief.

Enactment of the legislative proposals contained in H.R. 273 and H.R. 277 would achieve the desirable objectives of S. 747, S. 750, S. 751, S. 752, and S. 757,

89th Congress, and the two House bills provide a means for immediate enactment into law of these objectives, since they embody areas in which there is apparent agreement in principle and purpose between proponents of the House and Senate bills. Accordingly, in view of the immediate need for legislation in these areas, the American Bar Association urges enactment of the legislative proposals contained in those two House bills.

[From St. John's Law Review, May 1961]

THE UNIFORM CODE OF MILITARY JUSTICE—ITS PROMISE AND PERFORMANCE (THE FIRST DECADE: 1951–1961), A SYMPOSIUM

(Submitted by Prof. Arthur E. Sutherland, Harvard Law School)

THE BACKGROUND AND THE PROBLEM

Rear Admiral Robert J. White, CHC, U.S. Navy (Ret.) †

Students of American history have written at length concerning certain distinctive characteristics of the American people which have produced unique and recurring phenomena in the fields of politics, economics, and sociology.

Comparatively little, however, has been written about the impact of the American character upon the overall history of military discipline, and in particular about the unique and recurring phenomena in the public's reaction to military discipline during after major foreign wars.

From abundant evidence, we may safely generalize and submit certain historical conclusions. The American people have been slow and reluctant to enter war. Despite the problems posed in mobilizing a people accustomed to a wide latitude of freedom and traditionally opposed to regimentation of any kind, most citizens have responded willingly to a call for sacrifice. The nation has occasionally suffered humiliation through such incidents as the defections among some American prisoners in the Korean conflict. Yet in the overall experiences of foreign wars, American youths have proved themselves generous and courageous in their patriotism and have exhibited an outstanding capacity for adjustment and leadership.

Such united efforts of the military and civilian components have achieved great military success in hard fought wars. Yet, paradoxically, after achieving such victories, the American people, in a recurring pattern, have immediately demanded instant and precipitous demobilization which has seriously threatened military efficiency and discipline.

Finally, the American people, reacting to personal losses, continuous worry and strain, and disturbed by the complaints of returning servicemen, have lashed out indiscriminatively at military authorities and have coupled their criticisms with vociferous and violent demands on Congress for investigations which would lead to basic reforms in the laws governing the administration of military discipline.

Such a phenomenon occurred after the American Revolution. It was repeated after World War I and again after World War II. In the early days of the Republic, such resentment culminated in efforts to reform military discipline and courts-martial through a Committee appointed to revise the Articles of War which governed Army discipline. The Committee included Thomas Jefferson and John Adams.[1]

The American War Articles were borrowed from the British Articles, which in turn were almost a literal translation of the Roman Articles. The attempt to reform could hardly be called successful. Adams complained that Jefferson threw all the labor, including debate, on him, and the resulting legislation of 1806 re-enacted the Articles without substantial changes. A later attempt in 1874 accomplished little more, for eighty-seven of the one-hundred and one

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†Former Dean, Catholic University Law School; Consultant, U.S. Navy; Senior Member, Board for the Study of Disciplinary Practices and Procedures of the United States Navy (1953); Author of A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE and MOBILIZATION, MORALE, AND COMBAT SUCCESS IN THE UNITED STATES NAVY.

[1] Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). See also Address by E. M. Morgan before Maryland State Bar Association, 24 MD. STATE B. C. 195 (1919).

Articles remained unchanged and most of those remaining were not altered substantially. An eminent authority, Edmund M. Morgan, has characterized such military discipline as an attempt to subject an Army of citizens in uniform to a system designed "to fit an army of professional soldiers serving an empire for hire." [2] Though the Articles of War were again subjected to revision in 1916, the result was more a rearrangement and reclassification than a fundamental reform. Nor were the Articles for the Government of the Navy, based largely upon the British Articles, substantially changed—even in 1862 and subsequent thereto, the Articles remained fundamentally the same as the corresponding British Articles in theory and substance.[3]

Thus, at the outset of World War I, both the Army and Navy retained archaic systems of military justice poorly equipped for the stresses of military discipline of a huge conscript as well as volunteer military force in a large scale foreign war.

With victory over Germany achieved, the post-war pattern of American reaction soon became evident. Once again the public demanded, after World War I, a precipitous demobilization, and bitterly criticized the administration of military justice. Mounting public feeling culminated again in aggressive efforts for reform. Among the protagonists in the World War I controversy were John H. Wigmore, an eminent scholar in jurisprudence and the law of evidence, defending the military, and Edmund M. Morgan, then a young man, assuming the role of aggressive critic. It is noteworthy that Mr. Morgan, later a distinguished professor at Harvard Law School, served as the Chairman of the Committee appointed by the Department of Defense to draft the Uniform Code of Military Justice. The types of complaints after World War I formed an example which was to recur in much more dramatic form after World War II. Such complaints assumed a standard pattern: unduly large numbers of men were court-martialed, with an extremely high percentage of convictions (88%); the award of sentences by courts-martial were excessive, resulting in the recommendations by Boards of Review of reductions in some 77% of the noted cases; wide discrepancies existed in sentences for the same offense (contemptuous language was punishable by three months confinement in England, and twenty-five years in France; common absence offenses varied from three months to ninety-nine years); tyrannical practices of courts-martial; the poor calibre of defense counsel; and, the most damning criticism of all, official increases in sentences on appeal. The storm of controversy subsided without effective reforms. Indeed, the practical results of these and later attempted reforms were far from significant, with the result that the system of military justice without modern reforms was grossly unprepared for the problems of discipline arising in the global war when the Army increased from 1,460,000 to 8,266,000, the Navy from 220,000 to 4,758,000, and the sum total of persons subject to military discipline totalled some 12,300,000. The total of military courts-martial approached some 600,000 per year at the height of World War II.

The astounding differences between prior wars and World War II in the numbers of men involved, the global spread in territory, the far-flung lines of various task forces, in some areas affected by low morals and strange mores, and the presence of a large number of youths already emancipated from old fashioned family and neighborhood influences and discipline—all were factors contributing to the vast increase of courts-martial and disciplinary problems in World War II, which resulted in about 1,700,000 courts-martial, over 100 capital executions, and the imprisonment, even at the end of the war, of some 45,000 servicemen.[4]

Once victory had been achieved in World War II the historic post-war pattern of the American Revolution and of World War I recurred in a demand for court-martial reform and a rising tide of criticism for the administration of military discipline. The huge numbers involved in World War II dwarfed by comparison the numbers involved in earlier wars, and appeared to increase the number of complaints in geometric progression. The emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system.

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[2] Morgan Address, *supra* note 1, at 200.

[3] Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

[4] MacCormick, *Statistical Study of 24,000 Military Prisoners*, 10 FED. PROB. 6 (No. 2 1946); Karlen & Papper, *The Scope of Military Justice*, 43 J. CRIM. L., C. & P.S. 285 (1952); WHITE. A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE (1947).

An understanding of this recurring historical pattern and of the number and variety of complaints after World War II is essential for any knowledge of the genesis of a universal code unique in the world's military history. For it is unique as an attempt to enact a fundamental law embracing for the first time all the military services, and dedicated to attempting a balance between the preservation of fundamental discipline as an indispensable basis of military efficiency and the maintenance of the legal rights of military personnel in a constitutional democracy emphasizing the dignity of the individual.

There may well be flaws in the Code which need correction. But to admit such a need does not postulate any tolerance of the extreme view that the Code should be liquidated, or in the alternative, so weakened, as to amount to a rejection of its historical necessity and fundamental philosophy.

It would appear that a major cause of the erroneous thinking of the latter school is a failure to understand and appraise the forces which led to the Code's enactment. Admittedly in that post-war era, there was a failure to understand the logistic demands upon military authority in a global war to enforce discipline and conduct courts-martial. Nor could an unprejudiced critic fail to recognize some exaggerated, vicious, and even untruthful complaints. Anyone familiar with the post-war period, including members of Congress who were deceived by false information, or, more often, given only partial information, would agree with James Forrestal. When questioned about the pre-code functioning of military justice, he said, "I do not believe it is as bad as it has been painted, nor as good as some of its defenders claim. Many of the criticisms have seemed to me to be without foundation, but many of them have seemed to me to be justified." [5]

Even today, some extreme critics deny the historical need for the Uniform Code of Military Justice, minimize the complaints, and belittle its proponents. In this they betray a gross ignorance of American history and a culpable failure to understand the political necessities of public confidence in the fundamental fairness of courts-martial in our most critical period—not war, not peace—but in a period in which the national defense will need large numbers of young men in the military forces for an indefinite period.

Therefore, it becomes useful to review and gauge again the numerous factors and forces which produced the Code. At the outset it will be necessary to separate fact from myth. For example, no myth has survived more successfully than the often repeated fiction that the Doolittle Board Army reforms of 1946 slackened discipline and "*led to a revision of the Code of Military Justice* [which was] a concession to civilian pressures. . . ." [6] By an Army precept dated March 18, 1946, the Doolittle Board was directed to study officer-enlisted personnel relationships in the Army.[7] The evidence included over a thousand letters as of April 30, 1946, witnesses in person, magazine and newspaper articles, and radio commentaries. The Board procedures appeared haphazard and uncritical, and the hearings provided a field day for violent critics of the officer-enlisted personnel relationship. The Board itself seemed to be intrigued with the field of "social behavior," where social distinctions imposed indignities upon enlisted personnel. The Board stressed that it was in this category that "abuses were most rampant, violations occurred most frequently, and irregularities were most apparent." To be sure, the Board did state that "the largest differential which brought the most criticism in every instance, was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel." [8] Moreover the Board recommended a "review of the machinery for administering military justice and the courts-martial procedure with a view to making all military personnel subject to the same types of punishment as based upon infractions of rules and misdemeanors." [9] It can readily be seen that this loose report centered upon social differences, fell far short of any comprehensive investigation, and was totally lacking in any specific recommendations for legislative reforms. To attribute a dominating influence to the Doolittle

[5] Index and Legislative History—Uniform Code of Military Justice.
[6] Hanson N. Baldwin, Saturday Evening Post, Aug. 8, 1959, p. 13. Reprinted in condensed form, Reader's Digest, Jan. 1960, p. 96. See also Saturday Evening Post, July 30, 1955, p. 74; Saturday Evening Post, March 6, 1954, p. 64; N.Y. Times, Sept. 3, 1953, p. 23, col. 4.
[7] The Doolittle Report, Infantry Journal Press, Washington, D.C., June 1946, p. 7.
[8] *Id.* at 18.
[9] *Id.* at 21.

Report is to fall into the same error as the Board itself—a fascination with the reform of social amenities, salutes, and fraternization.

Conclusions contrasting in emphasis with those of the Doolitle Board were to be drawn by the Code Committee after months of study of a vast amount of evidence from a variety of sources using different approaches, whose only common denominator was an attitude deeply critical of the war-time administration of military discipline, coupled with an aggressive demand for a complete overhaul of the military judicial system. Primary sources included numerous studies hereinafter described, initiated by the armed services themselves from 1943 to 1947, large numbers of complaining letters to Congress and the White House, and numerous critical articles in service and veteran magazines, as well as special articles and editorials in newspapers including the New York Times and the Herald Tribune. Added to these were hundreds of printed pages of congressional hearings and debates.

Through convention resolutions from county to national level, the appointment of special committees, and the delegation of official spokesmen to congressional committee hearings, legal associations and patriotic organizations threw their prestige and political influence behind the support of the controversial charges and the resulting demands for remedial legislation. Included in the former were the American Bar Association [10] and special committees on military justice of the New York State Bar Association,[11] the War Veterans Bar Association,[12] and the New York County Lawyers Association.[13] Included in the latter group were the American Legion,[14] the Veterans of Foreign Wars,[15] the Amvets,[16] the National Guard Association,[17] the Reserve Officers' Association,[18] and the Marine Corps Reserve Association.[19]

In 1945, Army Under-Secretary Patterson had attempted to make comparisons favorable to the military courts-martial over civilian trials, particularly in the matter of review and clemency.[20] But the ground swell of criticisms alleging "caste," "discrimination," and "injustices" forced him to admit the need for "overhauling" the Army Court-Martial system in 1946.[21] As Secretary, he appointed the ineffective Doolittle Board, and, shortly thereafter, the Vanderbilt Committee, headed by the vigorous former President of the American Bar Association, who was ably assisted by lawyers and judges of wide experience and recognized integrity. This Committee held advertised regional hearings culminating in over twenty-five hundred pages of transcript, examined voluminous Army disciplinary studies, considered several hundred pertinent questionnaires, and digested several hundred letters.[22] While the Committee found that "the innocent are almost never convicted and the guilty seldom acquitted"—a conclusion generally admitted to be true—the Committee proceeded to indict the war-time administration of Army justice in several vital areas.

The Committee found a "definite pattern of defects" and concluded that the evidence justified these findings:

"1. There was an absence of sufficient attention to and emphasis upon the military justice system, and lack of preliminary planning for it.

2. There was a serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court.

3. The command frequently dominated the courts in the rendition of their judgment.

4. Defense counsel were often ineffective because of (a) lack of experience and knowledge, or (b) lack of a vigorous defense attitude.

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[10] *Hearings Before the Subcommittee of the House Committee on Armed Services*, H. R. REP. No. 2498, 81st Cong., 1st Sess. 715 (1949) [hereinafter cited as *1949 Hearings*]. See also *Changes Advised in Courts-Martial System*, 33 A.B.A.J. 40 (1947); *Improving Military Justice*, 33 A.B.A.J. 319 (1947).

[11] *1949 Hearings* 836.

[12] *Id.* at 646.

[13] *Id.* at 633. N.Y. Times, July 14, 1947, p. 9, col. 1.

[14] *1949 Hearings* 661, 662.

[15] *Id.* at 734.

[16] *Id.* at 776.

[17] *Id.* at 771.

[18] *Id.* at 831.

[19] *Id.* at 699.

[20] N. Y. Times, July 8, 1945, p. 10, col. 6.

[21] N. Y. Times, March 26, 1946, p. 31, col. 8.

[22] Report of War Department Advisory Committee on Military Justice to the Secretary of War (1946). See also N. Y. Times, Dec. 22, 1946, p. 1, col. 4.

5. The sentences originally imposed were frequently excessively severe and sometimes fantastically so.

6. There was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences.

7. Investigations, before referring cases to trial, were frequently inefficient or inadequate." [23]

The Navy had recognized earlier the difficulties of the administration of justice in the war expansion. On June 25, 1943, the Secretary of the Navy requested Arthur A. Ballantine, a distinguished lawyer with wide governmental experience, to prepare a report on "the organization, methods, and procedure of Naval Courts—with recommendations of possible improvement—[in] handling the largely increased volume of cases." [24] Because the study was conducted during the active period of warfare, the report was necessarily limited in scope. The report dealt principally with procedures, but it also pointed out a "serious lack of standardization of punishment" [25] and criticized the practice of the excessive award of bad conduct discharges, though liberally remitted,[26] undue time lags between arrest and trial and later review,[27] and excessive sentences.[28]

This last criticism was repeated in several later studies, the chief of which was a study of wartime discipline in the Navy by Vice Admiral Joseph K. Taussig.[29] Noting that in a review of 1600 courts-martial, the sentence had been substantially mitigated in some 1200, Admiral Taussig concluded:

"There is no doubt but that, under the system which we have followed for years, members of courts have generally been unwilling to undergo the risk of criticism based on supposed inadequacy of sentence which is inherent in attempting to fix a just and final measure of punishment. The result has been that courts usually impose excessively severe sentences which are mitigated with monotonous regularity." [30] The First Ballantine Report also stressed the need for improving the legal qualifications of all those participating in the various phases of courts-martial, and recommended a review of the whole subject after the war ended.[31]

The Second Ballantine Report pursuant to precept of November 15, 1945, dealt largely with the procurement, qualification, and function of legal officers in the Navy. It admitted that wartime experience indicated a need for changes in the court-martial system.[32] Such recommendations included some reforms proposed in the report of Judge Mathew P. McGuire, a District of Columbia Federal Court Judge.[33]

In addition to these general studies, the Navy made available special reports including the Keefe Board Review of general court-martial sentences,[34] the Snedeker Report, a comparative study of military disciplinary systems,[35] and the White Report, a study of "Five Hundred Naval Prisoners and Naval Justice," which revealed a common pattern of complaints and concluded with specific recommendations for the improvement of Naval Justice.[36] Rear Admiral O. S. Colclough, the Judge Advocate General of the Navy, announced that the Navy would modernize the basic laws for the government of the Navy and issue new rules for courts-martial. Included in such proposals were Review Boards with a civilian member, the division of duties between the Judge Advocate and the prosecuting (trial) counsel in a court-martial, protection of courts-martial from interference, and safeguards against unjust revocation of suspended sentence.[37]

The investigations, studies, and Congressional Hearings of the post-war years dealing with such a comprehensive and complex problem as military justice patently demanded a calm, objective appraisal and a mature, constructive approach. Yet stormy petrels, including some members of Congress, stirred up bitterness with sensational headlines in the press. For example: "The Army

[23] Report of War Department, *supra* note 22, at 3.
[24] First Ballantine Report, U.S. Navy (1943).
[25] *Id.* at 13.
[26] *Id.* at 12.
[27] *Id.* at 7.
[28] *Id.* at 10.
[29] Naval War-Time Discipline, Report from United States Naval Institute Proceeding, July 1944, August 1944, October 1944.
[30] *Id.* at 5.
[31] First Ballantine Report, U.S. Navy 5 (1943).
[32] Second Ballantine Report, U.S. Navy 1 (1945).
[33] Report of McGuire Committee to the Secretary of the Navy (1945).
[34] Report of General Court-Martial Review Board (1947).
[35] Report of Colonel James N. Snedeker, USMC to Judge Advocate General (1946).
[36] WHITE, A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE (1947).
[37] N. Y. Times, June 22, 1947, p. 17, col. 1.

has a rotten court-martial system but the Navy's is worse";[38] "Military Courts are guilty of the grossest types of miscarriage of justice";[39] "High Command accused of stacking courts against accused and refusing counsel of accused's choice";[40] "Marked discrepancy between justice to officers and enlisted men—a double standard";[41] "Denounces Army Gestapo training and alleged beatings."[42]

The accuracy and fairness of such charges may be seriously questioned. But merely to deny or to question them does not in the slightest degree minimize the terrific adverse political impact of such charges on the public's confidence in military justice.

Undoubtedly, such charges contributed to the bitterness of the most controversial of all the questions relating to military courts-martial—"command control." In essence, "command control" refers to the power of the convening officer to appoint the members of the court, the law officer, the trial (prosecuting) counsel, and often the defense counsel. The convening authority also reviews the findings of the court-martial and has plenary power to cut down the punishment and suspend a bad-conduct discharge. Moreover, he passes upon the fitness reports of these officers and other incidental matters, such as leave.

A sharp controversy ensued between those who believed that Commanding Officers should be deprived of "command control" and those who viewed such prerogatives as essential to the orderly functioning of command. In the former group were the American Bar Association, the Vanderbilt Committee, the New York County Bar Association, and the Bar Association of the City of New York.[43] The New York State Bar Association, however, took an aggressive stand in favor of retaining "command control," and made much of General Eisenhower's opposition to a divided command responsibility.[44] That "command control" had been abused by interference in isolated cases could not be denied. The Vanderbilt Committee found a deliberate attempt to influence the decision in many instances.[45] A State Governor, later a Federal Judge, informed the Committee on the Code that he was dismissed as a member of a general court because of an acquittal, and threatened with a lower efficiency rating as an officer if he failed to convict in a greater number of cases.[46]

The deep impact of the alleged abuses of "command control" is reflected in typical articles entitled "Can Military Trials Be Fair?",[47] and "Drumhead Justice",[48] as well as in newspaper accounts and editorials such as those of the New York Times and the New York Herald Tribune, which provided ammunition for the all-out attack upon "command control."[49] An amendment to deprive the convening officer of "command control" passed the House of Representatives on January 15, 1948, but failed to become law.

The Uniform Code has continued the retention of "command control." But it has placed a powerful proscription against abuse by Article 37,[50] which forbids any attempts to coerce or influence courts-martial, including any type of subsequent reprimand. Any violation subjects the offender to a court-martial under Article 98(2).[51] In no area is the military in such a vulnerable position as in the abuse of "command control," for the American people instinctively strike out at any interference with the independence and integrity of a court of justice.

It is, of course, impossible to appraise accurately the many different factors which combined to bring about the enactment of the Code. Some extreme

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[38] Rep. L. M. Rivers, World Telegram, April 14, 1947.
[39] Sen. Wayne Morse, N. Y. Times, Nov. 7, 1945, p. 8, col. 4.
[40] Sen. William E. Jenner, N. Y. Times, July 9, 1947, p. 1, col. 7.
[41] Sen. M. R. Young, N. Y. Times, Sept. 20, 1946, p. 36, col. 3.
[42] Rep. Leon H. Gavin, N. Y. Times, June 26, 1945, p. 20, col. 3.
[43] N. Y. Times, Aug. 17, 1947, § 4, p. 8, col. 7. See Letter to Committee on Uniform Code, Nov. 2, 1948.
[44] Letter, Special Committee New York State Bar Association to Committee on Military Justice, Jan. 29, 1949, *quoting* Eisenhower speech, New York Lawyer's Club, Nov. 17, 1948. See also N. Y. Times, March 1, 1949.
[45] Vanderbilt Report, pp. 6–7. Dec. 13, 1946.
[46] Letter From Governor E. Gibson to the Committee on the Code, Nov. 18, 1948.
[47] 2 STAN. L. REV. 547 (1950).
[48] Reader's Digest, Aug. 1951, p. 39. See also Los Angeles Daily Journal, Jan. 29, Feb. 4, 1946.
[49] N. Y. Times, July 13, 1947, § 4, p. 8, col. 3; Feb. 9, 1949, p. 13, col. 1; Feb. 10, 1949, p. 26, col. 3; Sept. 8, 1949, p. 21, col. 3; May 8, 1950, p. 22, col. 3; N. Y. Herald Tribune, March 14, 1948; May 25, 1951. See also United States v. Littrice, 3 U.S.C.M.A. 487, 491, 13 C.M.R. 43, 47 (1953); Ward, *UCMJ—Does It Work?* 6 VAND. L. REV. 186, 199 (1953).
[50] UCMJ art. 37, 10 U.S.C. § 837 (1958).
[51] UCMJ art. 98(2), 10 U.S.C. § 898(2) (1958).

criticisms and allegations of abuse were hardly credible. But, on the other hand, an assertion that fundamental changes were not necessary ignored the accumulated evidence and the deep resentment voiced not only by the people in general, but by some conservative members of the Federal Judiciary. Since state courts lack jurisdiction, courts-martial decisions were attacked in the federal courts, usually by habeas corpus proceedings. The federal law had traditionally refused to revise the decisions of courts-martial, thereby narrowing the grounds of appellate review to a claim that the decision was void on account of an absolute want of power, rather than voidable because of the defective exercise of power.[52]

No legal authority would deny that federal courts, engaged by flagrant abuses in some courts-martial, did in fact enlarge their jurisdiction to include collateral attack. A respected authority has warned that even the restoration by the Supreme Court of the narrower traditional rule and provisions of the Code itself will not prevent federal judges from assuming jurisdiction and reviewing any such flagrant abuses.[53]

Out of the charges and denials, the extended hearings of committees in and out of Congress, the proposals of extremists criticizing and defending the military, and the multiple pressures of various legal and patriotic organizations, emerged a new fundamental law, unique in the world's history—a law which attempted to reconcile and balance the "justice element and the military element" in the American Constitutional Democracy.[54] In announcing the enactment of the law to become effective May 3, 1951, the Defense Department stated:

(1) It creates a system of justice which is uniform for all the armed services;
(2) It contains many new provisions designed to assure the accused a fair trial and to prevent undue control of or interference with the administration of justice;
(3) It presents the basic military law in a well-organized, readily understandable form.[55]

Such were the promises of this new and unique Uniform Code of Military Justice hammered out on the anvil of Congressional Hearings and debate into final legislation effective May 31, 1951. To implement such promises, the Code required, among other protections, that charges and specifications be signed under oath.[56] It forbade the questioning of a suspect without prior warning as to his right to refuse to answer,[57] limited the authority to pre-trial arrest or confinement,[58] and required "immediate steps" to inform and to try or dismiss the charges,[59] while, at the same time, providing against undue haste in the trial of the accused.[60]

It also prohibited interference with the independence of the court-martial,[61] and granted the right to challenge court members peremptorily as well as for cause.[62] It stipulated the number of members on courts-martial,[63] and included the accused's right to enlisted members.[64] It further provided for the method of voting on guilt,[65] and set the effective date at which a sentence would begin to run.[66]

Moreover, specific provisions protected the accused against double jeopardy,[67] provided a statute of limitations,[68] and banned unusual and cruel punishments.[69] In specific terms, the Code guaranteed the presumption of innocence [70] and placed the burden on the prosecution to prove guilt beyond reasonable doubt.[71]

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[52] Carter v. McClaughry, 183 U.S. 365, 401 (1902).
[53] Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950).
[54] Brosman, *The Court: Freer than Most*, 6 VAND. L. REV. 166, 167 (1953).
[55] Department of Defense Press Release, May 5, 1950.
[56] UCMJ art. 30, 10 U.S.C. § 830 (1958).
[57] UCMJ art. 31, 10 U.S.C. § 831 (1958).
[58] UCMJ art. 9, 10 U.S.C. § 809 (1958); UCMJ art. 10, 10 U.S.C § 810 (1958).
[59] UCMJ art. 10, 10 U.S.C. § 810 (1958).
[60] UCMJ art. 35, 10 U.S.C. § 835 (1958).
[61] UCMJ art. 37, 10 U.S.C. § 837 (1958); UCMJ art. 98(2), 10 U.S.C. § 898(2) (1958).
[62] UCMJ art. 41, 10 U.S.C. § 841 (1958).
[63] UCMJ art. 16, 10 U.S.C. § 816 (1958).
[64] UCMJ art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1958).
[65] UCMJ art. 51(a), 10 U.S.C. § 851(a) (1958).
[66] UCMJ art. 57, 10 U.S.C. § 857 (1958).
[67] UCMJ art. 44, 10 U.S.C. § 844 (1958).
[68] UCMJ art. 43, 10 U.S.C. § 843 (1958).
[69] UCMJ art. 55, 10 U.S.C. § 855 (1958).
[70] UCMJ art. 52(1), 10 U.S.C. § 852(1) (1958).
[71] UCMJ art. 51(4), 10 U.S.C. § 851(4) (1958).

Of equal importance with providing such substantive guarantees was the further necessity of insuring their implementation by competent and legally qualified personnel in all stages of the proceedings, including investigation, trial, and review. Prior to convening a general court-martial, the convening authority is required to refer the charges to his Staff Judge Advocate or Legal Officer for advice.[72] Nor shall the charges be referred to a general court-martial unless there has first been an investigation at which the accused is entitled to be present and represented by counsel.[73] In a general court-martial, both prosecuting (trial) and defense counsel must be qualified;[74] and, in a special court-martial, the accused is entitled to qualified counsel automatically if the trial counsel is qualified.[75]

In addition, the Code provided for a qualified Law Officer for every general court-martial.[76] He controls the conduct of the proceedings and rules on the admissibility of evidence and interlocutory matters. His functions have been compared to those of a Judge in a civil or criminal case, including the duty to instruct the court as to the elements of the offense, the presumption of innocence, and the burden of proof, though he does not himself vote on the question of guilt or the sentence to be adjudged.[77]

While the drastic demobilization after World War II reduced the Armed Forces by several millions, the crisis in Korea reversed the trend, and required the recalling of thousands of reserves and substantial increases in the draft quotas. The annual total of courts-martial, including general, special, and summary (but excluding non-judicial punishment under Article 15 for which there are no available figures), increased by over 1000,000 from 1951 to 1952–53, the peak year of the ten-year period 1951–1961. In the latter year, there were 310,501 courts-martial. Some estimate of the size of the disciplinary problem in the Armed Services can be made from the Annual Report of the Court of Military Appeals:[78]

Total Court-Martial cases:	
May 31, 1951–January 1, 1959	1,743,239
Cases Reviewed by Boards of Review	119,802
Cases Docketed with U.S. Court of Military Appeals	12,642
U.S. Court of Military Appeals Decisions	1,368

Subsequent figures would bring the total number of courts-martial to about 2,000,000 for the 1951–1961 period, with 127,314 cases considered by the Boards of Review, and about 15,000 cases docketed with the Court of Military Appeals.[79]

Though the trend in the number of disciplinary cases has been steadily and substantially downward, the latest available figures for the last two years, respectively, total 130,458 and 122,713 courts-martial.[80]

Ten years have now passed since the enactment of the Code. The cumulative experience under the Code is reflected in the twelve volumes (totalling over 9,000 pages) of the opinions of the Court of Military Appeals, the twenty-eight volumes of Court of Military Appeals Opinions and selected Board of Review Decisions, the Annual Reports of the Judges Advocate of the separate services, and the past and present suggestions for revision of the Code, varying from slight corrective measures to proposals which could approach fundamental repeal.

At this point in the Code's history, the first decade provides a sufficient period of time and accumulation of experience for a reliable appraisal of the results of the Code "in operation." St. John's Law School, under the leadership of Dean Harold F. McNiece, has chosen THE UNIFORM CODE OF MILITARY JUSTICE—ITS PROMISE AND PERFORMANCE as the subject of public observance of Law Day 1961. The school has brought together a number of eminent authorities who have collaborated in bringing the several important factors of such an appraisal into focus, in the hope that such a review will provide an authentic historical survey as well as possibly offering some constructive suggestions for legislative

[72] UCMJ art. 34(a), 10 U.S.C. § 834(a) (1958).
[73] UCMJ art. 32(b), 10 U.S.C. § 832(b) (1958).
[74] UCMJ art. 27(b), 10 U.S.C. § 827(b) (1958).
[75] UCMJ art. 27(c)(1), 10 U.S.C. § 827(c)(1) (1958).
[76] UCMJ art. 26, 10 U.S.C. § 826 (1958).
[77] UCMJ art. 26, 10 U.S.C. § 826 (1958); UCMJ art. 51(c), 10 U.S.C. § 851(c) (1958).
[78] [1958] ANN. REP. OF U.S.C.M.A. exhibit B, p. 31.
[79] Figures submitted by Armed Services.
[80] These figures are for fiscal year July 1–June 30.

changes and administrative improvements. Such an effort is well worth while as a contribution to the study of contemporary American law. In a deeper sense, this symposium has added significance as a pledge of support to the living symbol of even-handed and humane justice in the American Armed Services, maintaining military discipline as the essential foundation of national strength in a critical era of American history.

An Appraisal of Proposed Changes in the Uniform Code of Military Justice

Rear Admiral William C. Mott †

This discussion will encompass all the significant changes proposed to the Uniform Code of Military Justice, and especially those presently under consideration. This subject could conceivably be developed into a complete course; it is not surprising to find that volumes of material have been written on this subject. This brief discussion, therefore, will limit itself to a discussion of the philosophy of the various changes, and comments concerning their feasibility and desirability in general.

At the ouset, it should be stated that no change in the law should be favored unless there is a pressing need for the change recommended. This need is, however, not as clearly perceived as one might imagine, for need is always relative. Involved may be considerations of saving manpower, conserving funds or supplies, effecting better justice, or—and this is the facet of military justice that is too often overlooked by civilian groups—avoiding the adverse impact of a complicated and drawn out judicial procedure on discipline and justice in time of war. It is hardly necessary to point out that, no matter how desirable an ideal system of justice may be, if it impedes or hampers the efficient performance of the military function to protect our country, we may lose all in an attempt to be absolutely protective of the rights of individuals.

As a preliminary comment, it may be said that our present Uniform Code of Military Justice is, in general, working well. It has recognized the needs of discipline, operational efficiency, and conservation of manpower on the one hand, and the indispensable requisites of fairness and justice on the other. This is not to say, however, that it is perfect. Congress expressly recognized the possibility that this new, complex and comprehensive Code would require amendment based on experience. A provision was therefore written into the Code establishing a Code Committee which is required to make annual reports to Congress concerning the workability of the Code and to suggest amendments.

This logically brings us to the first recommendations for amendment to the Code. The Code Committee, which, incidentally, is composed of the Judge Advocate Generals of the several services as well as the Court of Military Appeals, proposed in 1953, seventeen changes to the Code designed to improve its workability and effectiveness. These seventeen changes, with little modification, were formalized and approved by the Secretaries of the several services, the Court of Military Appeals, the Secretary of Defense and the Bureau of the Budget. They were introduced in the last session of Congress in the form of a bill commonly referred to as the "Omnibus Bill". The philosophy of this proposed legislation was (1) to simplify certain procedures without depriving the accused of rights accorded in the Code, and (2) to increase commanding officers' nonjudicial punishment powers slightly, to improve discipline and to avoid the necessity of trial in certain minor cases. Incidentally, the identical proposal is now awaiting its transmission as an Executive Communication for introduction in the current session of Congress, having been reaffirmed by the present administration.

Basically, this is a sound piece of proposed legislation. The streamlining provisions, if enacted, would result in considerable savings in manpower without any restriction on the safeguards presently accorded an accused. The increase in nonjudicial punishment powers (a senior officer would have the additional power of imposing confinement for seven days and forfeiture of one-half of one month's pay) would go far towards the improvement of discipline through prompt and sure punishment of minor offenders without the intervention of a court-martial.

As a matter of interest it may be pointed out that there is almost universal agreement among all persons interested in the Code that the commanding offi-

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cer's nonjudicial punishment powers ought to be increased. The disagreement that exists is not whether these powers should be extended, but how much. On the other hand, any increase would have the desirable result of effecting a decrease in courts-martial, which are, after all, federal convictions; but on the other hand, a greater possibility might exist of arbitrary or unfair action by a commander who may be too closely associated with the offense to render a completely impartial judgment.

Let us move on, however, to the next significant piece of legislation that has been proposed. In January of 1959, the American Legion sponsored a bill that would effect sweeping changes in the Code. It was introduced as H.R. 3455 in the first session of the 86th Congress. The philosophy of this bill was the removal of every vestige or possibility of command influence upon the decisions of courts-martial, and the placement of the administration of military justice more nearly in line with civilian practice. Among the specific changes recommended were: prohibiting trials in time of peace for purely civilian type felony offenses; requiring lawyers on all inferior courts, the lawyers to be under the rating authority and command of the Judge Advocate General; authorizing the U.S. Court of Military Appeals to prescribe rules of procedure for all courts-martial; granting law officers of courts-martial the full status of a judge; and placing all boards of review under the Secretary of Defense.

The principal objection to this bill was that it was based on the premise that drastic measures were needed to eliminate command influence from courts-martial. This premise is faulty. While it cannot be denied that command influence is occasionally encountered, it is invariably corrected when it comes to the surface. Furthermore, no more than an extremely small percentage of commanders, either directly or indirectly, attempt to influence the actions of courts-martial. Thus, this bill in effect proposes sweeping changes to correct a relatively minor evil. It has been estimated, moreover, that its enactment would require up to 3,600 additional lawyers in uniform—at a time when we are having extreme difficulty in recruiting and retaining enough lawyers to keep abreast of present workloads.

It is interesting to note that the American Legion proposal did not recommend any increase in commanding officers' nonjudicial punishment powers. No one close to the problem of administering military justice can fail to appreciate the need for such an increase.

The next proposed legislation is the so-called "Powell Committee Report". In 1959, the Secretary of the Army convened a committee composed of nine general officers of the Army to study the Uniform Code of Military Justice as well as order and discipline in the Army. That committee, early last year, proposed sweeping changes to the Uniform Code of Military Justice, which are presently under study by the other services. The philosophy of this proposed legislation is difficult to put in a few words. Many of the proposed changes are intended to overrule decisions of the U.S. Court of Military Appeals. All of the provisions of the "Omnibus Bill" are adopted. Certain other changes are recommended which would move military justice back toward the old "paternalistic" system. The most significant changes, however, were these: an increase of commanding officers' nonjudicial punishment powers to the imposition of a maximum of ninety days "correctional custody" (a euphemism for confinement) and a forfeiture of one-half of three months pay; abolition of all courts but the general court-martial; removal from convening authorities of the power to act on findings; removal from boards of review of the power to act on sentences; creation of a new "sentence control board" which would have plenary power over all activities related to convicted persons; and increase of the membership of the U.S. Court of Military Appeals to five. The stated philosophical bases for the proposed changes were "fairness, decentralization, simplicity and stability".

The Navy Department has not yet formalized its position on all the changes recommended. In this connection, a poll of all senior Naval and Marine Corps commanders in the field was taken so that the impact of the changes upon command efficiency could be evaluated. The comments of these commanders are now under study. Thus, the official position of the Navy cannot be stated. However, this author is of the opinion that the proposed increase in commanding officers' powers is far too extensive; the abolition of the special court-martial will considerably complicate the administration of justice in the Navy, and there is no real need for many of the other conceptual changes proposed. In short, the Powell Committee report has placed idealism over practicability, and while

the aims of the committee are to be admired, many of the evils cited can be overcome by better administration, better training of personnel, or by executive action correcting errors that were built into the Manual for Courts-Martial—the presidential regulations which were promulgated to implement the Uniform Code of Military Justice. Those of us in uniform are sometimes too prone to seek changes rather than trying to operate efficiently wtih what we have.

The final piece of proposed legislation within the scope of this article is the report of the Special Committee on Military Justice of the Association of the Bar of the City of New York, dated March 1, 1961. This report concludes that the "Omnibus Bill" is fine as far as it goes, but that its chief defect is in failing to recognize needs for reform and improvement in certain limited areas. Concerning the American Legion Bill, this report comments that its reflection of dissatisfaction with the administration of the present system of military justice and general lack of faith in the integrity and competence of military lawyers is unfounded. The report proposes no sweeping changes; instead of proposes corrective legislation within the existing framework of the Code. For example, the most significant changes recommended are: an increase of commanding officers' powers to the same extent as recommended in the Omnibus Bill; the abolition of the summary court-martial; the creation of a single-officer special court-martial consisting of a specially designated lawyer; the removal of the power of a special court-martial to adjudge a bad conduct discharge; an increase in the qualifications and stature of law officers of general courts-martial; and the qualification of the statute prescribing finality of courts-martial judgments to empower the Board for the Correction of Military Records to remove the fact of a conviction in appropriate cases.

No real objection to the proposals contained in this report can be found, with the possible exception that the slight increase in commanding officers' powers is insufficient to compensate for the loss of the summary court-martial. Insofar as the Navy is concerned, the removal from special courts-martial of the power to adjudge bad conduct discharges would also be objectionable. The services must rid themselves of undesirable members, and the fairest way to do this is judicially, not administratively. If special courts-martial did not have this power, resort would have to be made to administrative processes, for general courts-martial would not be apropriate in many cases, such as those of repeated minor offenders.

When the Uniform Code of Military Justice was enacted in 1951, this author was Commanding Officer of the School of Naval Justice in Newport, the Navy's only law school. The drastic changes which the Code effected on the Navy's previous judicial system created many problems, for it was so new that in many areas we had to grope our way. Now, when sweeping changes to the Code are being proposed, the author is the Judge Advocate General of the Navy and as such, is intensely concerned for the adoption of the best possible system. In the ten intervening years, our people have adapted to, accepted and finally favored the safeguards and fairness built into the present system of justice which Congress has given us. This author would, therefore, retain the system as it exists, with only minor reforms or improvements as indicated by experience over the years. This is essentially the same position as that taken by the new Secretary of Defense with respect to organizational problems. I think it is a sound one.

The United States Court of Military Appeals and Military Due Process

Hon. Robert Emmett Quinn †

Ten years ago Congress created the United States Court of Military Appeals. That action has been described as the "most revolutionary" ever taken by Congress in carrying out its constitutional responsibility "to make Rules for the Government and Regulation of the land and naval Forces." [1] Establishment of the Court was revolutionary because, for the first time in American military law, it provided for direct review of courts-martial by a judicial tribunal composed entirely of civilian judges. Civilian review was regarded as "the 'most vital element' in the [new] reformation and unification of military criminal law. . . ." [2] Only the more serious cases, that is, cases in which a dishonorable

† Chief Judge of the Military Court of Appeals.

[1] H.R. Rep. No. 491, 81st Cong., 1st Sess. 6 (1949).

[2] Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 Vand. L. Rev. 228 (1953).

or bad conduct discharge was imposed or in which the accused was confined for one year or more, were made subject to review by the Court of Military Appeals. It was contemplated, however, that the Court would function as the "Supreme Court" of the whole military justice system, which includes the summary court-martial which has no power to impose a sentence of the kind subject to review by the Court of Military Appeals, and that the decisions of the Court would be applied in all courts-martial.[3]

In the decade that has passed since its creation, the Court of Military Appeals has been subject to searching critiques of its operations and decisions. The latter have been examined in depth by practicing lawyers, military and civilian alike, by professors and students of the law, and by others interested in military matters. As a new institution in the federal governmental structure, the Court itself has been both praised and damned. It has been the subject of a commendatory thesis for a doctoral degree in Government,[4] and it has been excoriated by others because they believe the Court has usurped the prerogatives of the President of the United States.[5] As Chief Judge, I welcome the careful and continued attention given to the Court by the general public and the bar. Not long after the Court published its first decision, I expressed the hope that the bar in particular would "follow closely" the work of the Court, and "tell the public, the services and us . . . whether we [were] performing properly our task of enunciating principles worthy of existence. . . ." [6] The array of spirited articles and commentary on the Court and its work is happy realization of that hope.

The current compliments and criticisms of the Court of Military Appeals parallel those attending its creation. The Court was established in the crucible of controversy. The controversy has ebbed and flowed through the first years of its existence. One student of the conflict has concluded that the Nation's experience with the Court has established civilian review of courts-martial as a fixed principle of military law.[7] Even one of the most outspoken critics of the Court has said that the "country is simply not going back to any system of military justice which lacks that safeguard." [8] I share that view entirely apart from my position as Chief Judge of the Court. It is appropriate, therefore, to review some of the decisions of the Court in its formative years—years, incidentally, which encompassed full-scale war conditions in Korea; the emergency situation in Lebanon, with its accompanying combat alert for a considerable part of our military forces; and the stationing of our land, naval and air units all over the world. These decisions are the foundation of the administration of military justice in the years ahead, whether those years be years of peace; years on the brink of war; or years of war itself.

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[3] There are three courts-martial in the military system, the summary, the special, and the general court-martial. The first is composed of a single officer, and the trial is conducted on a very informal basis. The second is composed of at least three officers and enlisted personnel, if enlisted presonnel are specially requested by the accused. The general court-martial is composed of at least five members. The "judge" in the special court-martial is the President of the court-martial, but his rulings on interlocutory questions are subject to objection by the other members. See United States v. Bridges, 12 U.S.C.M.A. 96, 30 C.M.R. 96 (1961). The judge in the general court-martial is the law officer; his rulings on interlocutory matters, except on a question of insanity or a motion for a finding of not guilty, are not subject to objection by a court member. Uniform Code of Military Justice art. 51(b), 10 U.S.C. § 851(b) (1958) [hereinafter cited as UCMJ]. The course of review of a conviction varies according to the court and the sentence adjudged. All cases are revied initially by the convening authority. UCMJ art. 64, 10 U.S.C. § 864 (1958). Thereafter, review of summary and special court convictions in which the sentence does not include a bad conduct discharge is in the Office of The Judge Advocate General of the accused's armed force. Special and general court convictions resulting in a punitive discharge, or confinement at hard labor for one year or more, or cases affecting a general or flag officer are reviewed by a board of review appointed by The Judge Advocate General of the accused's service. Cases reviewed by the board of review are either appealable to the Court of Military Appeals or subject to mandatory review. UCMJ arts. 65–67, 10 U.S.C. §§ 865–67 (1958).

[4] Feld, the United States Court of Military Appeals: A Study of the Origin and Early Development of the First Civilian Tribunal for Direct Review of Courts-Martial (1951–1959), Georgetown Univ. Lib. (1960).

[5] Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N. Y. U. L. REV. 861 (1959); Jarrell, *The Vanishing American Naval Officer*, 80 U.S. NAVAL INST. PROC. 969 (Sept. 1954); Rydstrom, *Self-Incrimination Refined*, 19 JUDGE ADVOCATE, JR. 1 (Feb. 1955).

[6] Quinn, *The Court's Responsibility*, 6 VAND. L. REV. 161, 162 (1953).

[7] Feld, *op. cit. supra* note 4, at 222.

[8] Wiener, *Soldiers Versus Lawyers*, 9 ARMY 58, 62 (1958).

DEVELOPMENT OF MILITARY DUE PROCESS

Fundamental to the American system of law is the idea of due process. The idea itself defies easy definition and, more often than not, is recited in terms of specific prohibitions on the sovereign or as rights of the individual. In any event, it is the responsibility of the courts to give effect to the doctrine. As the highest court in the military judicial system, the Court of Military Appeals is intrinsically responsible for the military's observance of, and compliance with, the limitations and the rights embraced in the principle of due process. The responsibility is emphasized by the fact that, on completion of appellate review, a court-martial conviction is "binding" upon all "departments, courts . . .and officers of the United States. . . ." [9]

Judged by its first opinion on the subject, the Court's approach to due process appeared to be a narrow one. In *United States v. Clay*,[10] the prosecution was for two minor offenses. The accused, a hospitalman in the Navy, was charged with breach of the peace for fighting with some Koreans in Pusan, Korea, and with improperly wearing the uniform. Brought to trial before a special court-martial, he entered a plea of not guilty to the first charge and a plea of guilty to the other. Articles 51(c) of the Uniform Code of Military Justice requires that before the court-martial deliberates on the findings it must be instructed on the elements of the offenses charged, the presumption of innocence, and on the burden of the government to establish guilt beyond a reasonable doubt. No such instructions were given. The accused was convicted, and the conviction was in due course affirmed by a board of review in the Navy. The Court of Military Appeals reversed the conviction because the accused was denied "necessary elements of military due process." [11] Just what the Court meant by prefacing "due process" with the word "military" became a matter of considerable debate. The point in issue was whether "military due process" was limited to the provisions of the Uniform Code of Military Justice, and was something apart from the constitutional due process which prevailed in the federal civilian courts.

Those who argued that military due process was something apart from the regular federal due process relied upon certain language in the *Clay* opinion. The opinion said that the Court did not "bottom" the due process requirements for military courts on the United States Constitution but "base[d] them on the rights granted by Congress to military personnel." This language was interpreted as a ruling that the Uniform Code of Military Justice was the sole source of due process rights in the military justice system. Whether the advocates of this restricted concept of statutory due process read too much into the *Clay* opinion need not detain us. A significant supplement to the *Clay* case was the opinion in *United States* v. *Lee* [12] which the Court handed down some three months later.

In the *Lee* case the question before the Court was whether the trial counsel, who acts as the prosecuting attorney, was disqualified because he made an informal investigation of the facts before the filing of charges and had signed the formal charge sheet against the accused. Article 27(a) of the Uniform Code prohibits a person who has acted as the investigating officer in a formal investigation of charge from thereafter acting as trial counsel. Proceeding on the assumption that trial counsel should have been disqualified because of his previous connection with the case, the Court went on to consider what errors of procedure would justify reversal of a conviction where there is a statutory provision, as there is in the Uniform Code, that a conviction shall not be reversed for error of law "unless the error materially prejudices the substantial rights of the accused."[13] It noted with approval the general rule that errors of substance fall into two categories, the first being "a recognizable departure from a constitutional precept, and, [the] second, where it constitutes a departure from

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[9] UCMJ art. 76, 10 U.S.C. § 876 (1958). It should be noted that a court-martial conviction, like a conviction in a civil court, is subject to collateral attack on the ground of lack of jurisdiction in the broad sense, which includes deprivation of a fundamental right. Note, *Military Law—Due Process—Review of Courts-Martial on Petition for Habeas Corpus*, 21 GEO. WASH. L. REV. 492 (1953). There are also other means of collateral attack such as suit in the Court of Claims to recover a fine or forfeiture. See Johnson v. United States, 280 F. 2d 856 (Ct. Cl. 1960).

[10] United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[11] *Id.* at 82, 1 C.M.R at 82.

[12] *United States* v. *Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

[13] UCMJ art. 59(a), 10 U.S.C. § 859(a) (1958).

an express command of the legislature."[14] This was implicit acknowledgment that constitutional precepts were constituent elements of due process in courts-martial. The remainder of the opinion which deals with what came to be called the doctrine of general prejudice added force to the acknowledgment.

Judge Brosman, who wrote the opinion of the Court, conceived the phrase "general prejudice" to describe certain rights of an accused which were neither constitutional nor statutory. He had an unusual command of language and a flair for the dramatic, but it was not these qualities which led him to propose the new terminology. He spoke of general prejudice as existing when there was an "overt departure from some 'creative and indwelling principle'— some critical and basic norm operative in the area under consideration," without regard to whether the departure also constituted "a violation of constitutional or legislative provisions."[15] The opinion indicates a conviction that due process in courts-martial does not rest exclusively on statute. That was the real lesson of the *Lee* case. At the time, its meaning was not fully undersood. Part of the reason, perhaps was the close parallel between the rights accorded an accused in the military by the Uniform Code and those granted to defendants in a civil criminal prosecution by constitutional due process.[16] Usually, therefore, it was unnecesary to look beyond the Uniform Code of Military Justice and the supplementary provisions of the Manual for Courts-Martial, United States, 1951, which were promulgated by the President in accordance with the authority granted by Congress to prescribe the "procedure, including modes of proof in cases before courts-martial"[17] for the delineation of military due process rights. About a year after the *Lee* case, however, the Court was faced with an ostensible conflict between a provision of the Uniform Code and a principle of civilian due process. The case was *United States v. Sutton*.[18]

Marine Corps Private Alton D. Sutton was charged with shooting himself in the hand in order to avoid military service, and with two other offenses. At his trial by general court-martial in the United States, the prosecution introduced in evidence the answers to written interrogatories obtained from a Government witness stationed in Korea. Neither the accused nor his counsel was present at the taking of the deposition, although defense counsel had been given the opportunity to submit written cross-interrogatories. The deposition procedure was allegedly sanctioned by Article 49 of the Uniform Code. In pertinent part, that article provides that any party may take an oral or written deposition upon giving reasonable notice of the time and place for the taking to the other party. Elaborating on this provision, the Manual for Courts-Martial directs that, in the case of a deposition on written interrogatories, the party desiring the deposition shall submit to the opposing party a list of the questions to be propounded and allow him a reasonable time to submit cross-interrogatories and objections.[19] A majority of the Court held that, while the accused was not accorded the right to confront the witness against him, the procedure did not violate military due process. While a majority agreed on the result, each judge advanced a basically different reason for agreement.

The principal opinion held that the "source and strength" of the military due process was the Uniform Code, and that the Code could limit constitutional due process. I dissented strongly from that view; and I warmly approved the statement by Chief Justice Vinson in *Burns v. Wilson* that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."[20] Judge Brosman, who joined in the principal opinion, upheld the deposition procedure on the ground that it was a "necessary" exception to the constitutional right of confrontation.

The *Sutton* case sustained a procedure which had no counterpart in the federal courts, but the separateness of the grounds upon which concurrence in the result was obtained did not wipe out the significance of the *Lee* case. The Constitution was still the primary point of reference for military due process. Forthright reaffirmation of that dogma was set out in the separate opinions in *United States v. Ivory*.[21] And, more than such reaffirmation, a later reexamination of the deposition procedure resulted in unequivocal rejection of the *Sutton* decision.[22]

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[14] United States v. Lee, 1 U.S.C.M.A. 212, 216, 2 C.M.R. 118, 122 (1952).
[15] *Id.* at 217, 2 C.M.R. at 123.
[16] United States v. Clay, *supra* note 10, at 77–78, 1 C.M.R. at 77–78.
[17] UCMJ art. 36(a), 10 U.S.C. § 836(a) (1958).
[18] 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).
[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 117b.
[20] 346 U.S. 137, 142, *rehearing denied*, 346 U.S. 844 (1953).
[21] 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1958).
[22] United States v. Jacoby, 11 USC.M.A. 428, 29 C.M.R. 244 (1960).

It can be said, therefore, that military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different. How much more and how much different is indefinable in general terms for all possible situations. A discussion of the Court of Military Appeals' approach to specific rights and procedures in courts-martial will serve to illumine the nature and the scope of due process in the military judicial system.

United States v. *Clay* listed twelve basic rights, ranging from the right to be informed of the charges to the right to appellate review of the legality of the findings of guilty and the sentence. The Court expressly noted that the listing was not "intended . . . [to be] all-inclusive." [23] In the decade since the *Clay* case other rights, such as the right to have the court-martial free from the influence of command order, policy, or psychological pressure,[24] have been added to the list, and rights previously listed have been given wider application to effectuate the spirit and the letter of provisions of the Uniform Code.[25] Detailed consideration of even the original enumeration of basic rights is much beyond the scope of this article. Two rights of wide application have been selected for review.

THE RIGHT TO COUNSEL

A passage from the opinion of the United States Supreme Court in *Powell v. Alabama,*[26] is frequently quoted in cases concerning the constitutional right to have assistance of counsel in defending against a criminal charge. It is that an accused "requires the guiding hand of counsel at every step of the proceedings against him." [27] There are three main steps in a criminal prosecution, namely, the pretrial proceeding; the trial itself; and appellate review. That the accused is entitled to legal assistance during the trial is well-settled and well-known. Less clear, and certainly less known, is the operation of the right in the pretrial and post-trial proceedings. In fact, the right to counsel's assistance during a prelminiary investigation by law enforcement agents in the pretrial proceeding has only recently come before the United States Supreme Court.[28] The right to counsel in this critical period is, however, clearly marked out in military law by both the Uniform Code and the decisions of the Court of Military Appeals.

The right to counsel was expressly incorporated by Congress into the Uniform Code regarding offenses to be tried by general court-martial, the highest trial

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[23] 1 U.S.C.M.A. 74, 78, 1 C. M. R. 74, 78 (1951).

[24] See United States v. Shepherd, 9 U.S.C.M.A. 90, 25 C.M.R. 352 (1958); United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

[25] One of the rights enumerated in the *Clay* case is the right to exclusion of an involuntary confession from consideration by the court-martial. The fifth amendment provides that no person shall be compelled in any criminal case to be a witness against himself. The right is enlarged by Article 31 of the Code. Besides reiterating the constitutional provision, it provides as follows: "No person subject to this code may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." UCMJ art. 31(b), 10 U.S.C. § 831(b) (1958).

No similar requirements exist in the federal courts, although as a matter of practice, agents of the Federal Bureau of Investigation advise a suspect that he need not say anything, but if he does speak, anything he says may be used against him in a trial by court-martial UCMJ art. 31(b), 10 U.S.C. § 831(b) *Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24, 64–65 (1960). *But cf.* United States v. Holder, 10 U.S.C.M.A. 448, 28 C.M.R. 14 (1959). The purpose and policy of Article 31 have led the Court to reverse a conviction where evidence has been admitted in violation of the requirement of advice, without regard to whether the other competent evidence of guilt is compelling. United States v. Williams, 8 U.S.C.M.A. 443, 24 C.M.R. 253 (1959). At the same time, it should be noted that despite the broad language of the article, which applies to all persons subject to the Code, the Court has held that the interrogation leading to a statement by the accused must be of an official nature, and of a kind which is concerned with the search for evidence of crime. If the accused makes an incriminating statement in response to a question put to him by a person acting in a private capacity, as distinguished from an official capacity, or in an investigation other than that looking to obtain evidence of crime, the statement is admissible without the preliminary requirement of advice. See United States v. Souder, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959).

[26] 287 U.S. 45 (1932).

[27] *Id.* at 69.

[28] *In re* Groban, 352 U.S. 330 (1957).

court in the military justice system.[29] Article 32 provides that no charge may be referred to a general court-martial for trail until "a thorough and impartial investigation" of the charge has been made. A loose analogy between this pretrial investigation and the customary preliminary hearing in the civilian criminal law may be drawn. There are also important differences. As in the civilian community, a determination in the preliminary hearing that the available evidence against the accused is insufficient to support a conviction does not bar further proceedings. Just as the grand jury may return an indictment, despite the defendant's discharge at the hearing,[30] the recommendation of the investigating officer that the charge be dropped, is not binding upon the court-martial authority who ordered the investigation; the decision to refer a charge to trial to a particular court-martial or to dismiss it, is his alone.[31] In the civilian community the accused has, at best, only only a limited right to discover before trial the evidence available against him;[32] in military practice he is given a copy of the entire pretrial investigation, including the statements of witnesses and other evidence considered by the investigating officer.[33] The pretrial investigation is, therefore, an important means of discovery, since the accused is accorded the right to have the investigating officer call all "available witnesses" and to cross-examine those witnesses. If a verbatim record of the testimony is made, the transcript is admissible in evidence at the trial should a witness die or be unable to attend the trial because of illness or distance.[34] It is apparent, therefore, that the pretrial investigation in the military is no mere formality, but a substantial right of, and protection to, the accused. It is so "integral" a part of the court-martial proceedings, that a material departure from its requirements will, upon the accused's timely objection, entitle him to reversal of his conviction.[35]

Given the purposes and the consequences of the pretrial investigation, it is not surprising to find that the accused is accorded the right to be represented by counsel at the investigation. He has three choices. First, he may select his own counsel from the civilian community. The person chosen must be a member of the bar, whether that bar is the bar of the highest court of any state of the Untied States, the bar of a federal court, or the bar of a foreign country.[36] If the accused exercises that choice, he must pay the fees of his counsel. Second, the accused may select military counsel of his choice. The option here is subject to counsel's reasonable availability.[37] Third, if the accused does not desire either civilian or military counsel of his own choice, he has the right to have counsel appointed for him. Whether selected or appointed, defense counsel in a general court-martial must be professionally qualified.[38]

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[29] See note 3 *supra*.

[30] See United States v. Gray, 87 F. Supp. 436 (D.D.C. 1949).

[31] UCMJ art. 34(b), 10 U.S.C. § 834(b) (1958). United States v. Greenwalt, 6 U.S.C.M.A. 569, C.M.R. 285 (1955).

[32] See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Dierker, 164 F. Supp. 304 (W.D. Pa. 1958).

[33] UCMJ art. 32(b), 10 U.S.C. § 823(b) (1958). See United States v. Samuels, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); United States v. Nichols, 8 U.S.C.M.A. 119, 23 C.M.R. 343 (1957).

[34] United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953). Normally no counsel is appointed to represent the Government in the Article 32 investigation. As a result, it has been argued that a transcript of a witness's testimony would be inadmissible against the Government. To overcome the defect, it has been suggested that the accused move for appointment of counsel to represent the Government if he "anticipates use at the trial of the transcript" of the testimony. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL, § 23, p. 40.

[35] United States v. Nichols, *supra* note 33; see also United States v. Mickel. 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958).

[36] See United States v. Sears, 6 U.S.C.M.A. 661, 20 C.M.R. 377 (1956). The fact that civilian counsel may be a member of the bar of a foreign country can be a matter of considerable importance to an accused. The Uniform Code operates worldwide; that is, it attaches to our Armed Forces wherever they are stationed, whether in outlying possessions of the United States or in foreign countries and territories. UCMJ art. 5, 10 U.S.C. § 805 (1958). See Duke & Vogel, *The Constitution and the Standing Army; Another Problem of Court-Martial Jurisdiction,* 13 VAND. L. REV. 435 (1960), which questions the right of Congress to make certain civilian type offenses triable by court-martial in time of peace. Consequently, the accused's freedom to choose counsel from among the bar of a foreign country in which he is stationed is a valuable right. At the same time, this liberality of choice poses a problem in a prosecution involving the disclosure of classified material. Ordinarily, the accused cannot be deprived of his right to counsel of his own choice on the ground that the lawyer he chooses does not have a security clearance. United States v. Nichols, *supra* note 33. Whether this rule, applies where the accused selects counsel from a country "behind the Iron Curtain" has never come before the Court of Military Appeals, and it may be considered an open question.

[37] UCMJ art. 26, 10 U.S.C. § 826 (1958); United States v. Vanderpool, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954).

[38] UMCJ art. 27(b), 10 U.S.C. § 827(b) (1958); United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

Pretrial investigation is of course not limited to the formal preliminary hearings under Article 32 of the Uniform Code. As in the civilian community, informal investigation by law enforcement agents is the initial, and perhaps, most important means of obtaining evidence against the accused. Military police investigations are generally circumscribed by the same constitutional and statutory safeguards that protect an accused in the civilian community. For example, evidence obtained by unlawful search or by wiretapping is inadmissible in a court-martial on the same bases that forbid introduction of such evidence in a prosecution in a federal district court.[39] As for the right to counsel, military law, like the regular federal law, does not give a suspect the right to have counsel appointed to assist him during interrogation by the police. He cannot, however, be "precluded from obtaining necessary legal advice," and to have his own lawyer "present with him during [his] interrogation. . . ."[40] Denial of these rights will make a confession obtained from the accused in the course of the interrogation inadmissible in evidence at the trial.[41]

Turning to the right to counsel on appeal from a conviction, Rule 44 of the Federal Rules of Criminal Procedure indicates that a convicted accused can obtain appointed counsel only if he lacks the pecuniary ability to pay for an attorney of his own choice.[42] No such limitation exists in the military. Congress, through the Uniform Code has accorded full sweep to the right of assistance of counsel, and has given the accused the same right to appointed military counsel for the purpose of appeal as he has for the formal pretrial proceedings, and for the trial itself, without consideration of his ability to pay for a civilian lawyer.[43] The right to appointed counsel extends to all levels of appellate review.[44] The right to the assistance of counsel means more than having a lawyer stand or sit beside the accused. It means that counsel must truly assist; he must actually represent the accused. If the representation of counsel is so lacking in diligence or competence as to reduce the proceedings to a sham, the accused is entitled to reversal of his conviction.[45] The rule also applies to representation at the appellate level.[46]

Special provisions in military practice give rise to certain qualifications of the general rule. Unlike the usual situation in civilian courts, an accused in the military can be brought to trial on offenses which are entirely dissimilar in nature and which were committed at different times. The military rule is that all known offenses should be joined in a single charge sheet and referred to trial

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[39] It is appropriate to point out that the analogy is not wholly applicable so far as judicial "policy" safeguards are concerned. Thus, the rule of Mallory v. United States, 354 U.S. 449 (1957) which prohibits admission into evidence of a confession obtained from the defendant during an unreasonable delay between arrest and preliminary hearing has not been carried over into court-martial practice. United States v. Moore, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954); United States v. Dicario, 8 U.S.C.M.A. 353, 24 C.M.R. 163 (1957).

[40] United States v. Gunnels, 8 U.S.C.M.A. 130, 133, 135, 23 C.M.R. 354, 357, 359 (1957).

[41] United States v. Gunnels, *supra* note 40. *Cf.* Escute v. Delgado, 282 F. 2d 335 (1st Cir. 1960). A number of states have statutes granting an accused the right to communicate and consult with counsel whenever he is placed in restraint or under interrogation by the police. A violation of such a statute is generally not regarded as making inadmissible an incriminating statement made during the interrogation. H. B. & E. A. Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment,* 27 BROOKLYN L. REV. 24, 61 n. 174 (1960).

[42] See United States v. Arlen, 252 F. 2d 491 (2d Cir. 1958. *Cf.* Lee v. United States, 235 F. 2d 219 (D.C. Cir. 1956) which appears to hold that a defendant is entitled to appointed counsel if he either cannot or *does not* select his own.

[43] UCMJ arts. 38(c), 70, 10 U.S.C. §§ 838(c), 870 (1958).

[44] Depending upon the court and the court-martial power of the convening authority, there are either three or four such levels of review. See note 3 *supra.* For the nature of, and the limitations on, appellate review see UCMJ arts. 66–67, 10 U.S.C. §§ 866–67 (1958). FELD, MANUAL OF COURTS-MARTIAL PRACTICE, §§ 87, 97, 102, 118.

[45] There is no definite standard by which to judge the incompetency or inadequacy of counsel. Each case depends upon its own facts. A few illustrations will suffice to show the variety of possible situations. A lawyer who concedes guilt in final argument, although the accused entered a plea of not guilty and testified on the merits offering a valid defense, deprives the accused of effective assistance of counsel and reversal of the accused's conviction is required. United States v. Walker, 3 U.S.C.M.A. 355, 12 C.M.R. 111 (1953). Similarly, a lawyer who sits silently through the trial, offering nothing and saying nothing on behalf of the accused, although the record shows the ready availability of substantial evidence favorable to the accused, does not provide the degree of comptent assistance to which an accused is entitled. United States v. McFarlane, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957). Counsel may not repdesent an accused when such representation conflicts with his obligation to another client who is a government witness. United States v. Thornton, 8 U.S.M.C.A. 57, 23 C.M.R. 281 (1957). See also Avins, *The Duty of Military Defense Counsel to an Accused,* 58 Mich. L. Rev. 347 (1960).

[46] See States v. Fisher, 8 U.S.C.M.A. 306, 24 C.M.R., 206 (1957).

at the same time. Also the court members, who in the main act like the jury in the civilian court, not only determine the accused's guilt or innocence, but also impose the sentence. As a result, it is possible for inadequacy of representation to extend only to one of several charges, or only to the sentence but not the findings of guilty. To understand this limited effect of inadequate representation, it must first be understood that ineffectiveness of counsel does not deprive the court-martial of the power to proceed to verdict and sentence.[47] In other words, lack of effective assistance of counsel is not jurisdictional in the sense that the proceedings are wholly void.[48] Rather, they may be considered voidable to the extent they are affected by counsel's inadequacy. Two cases decided by the Court of Military Appeals provide good illustrations of the way the limitation operates.

In *United States* v. *Gardner*[49] the accused was charged with three specifications of larceny, and with one specification of failing to obey an order. He pleaded guilty to two of the larcenies, but not guilty to the third larceny and to the charge of violating an order. The meaning and effect of the plea of guilty were fully explained to him and he was advised he did not have to plead guilty. Still, he persisted in the plea of guilty to the two larcenies. The trial proceeded as to the offenses to which the accused pleaded not guilty. The court-martial found the accused guilty of the third larceny, but acquitted him of the order offense. On review of the case, the Court of Military Appeals held that it was unmistakably clear from the record that defense counsel's knowledge of trial practice "was so deficient as to result in inadequate representation." However, it went on to point out that the offenses to which the accused had pleaded guilty were completely unrelated to the contested issues. It further noted there was no claim that the accused had entered the plea of guilty on the mistaken advice of counsel, or that he had any defense to the charges to which he pleaded guilty. It concluded that, in these circumstances, reversal of the findings of guilty based on the free and voluntary plea of guilty was not justified. Accordingly, it set aside only the findings of guilty as to which the accused had pleaded not guilty and it directed a rehearing on these charges and the sentence.[50]

The second case is *United States v. Winchester*.[51] There the accused was brought to trial with a co-accused. He entered a plea of guilty to four charges including one of larceny of government rifles for the purpose of sale in Mexico. He was represented by individual military counsel whom he had specially requested. The co-accused entered a plea of not guilty. The prosecution and the co-accused proceeded to present their respective cases. When they had rested, the accused, against his own counsel's advice, insisted on taking the stand. He gave an account of his dealings with his co-accused which amounted to a confession of the larceny charge. However, the accused attempted to take the blame for originating the idea of the theft and for persuading the co-accused to join him in the undertaking. His counsel thereupon moved to be relieved from further participation in the case because he had "reason to believe that [the accused had] perjured himself." He also added that if he continued as defense counsel he would labor "under certain mental difficulties" in presenting the case for the

[47] United States v. Gardner, 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958).

[48] It should be noted that there is a difference in "jurisdiction," from the standpoint of power to proceed to verdict, and "jurisdiction" from the standpoint of collateral attack upon the validity of a conviction by means of habeas corpus. In the latter situation jurisdiction is given an expanded meaning. See United States v. Vanderpool, 4 U.S.C.M.A. 561, 10 C.M.R. 135 (1954).

[49] 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958).

[50] To the uninitiated in military practice, the disposition directed by the Court probably needs some explanation. In civilian practice, error as to one or several counts of a multiple count indictment ordinarily presents no special problem. The appellate court either ignores the error and sustains the sentence because it is supported by the "good" counts; or it merely dismisses the "bad" count, and returns the case to the lower court for resentencing of the accused on the remaining counts. Also sentence is imposed on each count which may be made to run consecutively or concurrently. Under military law, the sentence is single; it embraces all the offenses of which the accused is convicted; and, as previously indicated in the text, unrelated offenses can be and, in fact, are required to be brought to trial at the same time. Moreover, intermediate appellate courts have power to reduce or modify the sentence. As a result, in a case in which there is error affecting only some of several charges against the accused, the findings of guilty affected by the error may be set aside, along with the sentence, and a rehearing directed as to those findings and the sentence. Consideration will be given during the sentence proceedings to the previously affirmed findings of guilty. United States v. Field, 5 U.S.C.M.A. 379, 18 C.M.R. 3 (1955); see also United States v. Oakley, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

[51] 12 U.S.C.M.A. 74, 20 C.M.R. 74 (1961).

accused on the sentence. These remarks were made in the presence of the court members who, as indicated earlier, pass on both the findings and the sentence. Counsel was not relieved, and the accused was convicted and sentenced. The case came before the Court of Military Appeals on petition for review filed by the accused in which he contended he was denied due process because his lawyer was so lacking in diligence and professional competency as to make his trial a sham. The Court held that the accused's voluntary plea of guilty and sworn testimony showed there could be no possibility of prejudice because of his counsel's alleged inadequacy in regard to the findings of guilty. It reached a different conclusion as to the sentence. Considering the remarks made by defense counsel in open court, the Court held that his representation of the accused during the sentence stage of the proceedings had "the appearance of perfunctory formalism."

Professional competency raises the question of the accused's right to reject the counsel appointed for him. The accused has no right to refuse appointed counsel because counsel is newly admitted to the bar, and the accused thinks he is not capable of representing him.[52] However, where there is genuine difference of opinion affecting the merits of the case, or where there is an honest clash of attitudes and personalities between the accused and his appointed counsel, which makes preparation of the defense case difficult, substitution of counsel is proper.[53]

THE RIGHT TO A FAIR HEARING

Even the most skilled and ingenious counsel is worth little to an accused, if the trial is before a court that is prejudiced against him. Due process demands a fair hearing. A variety of circumstances may make the hearing unfair. It is familiar learning, for example, that a biased judge is disqualified from presiding at the trial. We may argue over the source of our ideals of justice and fair play but we are all convinced of the need for them in the administration of the law.[54]

The standards of fairness that obtain in the federal courts also obtain in courts-martial. In fact, the comprehensive revision of military law effected by the Uniform Code of Military Justice plainly indicates that courts-martial are to be guided by the principles of law and proceedings recognized in the federal courts.[55] Starting with its first case the Court of Military Appeals has looked to the federal courts for precedent. But, it has not followed the federal precedents without independent reappraisal of their validity. As Judge Brosman pointed out, the Court is "freer than any in the land—save . . . the Supreme Court— . . . to seek, newfledged and sole, for *principle* . . . unburdened by precedents demonstrated by the test of time and experience to be unrealistic, ill-devised, or out-moded." [56] Indeed, it has anticipated the Supreme Court in some instances.[57]

While it can be said that military courts apply the same criteria as the federal courts to determine the fairness of the hearing accorded the accused, there is a difference in emphasis and scope. Some of the differences merit particular attention.

An unbiased jury is, of course, a *sine qua non* for a fair hearing. The requirement is basic in courts-martial, but the requirement is more difficult to apply. Although the function of the court members is substantially like that of jurors in the civilian court, they do not act like jurors.[58] Jurors in a civil trial seldom ask questions, and almost never call for a witness not previously called by one of

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[52] *Spaulding* v. *United States*, 279 F. 2d 6 (9th Cir. 1960).

[53] *United States* v. *Bell*. 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960); see also *United States* v. *Howell*, 11 U.S.C.M.A. 712, 29 CMR 528 (1960).

[54] Chief Justice Earl Warren of the United States Supreme Court has said that due process is rooted in our "American ideal of fairness." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[55] UMCJ art. 36, 10 U.S.C. § 836 (1958).

[56] Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166, 167–68 (1953).

[57] See *Rathburn* v. *United States*, 355 U.S. 107 (1957); *United States* v. *DeLeon*, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955).

[58] In some respects the powers of court members are much different from jurors. A court member can overrule the law officer of a general court-martial on a motion for a finding of not guilty, the equivalent of a directed verdict. UCMJ art. 51(c), 10 U.S.C. § 851(c) (1958); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956); United States v. Berry, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952). A number of proposals to deprive court members of this right and to make them virtually like civilian jurors have been presented, but no action has been taken by Congress to amend the Uniform Code.

the parties. The practice is different in the military. Court members are authorized to participate in the trial. Article 46 of the Uniform Code provides that the court shall have "equal opportunity" with the Government and the accused to obtain witnesses. In practice, they call new witnesses and they often question the witnesses called by the Government and the defense.[59] Such participation always raises the question of bias and partisanship. Where does an impartial interest in eliciting facts for a better informed judgment on the accused's guilt or innocence leave off, and an interest in proving the prosecution's case begin? That is not an easy question to answer, especially since nuances in voice and gesture are not readily apparent in the pages of the record of trial. Judge Latimer recently noted that when "court members decide to try their hands at the art of cross-examination they usually select the witnesses favorable to the defense as their victims," and thereby become subject to the charge of being "pseudo-prosecutors seeking to salvage a case for the Government."[60] Even a single question or remark may indicate bias.[61] Consequently, the appellate tribunal reviewing the record of trial must be particularly sensitive to the questions asked by the court members in order to safeguard the accused's right to a fair trial.[62]

Until recently, other conduct by court members also had to be examined carefully for possible bias. Under the provisions of paragraph 55 of the Manual for Courts-Martial if the court members believe that the evidence presented by the prosecution is either insufficient to convict or shows the commission of an offense other than that charged, it may suspend the trial and ask the convening authority for further instructions. Several serious objections to the propriety of this procedure are apparent. Among other things, it appears to constitute "the court an advisory body for the convening authority."[63] However, a majority of the Court on first consideration of the procedure did not consider it to be unfair to the accused. As a result, whenever there was a suspension of proceedings under the Manual provision, it was necessary to scrutinize what transpired to determine if the court members had aligned themselves with the prosecution. Recent re-examination of the practice in light of added experience with it resulted in its rejection. In *United States v. Johnpier*[64] a question arose over whether the evidence showed the accused had committed the offense of suffering a prisoner to escape, the offense charged, or the offense of releasing a prisoner without proper authority. The proceedings were suspended under paragraph 55 to obtain further direction from the convening authority. About a month later, the court-martial was reconvened on direction from the convening authority to continue the trial on the offense charged. The law officer thereupon declared a mistrial. One of the reasons he gave was that it was apparent that there was a conflict of opinion between him and the convening authority as to the nature of the offense shown by the evidence; and he believed that his position as the judge of the court was seriously compromised by the convening authority's direction. The Court upheld his ruling. It said:

Since one of the two reasons given by the law officer is plainly sufficient to support his ruling, there would ordinarily be no need to discuss the remaining reason. However, suspension of the proceedings under paragraph 55 of the Manual is too important a matter to be passed over without comment. In United States v. Turkali, 6 USCMA 340, 20 CMR 56, the concurring opinion alluded to some of the dangers inherent in the procedure. It was pointed out that the procedure is "one-sided" and, therefore, unfair, in that it gives the Government a preliminary "advisory opinion" on the court's attitude toward the evidence. This case confirms the present-day inappropriateness of the procedure, and gives substance to the idea that it tends to make the law officer a "mere figurehead" in the trial.

Appellate defense counsel contend that since the procedure of suspension is sanctioned by the Manual and by the decision of the majority of this Court in

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[59] United States v. Parker, 7 U.S.C.M.A. 182, 21 C.M.R. 308 (1956).
[60] United States v. Flagg, 11 U.S.C.M.A. 636, 640, 29 C.M.R. 452, 456 (1960).
[61] United States v. Lindsay, 12 U.S.C.M.A. —, 30 C.M.R. — (1961); United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).
[62] United States v. Marshall, 12 U.S.C.M.A. 117, 30 C.M.R. 117 (1961); United States v. Blankenship, 7 U.S.C.M.A. 328, 22 C.M.R. 118 (1956).
[63] United States v. Turkali, 6 U.S.C.M.A. 340, 346, 20 C.M.R. 56, 62, (1955) (Quinn, C. J., concurring).
[64] 12 U.S.C.M.A. 90, 30 C.M.R. (1961).

the *Turkali* case, there was no possible justification for the law officer's conclusion that his authority was undermined by the convening authority's direction to continue with the trial. There are, however, "nuances" in the atmosphere of a trial which cannot be fully depicted in the cold pages of the record of trial. United States v. Gori, 282 F.2d 43 (CA 2d Cir.) (1960). One of the nuances in this case indicates rather clearly that the law officer was convinced the convening authority's direction seriously compromised his position as the judge of the court, and gave rise to substantial doubt whether the court-martial would remain uninfluenced by the apparent "victory" of the convening authority on a point of law. Cf. United States v. Knudson, 4 USCMA 587, 16 CMR 161. The pages of the record confirm his feeling. Also, the law officer was a member of the Field Judiciary Division, and a stranger to the command which convened the court. It is not at all fanciful to imagine that, as the situation developed, he lost not only "face" but also control over the court. We have no difficulty, therefore, in concluding that on this ground, too, the declaration of a mistrial was justifiable. Moreover, we are convinced that the paragraph 55 procedure for suspension of trial in order to obtain the views of the convening authority is both archaic and injudicious. It is contrary to the express language of article 51, and violates the spirit of the Uniform Code and the purposes for which it was enacted. Accordingly, the contrary view set out in United States v. Turkali, supra, is overruled.[65]

One of the severest criticisms of the court-martial process was that it was essentially a tool of command; that both the court-martial and the subordinate commander were inordinately sensitive to a superior officer's desires and responded readily to his requests. Such pressure and influences on the court-martial and the subbordinate commander were described as "command control." [66]

The Uniform Code sought to stamp out the pressure. Article 37 provides in part that no person subject to the Code "may attempt to coerce or, by any unauthorized means, influence the action of a court-martial. . . ." [67] No case has been before the Court of Military Appeals in which a person has been charged with a violation of this article. But, there are many cases in which the Court and service boards of review found the presence of command control which deprived the accused of a fair hearing. [68]

Command control may take many forms. Most obvious is the conference before the start of trial in which the commander's views about the accused or the offense are brought directly home to the court members. [69] Subtle psychological pressures, at all levels of the court-martial process, are less direct, but just as effective. Some elements of pressure which have been condemned by the Court of Military Appeals are worth mentioning.

One of the most troublesome forms of indirect pressure is the policy statement. A policy can be framed as a positive order; or it may be phrased as indicating what is merely desirable. As members of a hierarchical system, with promotion and type of duty largely dependent upon the rating of superiors, military personnel would naturally tend to regard all policy as mandatory. In the discharge of their executive and administrative responsibilities uncritical acceptance of policy is probably beneficial to both the service and the individual. In a judicial proceeding such ready tractability would violate the requirements of a fair hearing.

The court-martial process is judicial in nature.[70] Article 37, which prohibits interference with, or improper influence upon, the convening authority or the reviewing authority speaks of their "judicial acts." The court-martial tries and sentences a person for a criminal act. It has the power to imprison the accused and to impose fines and forfeitures upon him. Under the so-called Hiss Act a conviction by court-martial has the same effect as a conviction by a federal district court in denying the accused pension and retirement benefits

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[65] United States v. Johnpier, 12 U.S.C.M.A. 90, 94, 30 C.M.R. 90, 94 (1961).

[66] Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND L. REV. 169 (1953).

[67] U.C.M.J. art. 37 10 U.S.C. § 837 (1958).

[68] United States v. Hedges, 11 U.S.C.M.A. 642, 29 C.M.R. 458 (1960); United States v. Coffield, 10 U.S.C.M.A. 77, 27 C.M.R. 151 (1958); United States v. Sears, 6 U.S.C.M.A. 661, 20 C.M.R. 377 (1956); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).

[69] United States v. Littrice, *supra* note 68.

[70] In making this statement, I have not overlooked the apparently contrary opinion of Mr. Justice Black in Reid v. Covert, 354 U.S. 1, 36 (1957). He described courts-martial as "simply executive tribunals whose personnel are in the executive chain of command." *Cf.* Runkle v. United States, 122 U.S. 543 (1887).

which he would otherwise be entitled to receive from the federal government.[71] Manifestly, therefore, any external pressure or influence which dictates conviction or sentence has no place in the courts-martial process.

Policy is important at the very threshold of the court-martial proceeding. Earlier it was observed that the final decision to refer a charge for trial before a summary, special or general court-martial is the responsibility of the officer exercising general court-martial jurisdiction over the accused. A number of factors may be considered by him in reaching his decision. One is the severity of the offense. In theory, he can refer a minor offense, such as being disorderly in quarters for which the maximum penalty is forfeiture of two thirds pay for one month and confinement for one month, to a general court-martial, but he is not likely to do so.[72]

A second circumstance of substantial importance is the policy of a superior commander or of the President of the United States, as set out in the Manual for Courts-Martial or other executive orders or directives. Consideration, however, cannot be dictation. The policy statement cannot be made mandatory upon the court-martial authority. Rather, it must leave him free to follow or to disregard it, in the exercise of his judicial discretion.[73]

Injection of policy in the trial proceeding may come about in many ways. In most instances there is no permissible basis for calling the attention of the court members to the policy, and consequently reference to the policy is manifestly unfair to the accused.[74] Two ostensibly valid means of bringing policy before the court were used in the years immediately following enactment of the Uniform Code.

One medium of entry was the doctrine of judicial notice under which a copy of an official publication and general order and circular is admissible in evidence.[75] The other method was use of the Manual for Courts-Martial as a trial guide and source of instruction. Both means of entry are now closed.

After some preliminary warnings that the policy pronouncements set out in the Manual exerted an unfair influence upon the court-martial, the Court of Military Appeals held that the Manual could not be used in a court-martial case in any way that appeared to deprive the accused of a fair hearing. In the landmark opinion in *United States v. Rinehart*[76] the Court said:

One further matter merits discussion. In the recent case of United States v. Boswell, 8 USCMA 145, 23 CMR 369, we voiced our disapproval of the practice of permitting court members to consult "outside sources" for information on the law. We there said that "the Manual is no different from other legal authorities. It, too, has no place in the closed session deliberations of the court-martial." It was pointed out that court members may not understand the Manual's passages thereby creating an atmosphere of confusion and doubt during the closed deliberations. What was prophesied in Boswell, supra, has now come to pass. The prosecution in closing argument had directed the court's attention to paragraphs 76*a*(5) and 33*h* of the Manual. The court-martial in closed session, and on its own initiative, "discovered" paragraphs 76*a*(3) and 76*a*(4) of the Manual, neither paragraph being material in arriving at an appropriate sentence. Thus a virtual race to the Manual had begun in spite of the fact that the law officer

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[71] See United States v. Pajak, 11 U.S.C.M.A. 686, 29 C.M.R. 502 (1960).

[72] Strictly speaking no offense committed by a commissioned or noncommissioned officer can be considered minor. A commissioned officer sentenced to confinement is also usually dismissed. Any sentence to confinement or to hard labor without confinement imposed upon a noncommissioned officer results in automatic reduction to the lowest enlisted grade. UCMJ art. 58(a) 10 U.S.C. § 858(a) (1958), added in July, 1960 to change the effect of the decision in United States v. Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959). Also, a minor offense may have the consequences of a major delict if the accused has previously been convicted by court-martial. Two previous convictions within one year authorize imposition of a bad conduct discharge; and three previous convictions within that period authorize a dishonorable discharge and confinement at hard labor for one year, without regard to whether the offense of which the accused stands convicted carriers that punishment. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 127c, § B, as amended by Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954).

[73] United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957); United States v. Fowle, 7 U.S.C.M.A. 349 22 C.M.R. 139 (1956); United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); United States v. Isaacs, Docket No. 11,525, reversed on concession by the Government that the accused's commanding officer's recommendation for trial by general court-martial was dictated by a policy letter of the Secretary of the Navy.

[74] United States v. *Leggio*, 12 U.S.C.M.A. 8, 30 C.M.R. 8 (1961); United States v. Shepherd, 9 U.S.C.M.A. 90, 25 C.M.R. 352 (1958) (opinion by Latimer, J.)

[75] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 147*a*.

[76] 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

had fully and adequatey instructed the members on the applicable law pertaining to the sentence.

We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the Manual, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. In the first place, many of the passages contained therein have been either expressly or impliedly invalidated by decisions of this Court. [Citing cases.]

. . .

Secondly, we have consistently emphasized the role of the law officer in the instructional area. In United States v. Chaput, 2 USCMA 127, 7 CMR 3, we said that, "It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer."

. . .

Thirdly, the great majority of court members are untrained in the law. A treatise on the law in the hands of a non-lawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance. We have absolutely no way of knowing whether a court-martial applied the law instructed upon by the law officer or whether it rejected such instructions in favor of other material contained in the Manual. In United States v. Chaput, supra, we reversed a conviction where a law officer had referred the court members to several board of review decisions to permit them to determine for themselves the applicable legal principles involved.

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In civilian practice it would constitute a gross irregularity to permit jurors to consult outside legal references.

. . .

We see no compelling reason why a similar rule should not be adopted in courts-martial practice. All the law a court-martial need know in order to properly perform its functions must come from the law officer and nowhere else.

We are fully aware that the change in the system of military law occasioned by this decision represents a substantial departure from prior service practices. However, we cannot but feel that such change was imperatively needed if the system of military law is to assume and maintain the high and respected place that it deserves in the jurisprudence of our free society. Prior to the Code courts-martial were neither instructed on the elements of the offense charged nor the principles of law applicable to the case. The deliberations of the court were in camera and a genuine need then existed for the use of the Manual by the court members in determining the law to be applied. However, with the advent of the Uniform Code of Military Justice many of the problems which previously existed under the old system disappeared. Congress created the role of law officer and fashioned him in the image of a civilian judge. He was charged with the responsibility of instructing the court on the elements of the offense and the applicable principles of law in order that informed and intelligent findings and sentence could be reached. In a word, he was made a fountainhead of the law in the court-martial scheme of things. The sum total of these and other remedial changes inaugurated by the Code was to bring court-martial procedure, wherever possible, into conformity with the prevailing in civilian criminal courts. We believe that military law under the Code has come of age and the time has come when the use of the Manual by the court-martial must end.

Congress gave the President the right to fix the maximum punishment for offenses under the Uniform Code, but we do not believe that Congress intended the President to sit with the court members when they adjudge a sentence in a given case. As a matter of fact, the President himself clearly did not expect to be brought into every trial. He expressly provided that the rules of evidence normally applicable to findings are also applicable to sentence, except as they may be relaxed to a limited extent by the law officer or the president of the special court. Paragraph 75*c*(1), Manual, supra. See also United States v. Strand, 6 USCMA 297, 20 CMR 13.[77]

The influence of policy has also been carefully circumscribed in connection with the review of a conviction by the convening authority. Article 61 of the

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[77] Id. at 406–08, 24 C.M.R. at 216–19.

Uniform Code gives the convening authority nearly unlimited power over the findings and sentence. If he so desires, the convening authority can set aside the findings of guilty and the sentence, and dismiss the charge, irrespective of the sufficiency of the evidence of guilt and the appropriateness of the sentence adjudged by the court-martial. In the exercise of this discretion, he can consult anyone he pleases for information about the accused, including as Judge Brosman picturesquely put it "a guy named Joe." A policy directive is, therefore, a matter that may properly be considered by him. But, as in the case of reference of the charges to trial, policy statements cannot dictate the result. Consequently, if it appears that the convening authority believes he must act in any particular way because of his own policy or the policy of his superior commander, his action in the case will be set aside, and the record of trial will be returned for reconsideration.[78]

Before acting on the sentence, the convening authority usually obtains a great deal of information about the accused's military and civilian background and his character that is not shown in the record of trial. The information is generally obtained by his staff judge advocate or legal officer,[79] and is set out in what is called the post-trial advice or review. This advice consists of a comprehensive summary and analysis of the legal issues raised by the record of trial, and of recommendations to the convening authority on the findings and the sentence.[80] As regards the extra-record information on the accused's background, the review is in a general way, like the probation report to the sentencing judge in a civilian criminal case. Since there is this resemblance between the review and probation report, it was originally thought that the accused had no right to deny or rebut new adverse matter contained in it.[81] The Court of Military Appeals, however, regarded the accused's right to a fair hearing in broader terms. It held that the accused is entitled to an opportunity to explain or deny new unfavorable information included in the staff judge advocate's post-trial advice. It spelled out the right in *United States v. Griffin*.[82] Shortly thereafter, in *United States v. Vara*[83] it laid down general guidelines for changes in the practice which would assure preservation of the right. These cases show clearly the deep dimensions in military law of the requirements of a fair hearing.

Failure or refusal to accord the accused the opportunity to rebut or explain adverse new matter in the post-trial advice is ground for setting aside the action taken by the convening authority in reliance upon the advice. Not every deprivation of the right, however, is ground for reversal. If the adverse matter is of a minor nature, and it reasonably appears that the convening authority was not influenced by it, the error is not prejudicial and may be disregarded.[84]

Closely related to the right to an opportunity to rebut new matter, is the accused's right to have the advice itself prepared by an impartial person. Trial counsel[85] and the law officer[86] have each a special interest in the outcome of the prosecution, and are, therefore, ineligible to prepare or to assist in the preparation of the post-trial advice. Disqualification also exists if the person preparing or assisting in the preparation of the advice previously acted in a companion case in an inconsistent capacity. The reason for the exclusion was stated by the Court of Military Appeals in *United States v. Hightower*[87] as follows:

Realistically then, the accused and Moye were coaccused, tried separately for the same offense. Moye was convicted. Captain Hudson was the successful Trial Counsel. Having so acted, would he acquire a "frame of reference" which would improperly influence him in a review of the accused's case? See United States v. Stringer, supra, page 503. The Government maintains that he would

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[78] United States v. Wise, 6 U.S.C.M.A. 472, 20 C.M.R. 188 (1955); United States v. Doherty, 5 U.S.C.M.A. 287, 17 C.M.R. 287 (1954).

[79] The terminology varies according to the service. In the Army and Air Force, the legal advisor is called the staff judge advocate; in the Navy, Marine Corps, and Coast Guard he is described as the legal officer.

[80] See United States v. Fields, 9 U.S.C.M.A. 70, 25 C.M.R. 332 (1958).

[81] See Williams v. State of New York, 337 U.S. 241 (1949); *Cf.* Townsend v. Burke, 334 U.S. 736 (1948).

[82] 8 U.S.C.M.A. 206, 24 C.M.R. 16 (1957).

[83] 8 U.S.C.M.A. 651, 21 C.M.R. 155 (1958).

[84] United States v. Sarlouis, 9 U.S.C.M.A. 148, 25 C.M.R. 410 (1958).

[85] United States v Clisson, 5 U.S.C.M.A. 277, 17 C.M.R. 277 (1954).

[86] United States v. Crunk, 4 U.S.C.M.A. 290, 15 C.M.R. 290 (1954).

[87] 5 U.S.C.M.A. 385, 18 C.M.R. 9 (1955).

not. It contends that one of the fundamental qualities of the legal profession is a highly refined capacity to exercise objectivity and judicial discipline. We are quite willing to accord this quality to most members of the profession, but we believe that an impartial observer would conclude that personal convictions formed in the prosecution of one accused would tend to influence the prosecutor in his relations with the coaccused.

We have no doubt that Captain Hudson, having been instrumental in convicting Moye, would be personally convinced of the accused's guilt. Since the conviction is founded on personal experiences, it would certainly be more deep-seated than an opinion formed only on the basis of an official evaluation of the record. A fixed opinion of this kind manifestly affects the impartiality of the review. One consequence of it is to deny the accused the benefit of any doubt regarding the correctness of rulings by the law officer. See United States v. Floyd, 2 USCMA 183, 7 CMR 59. A second consequence is the sentence phase of the review. There is a distinct risk that the sentence recommendation would reflect unrecorded prejudices formed during the reviewer's prosecution of the coaccused. See United States v. Bound, 1 USCMA 224, 2 CMR 130. Thus, since the charges are alike and there is a substantial basis for "overzealous prosecution," we believe that the Moye case and the present proceeding constitute the "same case" within the meaning of Article 6(c).

Of course, in reaching our conclusion, we do not imply that Captain Hudson intentionally deprived the accused of an unbiased review. On the contrary, we are sure that he was honest and sincere in his belief that he could act dispassionately. Moreover, Congress intended to remove all possibility of bias; it did not contemplate ferreting for motives and delicate balancing of previous influences against objective fairness. Cf. Untied States v. Deain, 5 USCMA 44, 17 CMR 44. We must insist on adherence to the Congressional policy directed against conduct tending to impair the impartiality of the post-trial review.

One final point urged by the Goverment requires consideration. The Government contends that inasmuch as Captain Hudson prepared the report as Assistant Staff Judge Advocate, he was, essentially, only an amanuensis for the Staff Judge Advocate. The latter had no previous connection with either case, and, consequently, there is no violation of Article 6(c). This argument was adopted by the board of review below. However, some months after publication of the opininion by the board of review, this Court decided United States v. Crunk, 4 USCMA 290, 15 CMR 290. In that case, the person who had acted as law officer at the trial later prepared the post-trial review, in conjunction with a civilian attorney. There, as here, the staff judge advocate noted that he concurred in the opinions and recommendations of the reviewers. In a unanimous opinion, we held such conduct to be prohibited by Article 6(c).[68]

CONCLUSION

Military service is not an isolated and occasional occurrence in American life. The "cold war" has kept the Armed Forces at record peacetime levels. Millions of civilians work closely with, and for, the miltary establishment. The points of contact between the civilian community and the Armed Forces are today so numerous and so intimate that it can truly be said that military life is an immediate and integral part of American life.

Part of our heritage of freedom is the complex of the basic rights embraced within constitutional due process. Those same rights are inseparably interwoven into due process of military law. Other fundamental protections against arbitrary and unjust action have been added by Congress through the Uniform Code of Military Justice. As the Supreme Court of the military justice system, the United States Court of Military Appeals has the unique responsibility to protect and preserve due process in courts-martial. However, pronouncements by the highest court of legal doctrine are sterile exercises in semantics, if there is only grudging compliance with the letter, and little regard for the spirit, of the law. It is, therefore, the responsibility of the legal profession, both in and out of the military service, to uphold the meaning and importance of due process in the administration of military law and to help make military law an integral part of American jurisprudence.

[68] *Id.* at 388–89, 18 C.M.R. at 12–13.

THE GENERAL ARTICLES 133 AND 134 OF THE UNIFORM CODE OF MILITARY JUSTICE

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INTRODUCTION

We begin this discussion by taking certain liberties with the Uniform Code of Military Justice, for that Code mentions only one "General Article," Article 134, and we are going to use that description in referring to Article 133, "Conduct Unbecoming an Officer and Gentleman," as well. However, considering the history and indeed the very nature of these two articles, the reader will readily understand that the term "general" is here being used merely in a sense opposite to the term "specific," that is, in regard to the rather generic ideas of criminality or misconduct, which in some instances consist only of a failure to comply with certain necessary military standards, expressed in both of these articles. It also will be found that some of the particular acts or omissions which run afoul of these two articles do not always have convenient criminal connotations of the type immediately recognizable by one trained in the common law, but perhaps somewhat unfamiliar with military life, customs, and historical development. Such crimes as murder, robbery and larceny are traditionally recognized as abhorrent and as calling for punishment at the hands of the state by all of us, military and civilian; and even the act of being drunk in or out of uniform in a public or private place, being an offense under Article 134 if sufficiently discreditable,[1] would hardly give pause to the average police court judge. However, the Article 134 offenses of dishonorable failure to pay debts, incapacitating oneself for the proper performance of duties through previous indulgence in intoxicating liquors, and discharging a firearm through carelessness, and many other instances of questionable conduct which for one reason or another fall within the proscriptions of the general articles,[2] may not be too well understood by every student or practitioner of the law as amounting to conduct for which a criminal penalty may or should be imposed.

The true general article, Article 134, makes punishable by its terms three different types of offenses, whether committed by an officer or an enlisted person. These are disorders and neglects to the prejudice of good order and discipline in the armed forces, conduct of a nature to bring discredit upon the armed forces, and crimes and offences not capital.[3] Of course, it may well be that one act will suffice to fall under the ban of all three of these proscriptions.

Article 133 makes punishable conduct unbecoming an officer and a gentleman indulged in by an officer, cadet, or midshipman,[4] and it need hardly be said that anyone occupying one of these positions of honor who is guilty of unbecoming conduct is very apt to find that he has also violated at least one of the tenets of Article 134.[5] In order better to understand the meaning and reasons for these articles, a necessarily brief excursion into their history might prove helpful.

HISTORY

The very eary English military code[6] contained no general articles and dealt principally with the prohibition of specific types of misconduct which might ad-

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[1] United States v. Lowe, 4 U.S.C.M.A. 654, 16 C.M.R. 228 (1954); United States v. McMurtry, A.C.M. S–1547, 1 C.M.R. 715 (1951).

[2] See "Manual for Courts-Martial, United States, 1951" (app. 6c, Specs. Nos. 114–176) [hereinafter cited as MCM. 1951].

[3] Uniform Code of Military Justice [hereinafter cited as UCMJ] art. 134, 10 U.S.C. § 934 (1958) states: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[4] UCMJ art. 133, 10 U.S.C. § 933 (1958) states: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[5] United States v. Middleton, 12 U.S.C.M.A. 54, 30 C.M.R. 54 (1960); United States v. Gunnels, A.C.M. 11938, 21 C.M.R. 925, 956 (1956) (and cases cited therein), *rev'd on other grounds*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957); United States v. Loney, C.M. 355287, 8 C.M.R. 533 (1952), *petition for review denied*, 2 U.S.C.M.A. 678 8 C.M.R. 178 (1953).

[6] See "Winthrop, Military Law and Precedents 903" (app. I) (1920 War Dep't reprint of 2d ed. 1896) [hereinafter cited as Winthrop], *quoting* Ordinance of Rich. I, 1190; Winthrop 904 (app. II), *quoting* Arts. of War of Rich. II, 1385.

versely affect the internal discipline of the army in its encampments or while on the march. Of particular concern were the property right of officers and soldiers among themselves. A prisoner, or the ransom that one might obtain from a prisoner, was obviously a most valuable spoil of war in those days, for the Articles of Richard II contain a number of provisions which carefully detail a captor's rights in this respect.[7]

As a result of the labors of King Gustavus Adolphus (Gustavus II) of Sweden and his ministers, we see a remarkably detailed and developed military code in existence early in the seventeenth century.[8] After dealing with almost every conceivable aspect of military life, in and out of camp, in the first 115 articles of his code signed in the year 1621, his Article 116 reads as follows:

"Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offense finally shall be committed against these orders, that shall the several Commanders make good, or see severally punished unless themselves will stand bound to give further satisfaction for it."

The above general article is very probably the ancestor or our present Article 134, for the military code of the great Swedish king was translated into English and published in London in 1639 [9] and seems to have had a considerable influence on later English military codes. Although Gustavus Adolphus does not mention "crimes or offenses not capital" in his general article, probably because he had no need to express a noncapital limitation under the legal system of his time and place, he has included both of the other aspects of our present general Article 134, with interesting limitations, however, on the modern theory of the offense of casting discredit on the miliary service. It will be noticed in this latter connection that the "miserable and innocent country" must be "burdened against all right and reason." Anyone who has ever studied conditions as they existed during Gustavus' time will have no trouble in agreeing with him that the war-ravaged lands affected by his military operations and those of others were truly in a miserable condition, but the phrase "burdened against all right and reason" perhaps requires some explanation. This explanation is found in other articles of the code which attempt carefully to limit and control what appears to be a vested right in the soldiery to pillage under certain conditions and to impose heavy burdens on the citizenry.[10]

One might ask why it was that Gustavus felt the need for his particular general article. The answer to this question is supplied inferentially by the Code itself. It has already been indicated that the general article was preceded by 115 articles, mostly punitive in nature, and a further reading will show that eleven more specific offenses are listed following the general article, apparently as an afterthought. Even among persons with such vivid imaginations as Gustavus and his ministers, it was realized that it would be asking too much of human intelligence to attempt to forecast and catalogue every possible event which might unduly burden the civilian populace or which might be disruptive of military discipline, and perhaps gravely so. War was an immensely complicated affair even in those days, indeed one may say particularly in those days with their gross lack of communications. The maintenance of effective disciplinary control in this rough era—the one factor that distinguished an army in any real sense of the word from a mere mob of bandits, plunderers, and potential deserters—was a difficult

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[7] Arts. XII, XIX, XXII.

[8] See Winthrop 907 (app. III), *quoting* Code of Articles of King Gustavus Adolphus of Sweden, 1621. There were, of course, earlier Continental European military codes. Winthrop 17–18. Gustavus Adolphus, no doubt with the help of his chief ministers, was a genius for detail in all matters military. The author has seen some of his Tables of Organization and Tables of Equipment in the military museum in Stockholm. In many respects, these tables are remarkably similar in format to the tables in use in modern armies. There are many other items of interest concerning Gustavus Adolphus and his times in the National Museum in Stockholm.

[9] See WINTHROP 19, 907 n.1 (app. III); DAVIS, MILITARY LAW OF THE UNITED STATES 340 (3d ed. 1915). It seems that Gustavus' general article was also the ancestor of one of our claims statutes. UCMJ art. 139, 10 U.S.C. § 939 (1958). The Articles of the Earl of Arundel, published in 1639 during the reign of Charles I, are printed in 1 CLODE, MILITARY FORCES OF THE CROWN 429–40 (1869). The general article in that code reads: "In whatever cases or accidents that may occurre, for which there is no speciall order set downe in the lawes here published, there the ancient course of marshall discipline shall be observed untill such time as his Excellence the Lord General shall cause some further orders to be made and published in the Armie, which shall thenceforward stand in force upon the paines therein expressed."

[10] See, *e.g.*, Articles 93–96 of the Articles of Gustavus Adolphus.

and exacting task beyond all modern military experience. Consequently, some means had to be found to correct possible omissions and oversights in the structure of the military law, and that means, then as now, was the general article.

After passing over some earlier British military codes, we next come to the British Articles of War of James II, promulgated in 1688. These contain sixty-four articles, and in them one can clearly see some of the progenitors of certain articles of the Uniform Code. Of chief interest here is the last of these articles, the general article, which states:

All other faults, misdemeanors, and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offense by these Articles, and the Laws and Customs of War.[11]

The British Articles of War of 1765,[12] which were in force at the beginning of our Revolutionary War, contained a somewhat different version of the general article. Section XX, Article III, of that military code provided:

"All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion."

It will be noticed immediately that the mere limitation upon punishment amounting to the loss of life or limb found in the general article of James II appears in the 1765 general article as a jurisdictional limitation, not only in time of peace, upon the prosecution by courts-martial of "crimes not capital" under that article. This is not difficult to understand, for less than a year after the articles of James II were promulgated, the English Revolution took place, James II lost his throne to William and Mary, and the first British Mutiny Act was passed by Parliament. This act, although the principal event which brought it about was the defection to James of a detachment of mostly Scottish troops, had the effect of prohibiting the exercise of court-martial jurisdiction in places where the British civil courts were in operation except with respect to offenses (mutiny, sedition, and desertion in this particular act) specifically made the subject of such jurisdiction by Parliament itself. In this manner, Parliament reaffirmed and strengthened a position long held by that body and by the civil courts but not always followed by the British sovereigns under whose royal prerogative the various military codes had normally been promulgated.[13] Although the extreme

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[11] See WINTHROP 928 (app. V), *quoting* Articles of War of James II, art. LXIV. Winthrop sets forth a still earlier English general article, that found in the Articles of the Earl of Essex of 1642. It is substantially the same as the James II version except that the word "offenses" is used where the word "misdemeanors" is found in the later code, and the limitation upon punishment amounting to the loss of life or limb is omitted. The Articles of the Earl of Essex are printed in PIPON, MILITARY LAW, app. 11 (3d ed. 1863), with the exception of a few missing articles which are printed in 1 CLODE, *op. cit. supra* note 9, at 443. The general article was dubbed "the Devil's Article" by the British soldier because of its catch-all nature. See WINTHROP 720 nn. 64 & 67. For general remarks concerning British military codes antedating that of James II, see WINTHROP 18–19. See also 1 WINTHROP, MILITARY LAW 8 n.1 (1st ed. 1886) for a possible explanation of the frequent use of the year 1686 instead of 1688 in referring to this code of James II.

[12] WINTHROP 931 (app. VII). A 1774 edition of this code changed the general article by substituting for the word "Court-Martial" the words "General or Regimental Court Martial, according to the Nature and Degree of the Offence." See DAVIS, *op. cit. supra* note 9, at 341 and app. B. This change also appears in the Americal military codes of 1775, 1776, and 1806. See note 14 *infra*. The British military code of 1692 for use "in the Low Countries and Ports beyond the Seas" is printed in WALTON, HISTORY OF THE BRITISH STANDING ARMY 1660–1700, app. LIII (1894). The general article in this code is the same as that in the 1688 code of James II except that the word "crimes" is added to the list of prohibitions and the limitation upon punishment amounting to the loss of life or limb is omitted. The cited appendix to Walton's work also contains materials concerning earlier codes.

[13] See WINTHROP 929 (app. VI), *quoting* the First British Mutiny Act of 1689; see also Lee v. Madigan, 358 U.S. 228 (1959); CLODE, MILITARY AND MARTIAL LAW 20 (2d ed. 1874); TYTLER MILITARY LAW 18 (3d ed. 1814); WINTHROP 19–20; BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 10–11 (1939 reprint). There is considerable argument about the effect of this act on court-martial jurisdiction, and the original act is often misquoted by limiting its effect on non "life or limb" offenses to "time of peace." The material in the citation to Tytler points out that the "time of peace" limitation was an innovation of a Mutiny Act passed in Queen Anne's reign. Despite the apologistic interpretations of the effect of the First Mutiny Act which can be found in some of the above citations and elsewhere, the author's version of the matter would seem to be supported by the actual state of military law during the reign of George III as reflected in the British Articles of 1765 discussed in the text. See also the limited use of the 1692 Code mentioned in note 12 *supra*; WALTON *op cit. supra* note 12, at ch. XXVI.

limitations upon court-martial jurisdiction imposed by the first Mutiny Act were relaxed by succeeding Mutiny Acts, we find that even as late as 1765 British court-martial jurisdiction was considerably restricted. Section XX, Article II of the British Articles of that year permitted the trial by court-martial of civil capital crimes and other civil offenses only in places where they were no British civil courts. In other places, trial for such crimes and offenses was to be held in the civil courts. Jurisdiction over capital military offenses was granted by specific articles of the code. Naturally enough, therefore, the general article quoted earlier in this text was limited to "crimes not capital," and even these crimes had to have a military aspect by reason of being prejudicial to good order and military discipline. As we shall see later in this paper, this change from the general article of James II has had a profound effect upon American military law lasting to this very day.

With minor exceptions not material to our discussion, the language of the above quoted British general article of 1765 is found in all American Articles of War up to and including those of 1874, and the 1874 Articles remained in effect until a major revision by Congress in 1916.[14] It should be noted that all but one of the clauses found in the present Article 134 of the Uniform Code are found in the British Code of 1765. The missing clause—conduct of a nature to bring discredit upon the armed forces—did not appear in the American Articles of War until the revision of 1916. Thus, remembering that Gustavus Adolphus did deal with this matter in his code after the fashion of his times, there is a rather remarkable hiatus of almost three centuries in this one respect.

In Section XV, Article XXIII, of the British Articles of 1765, we find the ancestor of our other general article—conduct unbecoming an officer and gentleman. The cited article reads:

"Whatsoever Commissioned Officer shall be convicted before a General Court-martial, of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our Service."

Hazarding a guess for which the author fears he can supply no authority, one might say that some deep-seated sociological reason accounts for the presence in this code of such an article and the absence of a similar article in the otherwise detailed military codes of the preceding century. And indeed it may be true that behavior "unbecoming the Character of an Officer and a Gentleman" appears as an offense in the 1765 Code because the notion of the English gentleman, and the moral and ethical standards expected of him, had finally crystallized and emerged in the eighteenth century, whereas the much earlier and perhaps less complicated and exacting notion of chivalry had already become outworn and was certainly less adhered to, in the seventeenth century. Romantic as this may be, those who know the course of legislation will probably feel more inclined to suspect that the inclusion of the offense in question came about as the result of a "scandalous infamous" incident involving an officer that occurred shortly before the article denouncing such conduct first made its appearance. Whatever may be the true reason for this innovation, this general article involving officers appears virtually unchanged in the American Articles until the military code of 1806.[15] In the code of that year, the phrase "behaving in a scandalous, infamous manner" was deleted, probably in an effort to promote better standards, and the article acquired its present form—merely denouncing conduct unbecoming an officer and a gentleman.[16] Although no changes were made in the American Articles of 1874,[17] the revision of 1916 added cadets to the persons subject to this article[18] and, as we know, the Uniform Code added midshipmen.[19] Until the advent of the Uniform Code of Military Justice, dismissal (the word "dis

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[14] WINTHROP 953 (app. IX), *quoting* American Articles of War of 1775, art. L; WINTHROP 961 (app. X), *quoting* 1776 Articles, § XVIII, art. 5; WINTHROP 976 app. XII), *quoting* 1806 Articles, art. 99; WINTHROP 986 (app. XIII), *quoting* 1874 Articles, art. 62.

[15] WINTHROP 953 (app. IX), *quoting* American Articles of War of 1775, art. XLVII; WINTHROP 961 (app. X), *quoting* 1776 Articles, § XIV, art. 21; WINTHROP 972 (app. XI), *quoting* 1786 Articles, art. 20. See DAVIS, *op. cit. supra* note 9, at 468.

[16] WINTHROP 976 (app. XII), *quoting* American Articles of War of 1806, art. 83. Higher standards were, in fact, required under the new article. See WINTHROP 710–11; Benét, Military Law and Courts-Martial 274–77 (6th ed. 1868).

[17] WINTHROP 986 (app. XIII), *quoting* American Articles of 1874, art. 61.

[18] Articles of War of 1916, ch. 418, § 3, art. 95, 39 Stat. 666

[19] See note 4 *supra*.

charge" was used prior to the 1786 amendments to the American Articles) was a mandatory sentence upon conviction.[20]

As mentioned previously, it was not until the extensive revision of the Articles of War in 1916 that the phrase "conduct of a nature to bring discredit upon the military service" appeared in the predecessor of our present Article 134 of the Uniform Code. One other significant change was also made in that year, and we will discuss that change first. The 1916 Article in question was Article 96, and it will be necessary to set out in full both that article and the one it replaced, Article 62 of the Articles of 1874. Article 62 provided:

All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[21]

Article 96 read:

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[22]

It will readily be noticed that the phrase "though not mentioned in these articles" has been placed at the head of the sentence in Article 96. This was not done merely as a result of a grammarian's exercise in better phrasing. Prior to the decision of the Supreme Court of the United States in *Grafton v. United States*,[23] it had long been held that the "crimes not capital" clause of Article 62 of the Articles of 1874 was qualified by the "prejudice" of good order and military discipline" clause. The similar British general article had been given the same interpretation. In *Grafton*, however, the Supreme Court intimated that the "crimes not capital" clause of Article 62 was not limited by the "prejudice of good order and military discipline" clause, and Article 96 of the 1916 Code was rephrased accordingly.[24] There was a sound historical reason, however, for the earlier interpretation of the "crimes not capital" clause of Article 62 of the 1874 Article, for this article was a direct descendant of the general article of the British Articles of War of 1765, with the same phraseology in all material respects; and, as we have already seen in our discussion of that general article, its "crimes not capital" clause granted no court-martial jurisdiction at all over noncapital civil crimes unless they were divested of their purely civil nature because of being prejudicial to good order and military discipline. What jurisdiction there was over crimes of a strictly civil nature under the 1765 British

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[20] The original bill for the Uniform Code as submitted by the Department of Defense retained the feature of mandatory dismissal. *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1235 (1949). This was amended during the course of the Senate hearings apparently at the request of the Navy. *Hearings on S. 857 and H.R. 4040 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 286 (1949). Dismissal had not been a mandatory punishment for this offense in the Navy, such conduct having been punished under an Article 134 type of general article in that service. See NAVAL COURTS AND BOARDS § 99 (1937); Articles for the Government of the Navy, art. 22, REV. STAT. § 1624 (1875). A recent Army study has resulted in an Army recommendation that mandatory dismissal upon conviction of Article 133 be reinstated. REPORT BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE 16 (1960).

[21] WINTHROP 991 (app. XIII).

[22] 39 Stat. 666 (1916). It should also be noticed that the phrase "which officers and soldiers may be guilty of" appearing in Article 62 of the 1874 Articles was broadened to include all "persons subject to military law" in Article 96 of the 1916 Articles.

[23] 206 U.S. 333 (1907).

[24] COMPARISON OF THE PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 50 (1912) (War Dep't document accompanying transmission of proposed new articles to Chairman, Military Committee, House of Representatives); *Revision of the Articles of War, Hearing on H.R. 23628 Before the House Committee on Military Affairs*, 62d Cong., 2d Sess. 81–82 (1912) (Statement of Gen. Crowder); See "Explanation" accompanying S. 1032, 63d Cong., 1st Sess. 48 (1913); COMPARATIVE PRINT SHOWING S. 3191 WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 58 (1916) (Sen. Comm. Print prepared for the use of the Sen. Comm. on Military Affairs, 64th Cong., 1st Sess.). For the original interpretation of the "crimes not capital" clause of Article 62 of the 1874 Articles and its British counterpart, see WINTHROP 723–24 and materials there cited. See also WINTHROP 990 (app. XIII), *quoting* 1874 Articles, arts. 58–59.

Code was specifically granted in another article of the code, with express limitations regarding the place where the crime was committed.

Probably the most important change in the 1916 general article, however, is the addition of the "conduct of a nature to bring discredit upon the military service" clause. It would certainly suit the convenience of the author, and undoubtedly would bring relief to the reader, if it could merely be said that this clause was simply a recognition that something had been left out of this general article for many centuries, that at last it was recognized that unspecified offenses involving the civilian populace which might bring discredit upon our arms were as important as unspecified offenses within the military which were discriptive of military discipline. Unfortunately, and even surprisingly, the matter cannot be passed over quite so lightly, for the first memorandum accompanying the proposed new legislation, written in 1912, had this to say about the clause in question:

"The new language introduced in the article is for the purpose of covering the cases of *retired* enlisted men who are guilty of conduct (not crimes) which is discreditable and yet not directly prejudicial to discipline; such as refusing to make proper provision for the support of their families, or the disgraceful non-payment of a debt incurred for the necessaries of life." [25]

In the same year, we find the then Judge Advocate General, Brigadier General Enoch H. Crowder, making the following statement concerning the discredit clause before the House Committee on Military Affairs, which was considering a House bill containing the proposed new military code:

"That [the discredit clause] was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position, we can try him under the sixty-first article of war for conduct "unbecoming an officer and a gentleman." We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to good order and military discipline; because the act of a man on the retired list, away from any post, cannot reasonably be said to affect military discipline. . . . Sometimes it is because of refusal to support their families while on retired pay; complaints of creditors come into the office; . . . I wanted that language in there to try those retired soldiers whose cases became flagrant."

Despite General Crowder's stated restrictions on the new clause, fears were expressed that it was too broad and sweeping, and the committee chairman suggested that it be deleted.[26]

A later memorandum onthe subject, that accompanying Senate Bill 1032 in 1913, commences its explanation bravely enough but, unfortunately, loses force and becomes rather hopelessly involved in the field of enlisted retirement as it moves along. It stated:

"The clause 'all conduct of a nature to bring discredit upon the military service' has been interpolated in order to cover clearly conduct on the part of enlisted men, particularly retired enlisted men, which would tend to discredit the service but which at present does not constitute a criminal offense, and which is not clearly prejudicial to good order and military discipline because of the fact that the offender is at the time not directly associated with a military command." [27]

In what is apparently the last piece of written legislative history relating to Article 96, the "Comparative Print" accompanying Senate Bill 3191 in 1916, the discredit clause is not mentioned at all, although other changes in the article are explained.[28] Parenthetically, it may be of interest to note that the 1916 Aricles, after many and various vicissitudes, were finally enacted into law only as part of the Army Appropriation Act for the fiscal year 1917.[29]

The newborn chick cautiously peeped from the egg, however, in the discussion of the freshly enacted Article 96, found in the 1917 Manual for Courts-Martial. After stating that the "principal" object of including the clause dealing with discreditable conduct was to provide a remedy with respect to errant retired en-

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[25] COMPARISON OF THE PROPOSED NEW ARTICLES OF WAR, *supra* note 24. (Emphasis added.)

[26] *Revision of the Articles of War, Hearing on H.R. 23628, supra* note 24, at 83–84.

[27] See "Explanation" accompanying S. 1032, *supra* note 24.

[28] COMPARATIVE PRINT SHOWING S. 3191, *supra* note 24.

[29] 39 Stat. 619 (1916).

listed men—making again the reference to those who were apparently finding it difficult to live on their retired pay—it said:

"There is, however, a limited field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not made punishable by any specific article or by the other parts of the general article." [30]

When World War I had shown the necessity for once more amending the Articles of War (not, however, Article 96) and the 1921 Manual for Courts-Martial was promulgated to announce the amendments of 1920 and other changes in military law prompted by the war, the authors of that Manual must have found that the discredit to the service clause of Article of War 96 had more than the "limited field" envisioned by the authors of the 1917 Manual. The new Manual, after suggesting various applications of the clause to members on active duty, simply stated that "another principal" object was to take care of the case of retired members.[31] This marked the beginning of a steady retreat from the position taken by the drafters of the 1916 Articles, for we find that the 1928 Manual speaks of retired enlisted persons as being only "one object" of the discreditable conduct clause,[32] and the 1949 Manual omits all mention of retired enlisted persons in this connection.[33] The drafters of the Uniform Code of Military Justice were either unaware of this history of the clause or thought it unworthy of consideration, for they are completely silent about it,[34] and the 1951 Manual also makes no mention of retired enlisted persons in its discussion of discreditable conduct.[35] As for case law, the most cursory glance through the indexes of both the Court-Martial Reports and the Reports of the Court of Military Appeals [36] will disclose cases far too numerous to cite of persons on active duty having been tried and convicted of offenses only remotely prejudicial to good order and military discipline but clearly "of a nature to bring discredit upon the armed forces." It is obvious, therefore, that the limitations which the authors of the 1916 Articles attempted to place upon the clause were unjustified at the time, never really obtained a foothold in the law, and have since been deservedly forgotten.

Thus we come to an end of our formal history. However, because of the very nature of the subject, it will be necessary to dip back into the past from time to time in the following paragraphs.

Crimes and Offenses not Capital

To one reading Article 134 without possessing a knowledge of its background and interpretation, it might seem that the apparently unlimited prohibition against the commission of "crimes and offenses not capital" found in that Article would cover all manner of noncapital crimes and offenses not otherwise specifically set out in the Uniform Code, regardless of the jurisdictional source of the particular offense in question. Consequently, it might appear that offenses against municipal, state, and foreign laws were intended to be included. Such, however, is not the case.

This question was somewhat vividly brought to the fore in the hearings on the Uniform Code held before a subcommittee of the Committee on Armed Services. There, Mr. Felix Larkin, then Assistant General Counsel, Office of the Secretary of Defense, and one of the chief spokesmen for the Uniform Code, was asked what was meant by the "crimes and offenses not capital" clause. When the ensuing conversation indicated some confusion as to whether state criminal laws were intended to be within the scope of the clause, Mr. Larkin clarified the matter as follows:

". . . I believe a violation of a State law would be punishable under the code to the extent it is construed as conduct to the prejudice of good order and dis-

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[30] MCM, 1917, para. 446 (II). One might note the legal hedging and uncertainty caused by the absence of the discredit clause in the earlier articles as disclosed in Winthrop's discussion of the prejudice of good order and military discipline clause. Winthrop 723–32 n. 17.

[31] MCM, 1921, para. 446 (II).

[32] MCM, 1928, para. 152(b).

[33] MCM, 1949, para. 183(b).

[34] *Hearings on H.R. 2498, supra* note 20, at 1235.

[35] MCM, 1951, para. 213(b). As far as the Army is concerned, present policy is that complaints or accusations against retired persons not on active duty are "normally" outside the responsibility of that Military Department and are to be pursued through the civil courts. Army Regulations 600–10, para 25a(3) (1958).

[36] See citators and index to 1–25 C.M.R. (1958); index and tables to 1–10 U.S.C.M.A.

cipline but not to the extent of the specific State law itself. We purposely want to avoid trying personnel who happen to commit an offense under State law, by virtue of the tremendous variations between State laws and by virtue of the necessity that would fall upon the court of trying them according to the procedural practices and perhaps even the substantive provisions of one State as against another. But, if the act is to the prejudice of good order and discipline, the fact that it also incidentally is a State law violation as well would bring it under this jurisdiction but not triable as the State would try it." [37]

One will immediately observe, of course, that Mr. Larkin neglected to mention that the discredit to the armed forces clause might come into play here also, but this omission was no doubt due to an oversight. As we shall see later, in actual practice it is the discredit clause, and not the prejudice to discipline clause, which is normally considered in case of acts which happen also to violate state or foreign laws. However, Mr. Larkin's assertion that a violation of state law would not as such be triable under the "crimes and offenses not capital clause" represented the interpretation given to that clause in the 1921 Manual for Courts-Martial and in all succeeding Manuals.[38] Although the language of the 1917 Manual had apparently adopted a broader view which was certainly subject to an interpretation that military prosecution for violations of state and even foreign laws would be permitted under the "crimes and offenses not capital" clause,[39] it seems that the law must have changed in this respect at some time between 1917 and 1921, for the contrary assertions in the 1921 Manual, along with other changes, were stated in the introduction to that Manual to have been based on "the results of decisions made by the Office of the Judge Advocate General and the War Department." [40]

Certainly at present it can be said that the "crimes and offenses not capital" clause is restricted to violations of federal laws or local laws enacted under the authority of Congress, such as those found in the Criminal Code of the District of Columbia. And even such laws, in order to be properly utilized under the clause in question, must be applicable in the place where the offense is committed.[41] This interpretation of Article 134 was crystallized by the Court of Military Appeals in *United States* v. *Grosso*.[42] In that case it was stated in the majority opinion:

"A violation of a state statute does not by itself constitute a violation of Article 134. . . . The violation must, in fact, and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct. Undoubtedly, if we were to examine the statutes of the several states, we would find hundreds of acts which are made locally punishable but which would not be violations of millitary law." [43]

In dissenting on other grounds, Judge Latimer, after quoting the statement of Mr. Larkin set out earlier in this article, stated:

"That quotation merely restates the rule long established in military law to the effect that the proper yardstick to be used to determine the criminality of an act made punishable by a state statute is its impact on good government in the military community. The purpose of Article 134 of the Code . . . is to prescribe that measuring rod and, while the state statute may for state purposes,

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[37] *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1239 (1949).

[38] MCM, 1921, para. 446 (III); MCM, 1928, para. 152(c); MCM, 1949, para 183(c); MCM, 1951, para. 213(c).

[39] MCM, 1917, para. 446 (III); see WINTHROP 721.

[40] MCM, 1921 (introduction at XI).

[41] MCM, 1951, para. 213(c). These principles should not be confused with the entirely different principles found in the second paragraph of paragraph 127(c) of the Manual which deal with the use of federal and District of Columbia laws for the determination of *maximum punishment*.

[42] 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957). The somewhat related proposition that a violation of state law, or municipal or foreign law, is not automatically an offense of a nature to bring discredit on the military has been law in the Army at least from the time of the 1928 Manual for Courts-Martial. MCM, 1928, para. 152(b). Prior to this time however, it seems that the contrary was the case. MCM, 1921, paras. 446 (II, III). And in the Navy, it appears that a violation of state, municipal, or foreign law was considered to be, per se, conduct "to the prejudice of good order and discipline" in violation of Article 22 of the Articles for the Government of the Navy up to the time of the passage of the Uniform Code. NAVAL COURTS AND BOARDS § 98 (1937). However, the language of Navy Article 22 differed materially from the Army general article. The mentioned Article 22 read: "Offenses not specified.—All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct."

[43] United States v. Grosso, 7 U.S.C.M.A. 566, 571, 23 C.M.R. 30, 35 (1957).

define the crime, before it becomes a military offense the prohibited conduct must, as the Article provides, have a direct and proximate impact on good order, discipline, or credit of the service." [44]

It would not be proper to take leave of this problem, however, without pointing out that under some conditions state laws become, in effect, federal laws under the Federal Assimilative Crimes Act,[45] with respect to acts or omissions occurring in places which are within the state in question but under the exclusive or concurrent jurisdiction of the United States. In such an event, a violation of a noncapital criminal provision of the state law is punishable as a violation of federal law under the "crimes and offenses not capital" clause.[46]

Of course, an offense must in fact be not capital in order properly to be chargeable under the "crimes and offenses not capital" clause. This limitation, however, has a much more far-reaching and sweeping effect than might at first be thought. Suppose, for example, a member of the military service commits an offense denounced as a capital offense by a federal statute, other than the Uniform Code, for which he could be tried in a federal court, and the offense is not one found in any specific article of the Uniform Code. Suppose, further, that the offense in question is both disruptive of military discipline and of a nature to bring discredit upon the armed forces. Now, obviously, the offender could not be tried for this offense under the "crimes and offenses not capital" clause of Article 134, but could he be tried for the offense on a non-capital basis under the theory of one or both of the other two clauses? By a divided court, the Court of Military Appeals, in the case of *United States* v. *French* [47] has answered this question in the negative. Judge Latimer, the author of the principal opinion, after comparing the Articles of War of James II with the American Articles of War of 1775 and apparently not noticing that the "crimes not capital" clause was a British innovation found in the British Articles of 1765 and not an American innovation, stated:

"In light of the time and circumstances under which Congress enacted the precursor statutes to Article 134, we believe that body intended to erect an absolute barrier against military courts trying peacetime offenses which permitted the imposition of the death penalty in civilian courts. Apparently the legislative department of the Government intended that category of crimes should be tried before a civilian court and jury under civilian rights and privileges. If we are certain in that regard, then it is positive that this case falls under the bar for if the specification as herein alleged was pleaded in one charge in an indictment, a conviction would permit the imposition of a death penalty by a Federal civilian judge. Following this hypothesis one step further, if an indictment was returned which did not include an allegation that the information related to national defense [the allegation which made the offense capital], then only a ten-year penalty could be impsoed and the case would not be capital." [48]

Elsewhere in his opinion, Judge Latimer pointed out that since all federal capital offenses would necessarily tend to bring discredit on the military services, to permit the trial of such capital offenses on the basis of this clause would render meaningless the "crimes and offenses not capital" clause. The opinion went on to state that the same reasoning would prevent trial of such an offense on a noncapital basis as conduct unbecoming an officer and a gentleman under Article 133. If, however, the offense in question, although capital under a federal statute, is also specifically denounced by the Uniform Code, it can then be tried by court-martial under the appropriate specific article whether capital or noncapital, for the specific article would amount to a direct legislative grant

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[44] *Id.* at 752–73, 23 C.M.R. at 36–37.

[45] 18 U.S.C. § 13 (1958).

[46] United States v. Picotte, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); United States v. Wright, 12 U.S.C.M.A. 202, 30 C.M.R. 202 (1961). Both cases involved the crime of kidnapping in violation of an assimilated state statute.

[47] 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959). Judge Quinn, in his opinion purportedly "concurring in the result" (there were other offenses sustaining the sentence as affirmed by the intermediate appellate tribunal), apparently felt that the accused could be convicted under Article 134 on the noncapital basis of service discrediting conduct despite the similarity of language between the allegations of the specification in question and the provisions of a Federal statute denouncing a capital offense. Judge Ferguson, concurring in the result, stated that he was in general agreement with most of the principal opinion but that his concurrence was limited because of choice of language therein which he deemed "unfortunate." Judge Ferguson did not specify these choices of language.

[48] *Id.* at 178–79, 27 C.M.R. at 252–53. The historical error mentioned in the text of this paper would not affect the result of the *French* decision.

of court-martial jurisdiction with respect to the offense denounced by that article.[49]

THE PROBLEM OF DEFINITENESS

The Article 134 type of general article has been attacked on a number of occasions as lacking in that degree of definiteness constitutionally required of criminal statutes. This is not particularly surprising since the requisite elements of definiteness in the ordinary civilian criminal statute are normally, except in the case of crimes well known to the common law,[50] spelt out in the statute itself, and therefore it could be expected that one unfamiliar with military law and traditions might have some difficulty with such phrases as "crimes and offenses not capital," "disorders and neglects to the prejudice of good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces." However, to a military lawyer or even to a military man who is not a lawyer, these terms have at least as much meaning as do the terms murder, assault, larceny, or embezzlement to the nonmilitary member of the bar. And it is precisely for this reason that the legal attacks on the general article have failed. Two cases, one decided in the last century and one in this century, should suffice to settle the problem before us.

In *Dynes v. Hoover*,[51] decided in 1858, the Supreme Court of the United States had before it the case of a sailor who had been convicted by a Naval court-martial of "attempting to desert" in violation of the thirty-second Article for the Government of the Navy. That article, the Navy general article, read: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The plaintiff, Dynes, who had brought suit for false imprisonment against Hoover, a United States Marshal who had imprisoned him pursuant to the naval conviction, complained among other things that the above quoted article was too indefinite. In holding that the article was a sufficiently legal criminal statute upon which to base a conviction, the Court said:

"And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial, and the offences of which the different courts-martial have cognizance." [52]

In 1953, the matter was raised again, this time before the Court of Military Appeals.[53] One Frantz had been convicted by court-martial of wrongfully having in his possession with intent to deceive an armed forces liberty pass, well knowing the same to be false, in violation of Article 134. He appealed his conviction contending that Article 134, as applied to his case, was unconstitutional because of vagueness. Despite the fact that the appellant had thus limited his constitutional objections to the application of the Article to the facts of his particular case, the court felt that it was necessary to determine whether the Article was sufficiently definite "*on its face* and *generally* as well." [54] In determining that the Article was sufficiently definite, the court said:

"Surely the third clause of the Article is not vague. However, we cannot ignore the conceivable presence of uncertainty in the first two clauses. Assuming that civilian precedents in the field are applicable in full force to the military

[49] *Id.* at 180, 27 C.M.R. at 254.
[50] See, *e.g.*, 18 U.S.C. § 113 (1958) ("assault with intent to commit murder or rape"); 18 U.S.C. § 114 (1958) ("with intent to maim or disfigure, cuts. . . ."); 18 U.S.C. § 153 (1958) ("embezzles"); 18 U.S.C. § 641 (1958). ("Whoever embezzles, steals. . . ."); 18 U.S.C. § 1111 (1958) ("Murder is the unlawful killing of a human being with malice aforethought."). There are many others.
[51] 61 U.S. (20 How.) 65 (1858).
[52] *Id.* at 82.
[53] United States v. Frantz, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).
[54] *Id.* at 163, 7 C.M.R. at 39.

community, we do not perceive in the Article vagueness or uncertainty to an unconstitutional degree. The provision, as it appears in the Uniform Code, is no novelty to service criminal law. . . . On the contrary, it has been part of our military law since 1775, and directly traces its origin to British sources. . . . It must be judged, therefore, not in vacuo, but in the context in which the years have placed it. . . . That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicity included in the Table of Maximum Punishments of the Manual. . . ." [55]

After pointing out that a certain minimum amount of indistinction would always be present in legislation of this nature which would have to be dealt with on a case to case basis, the court stressed the military importance of the general article in the following manner:

"[T]he briefest of terminal references must be made to the presence of special and highly relevant considerations growing out of the essential disciplinary demands of the military service. These are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development." [56]

It should be quite clear that the same principles that appear in the two cases we have discussed in connection with Article 134 would apply with equal force to Article 133.[57]

THE DOCTRINE OF PRE-EMPTION

Before becoming too deeply involved in this doctrine, if it can be called a doctrine, it will be necessary to explain what is meant, and what is not meant, by "pre-emption." This will be done in inverse order.

First, the doctrine of pre-emption does not prohibit a multiplication of charges, that is, charging one aspect of an act under a specific article and another aspect of the same act under Article 134 or 133, or both, provided the other aspect so charged is a cognizable offense under the general article in question.[58] If and when such a duplication may prejudice an accused at all it is not because of any doctrine of pre-emption but rather because of the rules govering multiplication of charges.[59] The author is not to be understood as suggesting an indiscriminate use of such a procedure. Unnecessary multiplication normally serves only to confuse the members of the court, to make life difficult for the law officer in drafting his instructions, to lead to possibilities of error with regard to the sentence, and to lay the proceedings open to charges by the defense that the accused is being improperly portrayed as a "bad man." [60]

Secondly, the doctrine of pre-emption has nothing to do with singly charging an offense denounced by a specific article as a violation of Article 134 or 133 when no elements of the specific offense are left out of the specification and no new elements are added. There would normally be no point in doing this anyway.[61]

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[55] *Ibid.*

[56] *Id.* at 163–64, 7 C.M.R. at 39–40.

[57] United States v. Lee, C.M. 348951, 4 C.M.R. 185, *petition for review denied,* 1 U.S.C.M.A. 712, 4 CMR 173 (1952)

[58] It might be argued that the discussion of Article 134 in the Manual for Courts-Martial, 1951, which, with respect to each of the three clauses, appears to restrict the operation of the Article to offenses not made punishable by a specific article (MCM, 1951, para. 213(a) (b) (c)) would, in close cases at least, prohibit such multiplication of charges with respect to Article 134. However, this restriction would appear to rest on a tender reed, for the Article itself in introducing its three proscriptions uses the phrase "though" not specifically mentioned in the Code, not "unless" specifically so mentioned. Article 133 has no restrictive language of any kind, and, indeed, double charges are expressly permitted here. See the penultimate paragraph of the "Discussion," MCM, 1951, para. 212. The above cited provisions of the Manual pertaining to Article 134 should not be confused with the provisions against unreasonable multiplication of charges found in paragraph 26(b) of the Manual.

[59] United States v. Middleton, 12 U.S.C.M.A. 54, 30 C.M.R. 54 (1960).

[60] *Ibid.*

[61] With respect to an Article 134 charge, at least, if there is any particular reason for using such a procedure it will probably be an illegal one and will be stricken down by the courts. See Rosborough v. Rossell, 150 F.2d 809 (1st Cir. 1945); WINTHROP 721; compare Gratfon v. United States, 206 U.S. 333 (1907). And if a specification is laid under Article 134 which could have been laid under a specific article, the court-martial, reviewing, or appellate authorities will simply change the charge so that it will recite the appropriate specific article. United States v. Hallett, 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954); United States v. Deller, 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953).

The doctrine of pre-emption does come into play, however, or rather, the question arises as to whether the prohibition of the doctrine applies, when an attempt is made to charge an offense under Article 134, or Article 133, which is similar to, but not the same as, an offense specifically proscribed by the Code either because one or more elements have been added or left out or because the offense charged otherwise lies in the same field of criminality as the specifically denounced offense in question. In such a case, the problem always is one as to whether Congress, in enacting the specific article, intended completely to cover—to pre-empt—in that article the entire field of criminality pertaining to that particular department of crime, and consequently would brook nothing greater or less and had turned its face away from the possibility of any non-identical general article twins. This, obviously, is a problem of statutory construction of the specific articles, not one of construing the general articles.

Prior to the Uniform Code and for a relatively short time thereafter, this doctrine appeared not to have been recognized by military appellate tribunals. Indeed, the theory current in those days seemed to be that the Article 134 type of general article encompassed, as stated by Winthrop, "acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter . . ." and acts similar to those specifically denounced but "which lack the *gravamen* expressed in the term 'knowingly,' 'wilfully,' or the like"—all this without paying any particular attention to any possible exclusionary construction of the specific articles themselves.[62]

In *United States v. Norris*,[63] decided by the Court of Military Appeals early in 1953, the accused had been found guilty of the offense of wrongful appropriation in violation of Article 121 of the Code. That Article denounces the offenses of larceny and wrongful appropriation and requires that there be an intent permanently to deprive, defraud, or appropriate in the case of larceny, and an intent temporarily to do one or more of these things in the case of wrongful appropriation. Because of instructional difficulties at the trial, the board of review (an intermediate military appellate tribunal) determined that the accused could not legally be convicted of having the temporary intent necessary for wrongful appropriation, and, acting on the basis of prior service precedents, sustained only a conviction for "wrongful taking" without such temporary intent in violation of Article 134. In reversing the conviction, the Court of Military Appeals said:

"We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."

"We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined. It follows that there is no offense known as "wrongful taking" requiring no elements of specific intent, embraced by Article 134 of the Code."[64]

As might be noticed, the decision in this case is at least partially based on the fact that the drafters of the Manual, in their supporting material, had stated that wrongful appropriation, as defined by Article 121, included "offenses heretofore known as misappropriation, misapplication, joy-riding, wrongful taking and using, and wrongful conversion." Actually, in his concurring opinion, the late Judge Brosman indicated that this was the principal, if not the only, reason for his concurrence.[65]

In another case decided by the Court of Military Appeals in 1953, the case of *United States v. Deller*,[66] the accused had been convicted of absence without

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[62] WINTHROP 725–26; United States v. Norris, C.M. 354500, 7 C.M.R. 412 (1952), *rev'd*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). A rather generalized theory of pre-emption was apparently recognized in England, however, at an early date. See SAMUEL, MILITARY LAW 688 (1816).

[63] 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). See also United States v. Bridges, 12 U.S.C.M.A. 96, 30 C.M.R. 96 (1961).

[64] United States v Norris, 2 U.S.C.M.A. 236, 239–40, 8 C.M.R. 36, 39–40 (1953).

[65] *Ibid.*

[66] 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953). When an accused raises the issue of pre-emption, he normally does so with one or more of the following reasons or contentions in mind; that the pre-empted act is no offense at all; that the pre-empting offense carries a lesser penalty; or that the instructions upon the elements of the pre-empted offense do not fit the elements of the pre-empting offense.

leave 'with the wrongful intent of permanently preventing completion of his basic training and useful service as a soldier" in violation of Article 134. Article 86 of the Uniform Code, which specifically makes punishable absence without leave, nowhere mentions such an intent. However, Article 85, the desertion Article, defines one type of desertion as an unauthorized absence with intent to shirk important service. The court of Military Appeals, after holding that basic training constituted "important service," affirmed a conviction of desertion with intent to shirk such service in violation of Article 85. In the course of its opinion the court said:

"[O]ffenses sounding in unauthorized absence may be reached and penalized only under the provisions of Articles 85, 86, and 87 of the Code . . . proscribing, respectively, desertion, absence without leave, and missing movement. With a single exception not relevant here [probably breach of restriction is meant; actually, there are others, such as breach of quarantine], there are simply no offenses of an unauthorized absence type cognizable under Article 134." [67]

This case turned upon statutory construction of the absence without leave Article (Article 86) found in the discussion of that Article in the Manual, wherein it was said that the Article was designed to cover "every case not elsewhere provided for" in which a member of the armed forces was through his own fault not at the place where he was required to be at the prescribed time. [68]

In *United States v. Hallett*,[69] the accused was tried under a specification alleging that, being before the enemy, he was guilty of cowardly conduct in that he wrongfully failed to accompany his platoon on a combat patrol, in violation of Article 99. By exceptions, the court-martial found him not guilty of this offense but guilty merely of wrongfully failing, while being before the enemy, to accompany his platoon on the patrol, in violation of Article 134. The predecessor of Article 99 of the Uniform Code, Article 75 of the Articles of War, had contained a clause making punishable the act of one who "before the enemy, misbehaves himself." This generalized provision had been left out of Article 99, despite the protests of the then Judge Advocate General before the congressional committee considering the Uniform Code. No provision in Article 99 covered the conduct of which the accused was found guilty. The court held that under the circumstances, Congress had covered in Article 99 the "entire range of offenses which are assimilable to misbehavior before the enemy" [70] and that no room was left in this area for the application of Article 134. The court did sustain, however, under the finding of the court-martial, a conviction of unauthorized absence in violation of Article 86.

The case of *United States v. Frayer* [71] represents an interesting split of opinion on this matter within the Court of Military Appeals. The accused was convicted of communicating a threat, an offense for which the Manual provides a sample specification [72] and an entry in the Table of Maximum Punishments,[73] both listed under Article 134. On appeal, the accused contended that this sort of offense was preempted by Article 127 of the Code, the article denouncing extortion. The court, with Judge Ferguson dissenting on this point, held that the act of communicating a threat was properly an offense in violation of Article 134. Judge Latimer's rationale in this connection is particularly illuminating:

"There seems to be some misapprehension about the power of Congress to make one act a crime under two or more punitive Articles. There is no such proscription, for the bar that has been erected is that an accused shall not be twice tried or punished for the same offense. But that is not to say that the Government cannot elect to prosecute once under any statute which has been violated. By way of illustration, when a member of the military misses a movement, he can be charged with violating either Article 86 [absence with leave] or Article 87 [missing movement]. . . . Examples could be multiplied, but from the foregoing it ought to be evident that, *unless there are clear indications that Congress, by enacting one statute, intended not to permit prosecution under any other law*, then the Government may choose which punitive Article will be used to support the specification and charge." [74]

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[67] *Id.* at 413, 12 C.M.R. at 169.
[68] MCM, 1951, para. 165; United States v. Johnson, 3 U.S.C.M.A. 173, 11 C.M.R. 174 (1953), relied on by the court in the *Deller* case.
[69] 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954).
[70] *Id.* at 382, 15 C.M.R. at 382.
[71] 11 U.S.C.M.A. 600, 29 C.M.R. 416 (1960).
[72] MCM, 1951 (app. 6c, Spec. No. 171).
[73] MCM, 1951, para. 127(c).
[74] United States v. Frayer, 11 U.S.C.M.A. 600, 607, 29 C.M.R. 416, 423 (1960). (Emphasis added.)

Judge Latimer, as had Judge Quinn, then found that there was no indication that Congress had intended to pre-empt the field of threats when it enacted Article 127. Judge Ferguson, in dissenting on this point, indicated that he would approach the problem of pre-emption by finding evidence of legislative intent in the phrase "Though not specifically mentioned in this chapter" [Code] appearing in Article 134 itself.[75] He felt that Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive articles.

There have been two recent cases on this subject. In one, *United States v. McCormick*,[76] the accused was convicted of assault and battery upon a child under the age of sixteen in violation of Article 134[77] and, on appeal, contended that this offense was pre-empted by the assault article, Article 128. This Article denounces ordinary assault and two kinds of aggravated assault, no mention being made of assaults upon children. Judge Ferguson, again referring to his concept that the phrase "Though not specifically mentioned in this chapter" [Code] was one of limitation, held that the offense in question was pre-empted but that the error thereby caused was *de minimis* in view of the other offenses of which the accused stood convicted. Judge Quinn's opinion was neutral on the question of pre-emption, and Judge Latimer, after noting that the three opinions resulted in no law being decided on the matter of pre-emption, stated that there was no congressional intent to blanket the entire field of assaults with Article 128.

In the other case, *United States v. Picotte*,[78] the accused was charged with kidnapping in violation of Article 134. The case fell under the "crimes and offenses not capital" clause since under the circumstances the provisions of the Colorado kidnapping statute had been assimilated under the Federal Assimilative Crimes Act. On appeal, the accused contended that the kidnapping charge was pre-empted by Article 97 of the Code, which proscribes the offense of unlawful detention. Judge Latimer, using the same approach employed by him in earlier cases, held that the offense of kidnapping was not pre-empted by Article 97, principally on the ground that, in that Article, Congress had intended only to define the less serious offense of false arrest or false imprisonment and had not intended to cover the more serious offense of kidnapping. Judge Quinn concurred, and Judge Ferguson, although he concurred in the result on the ground that there could be no possibility of pre-emption under his view of Article 97 (he would limit the article to military abuses of the power to detain), nevertheless gave notice that he had not retreated from his theory of the doctrine of pre-emption as expressed in earlier cases.

It would appear that the doctrine of pre-emption as explained at the beginning of this chapter and as expounded in Judge Latimer's opinions, which now seem to express the views of the majority of the court, would apply to questions of pre-emption arising under Article 133 as well as to those arising under Article 134. If the matter is to be controlled by reference to the intent of the legislature in covering, or not covering, in a specific article the whole field of criminality to which that Article pertains, and if it is found that the legislature did intend to cover that field entirely in the Article in question, then it is difficult to imagine how there could be any room left in that field for the operation of other concepts, such as conduct unbecoming an officer and a gentleman.[79]

THE TRUE NATURE OF THE GENERAL ARTICLES

It is very easy to become somewhat overly aware of case law in connection with any research of a legal problem involving the general articles. Indeed, and perhaps to his ultimate dismay, a member of the legal profession nurtured in the case by case or Holmesian doom theory of the study of law can become quite bogged down in a veritable morass of legal decisions and opinions on this subject that can well turn out to be a somewhat annoying form of non-stare decisis law. This apparent anomaly suggests a comparison with certain procedural aspects of the romanesque legal systems on the European Continent. As any student of comparative law well knows, in those systems case law is used only as a sort of guide or appeal to reason, and when the chips are down on a difficult legal point and the case is ripe for decision the judge will go back to the basic legal prin-

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[75] See note 58 *supra*.
[76] 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960).
[77] The Manual contains a specification for this offense and an entry therefor in the Table of Maximum Punishments, both listed under Article 134, MCM, 1951, para. 127(c), Table of Maximum Punishments; MCM, 1951 (app. 6c, Spec. No. 125).
[78] 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961).
[79] See United States v. Daggett, 11 U.S.C.M.A. 681, 29 C.M.R. 497 (1960), which leaves the matter in doubt.

ciples of the statute, unadulterated by any legal gloss—particularly case law.[80] Our general articles, except for the "crimes or offenses not capital" clause of Article 134, lend themselves peculiarly well to this type of approach, for they seek to express theories or principles of guilt as distinguished from mere denunciations of certain prohibited acts. Whether this is due to the fact that at least one of our general articles—Article 134—and much of earlier court-martial procedure may be traced to Continental European sources is difficult to determine. However, whatever the historical or other reasons may be, it is clear that in the general articles apart from the "crimes or offenses not capital" clause we are not dealing with such things as dishonorable failure to pay debts, assault and battery upon minor children, and other conveniently identifiable delicts or crimes alone. We are dealing with theoretical but nevertheless intensely practical concepts of guilt, deeply flavored with important and even crucial considerations of public policy which in cold fact are probably well understood by even the most ignorant offender. These theories of guilt, which in some instances may have a mens rea somewhat different from that ordinarily found in common-law crimes but which are still much more meaningful than those expressions of criminality contained in some of our so-called "malum prohibitum" statutes that are becoming more and more prevalent in the civilian field, are simply but lucidly expounded in the following terms—"disorders and neglects to the prejudice of good order and military discipline," "conduct of a nature to bring discredit upon the armed forces," and "conduct unbecoming an officer and a gentleman." Should there be any lingering doubt as to the precise nature of these terms, that doubt has been dispelled with respect to matters prejudicial to good order and military discipline and conduct unbecoming an officer and a gentleman by the terse provisions of the Manual,[81] following ancient precedent.[82] The Court of Military Appeals has quite effectively defined the limits of the "conduct to the discredit of the armed forces" clause by indicating that conduct reflecting only *some* measure of discredit on the armed forces is not enough,[83] and that in this clause "Congress intended to proscribe conduct which directly and adversely affected the good name of the service,"[84] thus paralleling the limitations upon the "prejudice of good order and military discipline" clause found in the Manual.

A few cases from the Court of Military Appeals will serve to show that the general articles are not to be considered as a fertile ground for crystallization by case law and that their general clauses are to be considered as expressing, in themselves, the governing law on the subject. Of course, as mentioned earlier, the cases are a guide and an appeal to reason. But one who relies on a particular

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[80] For on interesting, though non-technical, presentation of the Continenal European romanesque legal systems, see WIGMORE, PANARAMA OF THE WORLD'S LEGAL SYSTEMES, ch. XV (1936); BURDICK, THE BENCH AND BAR OF OTHER LANDS, chs. III–V (1939).

[81] The Manual discussion of Article 134 (para. 213(a)) states *inter alia;* "'To the prejudice of good order and discipline' refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable."

The Manual discussion of Article 133 para. 212 states, *interalia*: "Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer.

"There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman. This article contemplates conduct by an officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising."

In comparing the general clauses of Article 134 with Article 133, it should be noted that officers are and must be held to a somewhat higher standard of conduct and responsibility than are enlisted persons. United States v. Downard, 6 U.S.C.M.A. 538, 542, n. 2, 20 C.M.R. 254, 258 n. 2 (1955); see United States v. Underwood, 10 U.S.C.M.A. 413, 27 C.M.R. 487 (1959).

[82] WINTHROP 710–13, 723. With respect to conduct unbecoming an officer and a gentleman, Winthrop states, and so does the Manual by inference, that in order to constitute this offense the conduct in question must be unbecoming in regard to both concepts, officer and gentleman, not just one of them.

[83] United States v. Downard, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955). To be considered dishonorable, a failure to maintain a sufficient bank balance to cover a check or a failure to pay a debt must be characterized by deceit, evasion, false promise, bad faith, or gross indifference. See also United States v. Groom, 12 U.S.C.M.A. 11, 30 C.M.R. 11 (1960).

[84] United States v. Sanchez, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34 (1960).

case in this field had better be very sure that he has an exact parallel and, more importantly, even then he cannot assume that the judicial winds will not have changed in the meantime.[85]

An illustration of the validity of the proposition that the general provisions of the general articles are a law unto themselves and are not governed by particular judicial decisions is found in the case of *United States v. Williams*.[86] In that case, the accused had been convicted of wrongfully using a habit forming narcotic drug in violation of Article 134. This offense is mentioned in the Manual under the discussion of the "prejudice of good order and military discipline" clause of Article 134. On appeal, the defense contended that the conviction could not stand because the law officer had failed to instruct the members of the court that in order to find the accused guilty they must find as one of the elements that the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces. In holding that the contention of the defense was correct, the court said:

"It [the matter omitted by the law officer] is an element of the offense and must be instructed upon. The Government's contention that wrongful use of narcotics is prejudicial conduct as a matter of law would be equally applicable to practically every offense charged under the general Article. Accordingly, we hold that the law officer erred in failing to instruct the court that in order to find the accused guilty of the offense charged, it must find that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." [87]

It is very probable that the same instructional requirements would apply with respect to conduct unbecoming an officer and a gentleman.[88]

Another case supporting the principles here suggested is the case of *United States v. Snyder*.[89] The accused had been convicted of three specifications of wrongfully and unlawfully attempting to entice another service member to engage in sexual intercourse with a female to be directed to him by the accused, in violation of Article 134. The Judge Advocate General of the Navy certified the case to the Court of Military Appeals asking whether the three specifications stated offenses under Article 134. In holding that they did, the court made some interesting comments concerning Article 134 in general. The court stated:

"It is true, as urged by appelate defense counsel, that fornication, in the absence of aggravating circumstances, has been held not to be an offense under military law. United States v. Ord, 2 CMR (AF) 84. This is consistent with the view expressed earlier herein that Congress has not intended by Article 134 and its statutory predecessors to regulate the wholly private moral conduct of an individual. It does not follow, however, that fornication may not be committed under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment. Likewise it does not at all follow that, because simple fornication is not an offense cognizable under military law, neither is enticement or an attempt at enticement thereto." [90]

[85] United States v. Day, 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960). Here the Court of Military Appeals reversed a conviction for usury (loaning money at an "unconscionable" rate of interest), in violation of Article 134, on the ground that there was no such offense in military law, despite the fact that the present and earlier Manuals for Courts-Martial had listed usury as an offense under the general article and convictions for usury had long been sustained by military appellate tribunals. Judge Latimer wrote a strong dissent, stating that usury was in fact prejudicial to military discipline. This case, which is really atypical of the principles expressed in the text, will probably cause some readers to think that the author might have qualified his statement to the effect that the standards of the general articles are capable of being understood by all service personnel by indicating that those who have had their convictions reversed on appeal might sometimes have difficulty in this connection.

[86] 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957).

[87] *Id.* at 327, 24 C.M.R. at 137. Judge Latimer dissented on the ground that the Manual itself stated, with good reason, that wrongful possession of a habit forming narcotic drug *was* an offense under Article 134 and that this would be obvious to anyone. While the author personally agrees with the dissent, the case is nevertheless a useful vehicle to illustrate the point made in the text. Parenthetically, it might be of interest to know that the majority opinion points out that although it is necessary to instruct upon these matters, it is not necessary to *allege* in the pleadings that the conduct was prejudicial to good order and military discipline or that it was service discrediting.

[88] See U.S. DEP'T OF THE ARMY PAMPHLET NO. 27-9, MILITARY JUSTICE—THE LAW OFFICER, par. 74d (1958).

[89] 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

[90] *Id.* at 427, 4 C.M.R. at 19. See also United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956); United States v. Sanchez, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960)—act of bestiality with a chicken held criminal per se and a violation of Article 134, but the question of pre-emption by Article 125 (sodomy) was purposely not raised by the defense.

Thus we see that the facts and circumstances, not the name by which a particular act may be called, will make or break any prosecution under the general articles, depending upon whether those facts or circumstances are judicially regarded as falling within the stated prohibitions or theories of guilt of those articles. One limitation, however, upon this approach is the doctrine of preemption which has been previously discussed. When that doctrine is applicable, the concepts of the general articles fall by the wayside.

CONCLUSION

Those who have had any experience in the field of military justice will realize at once, of course, that there are many problems connected with the construction and application of the general articles which have not been touched upon in this discussion. The intent of the author was only to bring to light some of the rather obscure historical background of the articles and to mention, in a relatively brief form, what were thought to be their most important and troublesome aspects. If we have done nothing more, however, this paper should at least have indicated that the general articles are indeed living and growing members of the corpus of military law, that it is important to understand their ancestry which has given shape and meaning to their present day existence, and that a flexible and even philosophical approach must be employed in applying them to the circumstances and happenings of military life.

From the standpoint of maintaining the discipline and good name of the United States Armed Forces at home and abroad, the general articles, and in particular Article 134, are extremely valuable. Back in 1912 and 1913, when a major revision of the military code which later became the Articles of War of 1916 was under consideration, it was mentioned that fully twenty-five per cent of all "cases" tried in the Army were prosecuted under the predecessor to Article 134.[91] It did not appear whether inferior court-martial cases were included in these statistics, but the probabilities are that they were not and that only general court-martial cases were considered in arriving at this percentage. In those days there were only forty-four specific articles, while today, under the Uniform Code, there are fifty-four specifically denounced crimes and offenses. Even so, taking a sampling from one of the services, during the calendar year 1960, fourteen per cent of all offenses tried by Army general courts-martial were Article 134 offenses and twenty-three per cent of all persons so tried were prosecuted under this article.[92] Bringing our discussion thus to a close, it can readily be seen that the need for an effective means of solving unforeseen and often unforeseeable problems of military misconduct through the civilized processes of the law, which prompted Gustavus Adolphus to include a general article in his early code, is as much a requirement of a properly disciplined and controlled armed force in our present society as it was in those of former times.

In The United States District Court, District of Utah, Central Division

Civil No. C-188-65

IN THE MATTER OF THE APPLICATION OF JAMES E. STAPLEY, PFC, UNITED STATES ARMY, FOR WRIT OF HABEAS CORPUS

JUDGMENT

The Court having heretofore entered its Findings of Fact and Conclusions of Law in the above entitled matter and being fully advised in the premises, it is hereby ORDERED, ADJUDGED AND DECREED:

That the petitioner Pvt. James E. Stapley, United States Army, is granted a Writ of Habeas Corpus and released from the custody of miltary authorities

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[91] See COMPARISON OF THE PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 50 (1912); "Explanation" accompanying S. 1032, 63d Cong., 1st Sess. 48 (1913). In COMPARATIVE PRINT SHOWING S. 3191 WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 58 (1916), the statement was made that fifty per cent of the cases tried were Article 134 cases. This statement is probably erroneous.

[92] Statistics obtained from Court-Martial Records Branch, Military Justice Division, Office of The Judge Advocate General of the Army.

holding him under judgment of the Special Courts-Martial which tried him, the same being void, ab initio and without jurisdiction.

Dated and signed this 1st day of October, 1965.

BY THE COURT
A. SHERMAN CHRISTENSEN, *Judge*.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This case involves the question of whether the Sixth Amendment to the Constitution of the United States requires the appointment of counsel to represent military personnel on serious charges before special as well as general courts-martial and, if so, whether minimal constitutional requirements were met in this case wtih respect to the qualification and representation of appointed counsel.

The case for good cause came on for expedited hearing before this court pursuant to rule on the 17th day of September, 1965. The petitioner James E. Stapley was present in person and was represented by his counsel, James P. Cowley, Esquire. The respondent was represented by Ralph Klemm, Esquire, Assistant Untied States Attorney for the District of Utah and by a representative of the command under which the petitioner served. Evidence, both oral and documentary, was received, and arguments were heard. Whereupon the court, being fully advised in the premises, announced its decision, and now in accordance with such oral decision, makes and enters the following written

FINDINGS OF FACT

1. James E. Stapley, Private First Class, United States Army, assigned to the U.S. Army Garrison (6001–00) Ft. Douglas, Utah, on July 29, 1965, was arraigned and tried before before a special court-martial for violation of the Uniform Code of Military Justice, Articles 86, 90, 117, 123a and 134. While a general court-martial was not involved, these charges were substantial and serious, involving not only breaches of military orders and discipline, but also repeated acts of claimed fraud in the issuance of checks some of which, if established, could have constituted felonies in a civil court and all of which imputed moral turpitude. Such charges involved problems of substantive law as well as practice, reasonably necessitating knowledgeable legal counsel, advice, and assistance.

2. The petitioner Stapley at the time he faced these charges was of the age of nineteen years, apparently immature even for this age, suffering from emotional difficulties, and of limited experience notwithstanding his prior exemplary service as a trainee and in Korea. There had been no previous experience on his part with disciplinary problems or with proceedings under the Code of Military Justice as far as the record discloses.

3. When the charges were first served upon petitioner by trial counsel he requested the appointment of a lawyer as defense counsel but this request was not granted. There were appointed as his defense counsel and assistant defense counsel, respectively, a captain and a second lieutenant from the command under which petitioner served. The captain had been in service about two years. He was a veterinarian without training or experience in, or acquaintanceship with, legal proceedings of any kind. He was naive and unknowledgeable with regard to legal matters, devoid of experience with them, possessed no aptitude with respect to such matters, and was uncertain of his functions or duties. He estimated that his total training as an officer in military law had been accomplished in two days. The second lieutenant was at the time twenty-two years of age, had been in the service about one year, and, while he had had academic background in history and political science and had studied the Code of Military Justice in an R.O.T.C. program, he had no special knowledge or ability in these fields and no practical experience whatsoever in legal matters or procedures. Moreover, it appears that he deferred largely to the senior officer. Neither defense counsel had any experience before or with any court-martial or in advising persons charged with offenses. Their advice to the accused on various legal matters was based upon consultation with the officer who had drawn up the charges, and probably was garbled in its being so relayed, as was illustrated by the captain's concept that intoxication could be no defense for a "specific intent" crime. And counsel advised the accused to plead guilty to all charges, including one thereafter ordered dismissed by the convening authority for legal insufficiency to state an offense.

4. The defendant upon a preliminary consultation with his assigned counsel requested that he be permitted to have qualified attorneys to represent him, but was told that there was none available to him from the military service and that if he wished a civilian attorney he would have to pay approximately $150.00 for his services, which the accused was financially unable to do. The accused was further advised not to raise any question with regard to his legal representation with the convening authority or before the court-martial; that he should not request any non-commissioned officer upon the court because it would go harder with him if he did, that he should enter into a "deal" with the commanding officer to return pleas of guilty to all charges in return for an agreement that if he were sentenced to more than two months confinement, his sentence would be commuted to that sentence.

5. The accused, petitioner herein, entered into such an agreement and pursuant to the suggestion of his attorneys made no statements other than "Yes sir" or "No sir" before the court-martial but entered pleas of guilty to all charges, except for one which had been dismissed pursuant to the order of the commanding officer because patently insufficient on its face. Before the court-martial when the accused was asked whether he had any objection to defense counsel, defense counsel himself answered "no," although the accused probably would have given the same answer in view of the prior conversation with defense counsel concerning his request for other counsel and the belief that defense counsel's views in this and other matters should be accepted. Defense counsel was assigned approximately one week before the trial and spent several days studying the Code of Military Justice and the Manual for Courts-Martial and otherwise attempting to properly advise or represent the accused and there is no doubt that both he and the assistant defense counsel were in good faith in attempting to properly handle the case. Trial counsel representing the prosecution were not certified counsel, nor were they lawyers, and the evidence does not otherwise indicate their qualifications or competency.

6. The consultations with his assigned "counsel" did not involve counseling or legal advice in any proper sense. That services of "defense counsel" did not constitute the assistance of counsel, in any proper sense. Notwithstanding the conscientious attitude of his assigned counsel they were wholly unqualified to act and failed to act as "counsel" with respect to military law, procedure, trial or defense practicality, or at all.

7. The trial before the court-martial notwithstanding that all participants acted in good faith, constituted no more than an idle ceremony or form in accordance with a script arranged before hand, and limited and determined by defense counsel in their instructions for the accused not to raise any problems or to make any statement except "Yes sir" or "No sir" to questions asked, the pre-trial agreement with the commanding officer and the pleas of guilty agreed upon pursuant thereto. By reason of the circumstances above mentioned, the representation of the accused by defense counsel was in the nature of a mere mockery or sham and did not in fact or law constitute representation by "counsel" either civil or military.

8. Upon the petitioner's pleas of guilty he was adjudged and found guilty by the special court-martial of all charges and specifications then pending and was sentenced to be confined at hard labor for three months and to forfeit $55.00 per month of his pay for six months and to be demoted. No appeal or proceeding for review were advised by counsel or taken by the accused, although the accused was advised of his rights to review in accordance with the provisions of paragraph 48j(3), MCM 1951. Pursuant to the pre-trial agreement the convening authority, petitioner's commanding officer, declined to approve the sentence imposed by the court-martial in excess of confinement at hard labor for two months and forfeiture of two-thirds pay per month for two months with reduction to the lowest enlisted grade. The petitioner or his counsel did not take any proceedings for review of his conviction or sentence through military channels but petitioner could not reasonably be considered barred from recourse to this court for failure to exhaust military remedies under the circumstances of this case.

9. At the time of the issuance of an order to show cause why a writ of habeas corpus should not be entered, and at the time of the hearing upon said order to show cause, and at the time of granting of the writ, the petitioner was in custody under said sentence.

From the foregoing Findings of Fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. That federal courts, and particularly United States District Courts have not been invested by the Constitution or laws of the United States with power to review the regularity or legality of proceedings before military tribunals. That the only jurisdiction of this court to consider such matters is inquiry and ruling upon application for writs of habeas corpus by persons held in confinement under order or sentence by military tribunals proceeding without jurisdiction in violation of rights guaranteed by the Constitution of the United States. That notwithstanding the limited scope of such jurisdiction, the vindication of constitutional rights through such inquiry and rulings in proper cases transcends ordinary limitations and affords federal courts both the jurisdiction and the duty to inquire and rule upon the legality of detainment of any person entitled to constitutional protection whether in or out of military service.

2. That the Sixth Amendment to the Constitution of the United States applies to proceedings before special courts-martial in the military service, as far as concerns the right to the assistance of counsel on the part of an accused, particularly where the charges are substantial or involve moral turpitude or, may result in a substantial deprivation of liberty. The charges brought against the accused petitioner were of such character.

3. That the right to counsel of one charged with crime before a military tribunal is as fundamental to a fair trial as before a civilian court and while military exigency may to an extent condition such right, it cannot obliterate it; on the contrary such exigency often renders constitutional protection all the more indispensable. Nor is such right limited to spectacular or especially extreme cases, for in our citizens army the cumulative effect of repeated constitutional violations, even in supposedly little cases, looms large in its eroding effect.

4. The circumstances of this case render it unnecessary to decide whether before such tribunals under all circumstances an accused is entitled to be represented by counsel who have been trained and admitted to practice before a civilian court, although the training, experience, code of conduct, and professional conditioning of such attorneys seems most conducive to the necessities for the type of representation reasonably to be expected. It is sufficient here to consider only whether under the peculiar circumstances of this case, and in view of the frustration of petitioner's efforts to obtain qualified legal services because of his financial inability to pay for them, minimal requirements of due process particularly in view of the Sixth Amendent, required that counsel made available to the petitioner had requisite competency or qualification in military or civilian laws and proceedings, or both, beyond that common to every officer in the military service.

5. That minimal requirements of due process and the Sixth Amendment are not satisfied by the assignment as counsel to an accused of officers with substantially no experience, training or knowledge in the field of law, either military or civilian. That with the increasing personnel in the military service, the rapidity and ease of transportation and the training facilities and techniques readily available for specialized training or experience, it is no longer either reasonable or necessary, if it ever were, to deem any officer qualified to act as defense counsel for an accused merely because he is an officer; nor is it either reasonable or necessary to limit the availability of qualified defense counsel to cases in which the prosecution is represented by qualified counsel. That an accused has the right to be reasonably advised concerning charges even though they are filed inadvisedly and prosecuted unintelligently, and in the latter event sometimes he needs qualified counsel all the more.

6. That the apparent evidence or proofs arrayed against a defendant prior to trial or the possibility or probability of guilt do not dispense with the necessity for qualified counsel nor the right thereto; nor does the fact that pleas of guilty have been entered waive or ratify deprivation of the right to counsel.

7. That the qualifications of appointed defense counsel in the court-martial of James E. Stapley were not adequate to constitute "counsel" as that term is used and contemplated in the Sixth Amendment to the Constitution of the United States and as required by due process, but that on the contrary the representation of the accused was in the nature of idle form or mockery.

8. That "military due process", while within the competence of Congress to establish in view of military necessity, must comport with minimal requirements of constitutional due process to render it immune from attack in the courts when inconsistent confinement of military personnel is involved.

9. That not only in proceedings involving general courts-martial, or the possibility of dishonorable or bad conduct discharges, but also in proceedings before special courts-martial where substantial criminal charges are to be tried involving claimed moral turpitude or the risk of substantial incarceration is the availability of counsel a constitutional requirement.

10. That withdrawn from its problems and responsibilities, courts could easily become insensitive to military necessity, and no jurisdictional doctrine would be practical without recognition of this danger. Yet it can safely be recognized within the limits of this ruling that the assignment of defense counsel possessing at least minimal qualifications to rationally advise on substantive and procedural legal problems may not be deemed precluded in this day and age in the absence of a showing of overriding military necessity that does not exist here.

11. The precedential [1] structure within, or upon the periphery of which, these conclusions have been reached, and the competing historical, practical and conceptual considerations [2] that have been taken into account and reconciled insofar as has seemed possible, are indicated in the margin.

12. In sum it appears appropriate, timely and necessary to recognize that it may be repugnant to minimal requirements of due process, even in the military service, for the juridically blind to lead the blind under a system or in a particular command accepting this as a rule rather than a militarily necessitated exception; that the fiat of an appointment of "defense counsel", a military commission, a presidential appointment or even an act of the Congress cannot itself satisfy the demands of the Sixth Amendment that in all criminal prosecutions the accused is "to have the assistance of counsel for his defense"; that is assistance of counsel, however adaptably we may interpret the term in view of military expediency, cannot be constitutionally debased to mean the substantial absence of any legal assistance, the mere shell or shadow of counsel or no more than a semantic illusion; and that the military service in these respects may not be considered a constitutionally uninhabitable wasteland beyond even the scan of the Great Writ where the court is powerless to reach out a protective hand.

13. That by reason of the violation of petitioner's constitutional rights the special court-martial acted without jurisdiction; that petitioner was at the time of the hearing and the granting of the writ of habeas corpus illegally detained and deprived of his liberty contrary to the Constitution of the United States and that he was and is entitled to discharge from such detention by writ of habeas corpus.

Ordered: That the petitioner is discharged from confinement.

Dated this 1st day of October, 1965.

A. SHERMAN CHRISTENSEN,
U.S. District Judge.

In The United States District Court for the District of Kansas

No. 3919 H. C.

MICHAEL T. LEBALLISTER, PETITIONER

v.

THE WARDEN, UNITED STATES DISCIPLINARY BARRACKS, LEAVENWORTH, KANSAS, RESPONDENT

Mr. Roy Cook, Kansas City, for petitioner.

Lt. Col. Abraham Nemrow, JAGC, Washington, D.C., and Mr. Benjamin E. Franklin, Assistant United States Attorney, Topeka, Kansas, for respondent.

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[1] *Burns* v. *Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953); *Powell* v. *State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), 84 A.L.R. 527; *Trop* v. *Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 630 (1958); *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963); *Reid* v. *Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed. 2d 1148 (1957); *United States* v. *Culp*, 14 USCMA 199, 33 CMR 411 (1963); *United States* v. *Kraskokas*, 9 USCMA 607, 26 CMR 387 (1958); *United States* v. *McElroy*, 158 F.Supp. 171 (D.C.D.C. 1958).

[2] Chief Justice Earl Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181 (1961); Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L.Rev. 293 (1957); Avins, Accused's Right to Defense Counsel Before a Military Court, 42 U. Det. L.J. 21 (1964); Cf. Wiener, Courts-Martial and the Bill of Rights, 72 Harv. L.Rev. 1 (1958).

OPINION

ARTHUR J. STANLEY, JR., Chief Judge

The petitioner in this habeas corpus proceeding is now in the custody of the respondent by virtue of two convictions by separate special courts-martial, each resulting in a sentence of confinement for a period of six months and forfeiture of pay. The facts are not disputed. The sole question presented is whether the Sixth Amendment to the Constitution of the United States requires that an accused before a special court-martial be represented by legally trained counsel.

On November 1, 1965, the court, after argument, announced its decision. The court now makes and enters its

FINDINGS OF FACT

1. The petitioner enlisted on February 14, 1965 for a term of six years in the Army National Guard of the State of Nevada and as a Reserve in the Army for service in the Army National Guard of the United States. On that date he agreed to enter on active duty for training for a period of approximately 26 weeks and, after completing the active duty training, to serve in the Ready Reserve for the remainder of his six-year military service obligation.

2. By direction of the Secretary of the Army and with the consent of the petitioner and the Governor of the State of Nevada, the petitioner was ordered to active duty for training effective April 1, 1965, and attached to the U.S. Army Training Center, Infantry, at Ford Ord, California, for basic combat training. Pursuant to such orders, petitioner reported for active duty and was attached to Headquarters and Headquarters Company, 3d Battalion, 3d Brigade, effective April 8, 1965.

3. The petitioner was a soldier in the active military service of the United States at the time he committed the offenses and at the time of trial by special courts-martial. He was, therefore, subject to the jurisdiction of the United States Army.

4. The special courts-martial which tried the petitioner were properly constituted, had jurisdiction over the petitioner and of the offenses charged against him, and the sentences adjudged against the petitioner by the courts-martial were within legal limits and within the power of the courts-martial to adjudge.

5. The first special court-martial was constituted by Court-Marital Appointing Order No. 10, Headquarters, 3d Brigade, and the second by Court-Martial Appointing Order No. 12, of the same Headquarters. The officers appointed as trial counsel and as defense counsel were all infantry officers and were not judge advocates, graduates of an accredited law school, or members of the bar of any court.

6. At his first trial (by the court appointed by Order No. 10), the petitioner, on May 18, 1965, pleaded guilty to all charges and specifications—absence without leave and disobedience of orders on three occasions. He elected to make a sworn statement in his own behalf, and his counsel made an unsworn statement on his behalf.

7. At his second trial (by the court appointed by Order No. 12), the petitioner, on June 25, 1965, pleaded guilty to two charges of disobedience of orders while confined in the post stockade at Fort Ord, California, serving the sentence imposed by the court-martial at the first trial. He elected to remain silent, and when his counsel attempted to make a statement on his behalf in extenuation and mitigation, the petitioner interrupted and forbade the making of any such statement.

8. The petitioner in his sworn statement at his first trial declared himself as being opposed to the taking of human life, although he rejects the existence of God and disclaims any religious belief. He had filed with his Selective Service Board a "Form for Conscientious Objectors," but had been classified as 1–A. His solution, in his own words, was: "You might now ask why I joined the National Guard. The answer is that I thought the struggle of being accepted as a conscientious objector was hopeless, that nobody would listen or believe, that the legal hassle would cost a fortune. Where in the service is the possibility of ever being ordered to kill anyone (an order I would never obey) the least? My answer was the National Guard. I thought I could go through the motions of being a soldier and nobody would be the wiser. I now realize that to bear any weapon for the Army even in mock battle or training is to admit to them that you will use it to kill. If the situation ever arose where I was face-to-face with a man who wanted my life, I would do everything in my power to disable him,

render him unconscious, somehow make it impossible for him to fulfill his desire without killing him." The petitioner's initial date of service was April 1, 1965, just 18 days before his first offense. The violations which led to the preference of charges against him were expressions of his rebellion against authority and were so intended by him.

9. The petitioner is and was at the time of the commission of the offenses charged and at the time of his trials and sentences mentally competent, well educated and sophisticated. He had attended the University of California at Berkeley. He understood fully and at all times the probable consequences of his actions.

10. The petitioner's counsel represented him at each trial ably and as effectively as was possible under the circumstances.

11. The petitioner did not, at either trial, request representation by civilian or military counsel of his own choice.

12. The petitioner did not raise before either court-martial or in any manner within the military establishment any question that his representation by defense counsel was inadequate, nor did he challenge the qualifications of counsel.

13. The record of each trial was reviewed by the Staff Judge Advocate at Fort Ord, California, who determined that the proceedings, findings and sentence in each case were legally correct.

The court makes the following

CONCLUSIONS OF LAW

1. Because of the peculiar relationship between military and civil law, the scope of matters open for review in habeas corpus proceedings brought by a military prisoner is limited. Sentences of courts-martial, affirmed by reviewing authority, may be reviewed "only when void because of an absolute want of power, and are not merely voidable because of the defective exercise of power possessed." *Carter* v. *McLaughry*, 183 U.S. 365, 401 (1902); *Fowler* v. *Wilkinson*, 353 U.S. 583, 584 (1957).

2. Congress, under the power "To make Rules for the Government and Regulation of the land and naval Forces," a power expressly granted by Section 8, Article I of the Constitution, has enacted the Uniform Code of Military Justice, 10 U.S.C.A. Chapter 47.

3. Congress is empowered to set the rules governing military trials, and Congress, in Articles 27 and 38 of the Code (10 U.S.C.A. §§ 827 and 838), has prescribed the qualifications of trial and defense counsel and has given the accused the right to representation by civilian or military counsel of his own choice.

4. Petitioner's counsel at both courts-martial met the requirement of Article 27 of the Code (10 U.S.C.A. § 827).

5. An accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel. The right of an accused to be so represented at a general court-martial springs not from the Sixth Amendment, but from the action of Congress under Section 8, Article I of the Constitution. No such right is accorded by Congress to one being tried by special court-martial. See *United States* v. *Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

6. The petitioner has cited the decision of the Honorable A. Sherman Christensen in *In re Stapley*, No. C 188-65, D. Utah, October 1, 1965 (34 U.S.L. Week 2185). In that proceeding, Judge Christensen expressly limited his consideration to the peculiar circumstances of the case, including "the frustration of petitioner's efforts to obtain qualified legal services because of his financial inability to pay for them," circumstances not present here.

7. The petitioner was not denied "military due process" at either of his special courts-martial. See *United States* v. *Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

8. A question not raised in the military courts may not be considered when presented for the first time in an application for habeas corpus in a civil court. "Obviously, it cannot be said that * * * [the military courts] have refused to consider claims not asserted." *Suttles* v. *Davis*, 215 F. 2d 760, 763 (10th Cir. 1954).

9. The petitioner is lawfully detained by the respondent by virtue of lawful convictions by the special courts-martial.

10. The petitioner is not entitled to a writ of habaes corpus.

The petition is dismissed.

COVINGTON & BURLING,
Washington, D.C., March 2, 1966.

LAWRENCE M. BASKIR, ESQ.
Counsel, Senate Subcommittee on
Constitutional Rights of the Committee on the Judiciary,
Old Senate Office Building,
Washington, D.C.

DEAR SIR: I am enclosing copies of the correspondence about which you indicated some interest.

I have also enclosed a letter, relating to participation by military personnel in the Savings Bond Program, which reveals a different type of command influence. I don't know whether Senator Ervin's subcommittee wishes to become involved in matters of this nature—but the letter should at least be of some interest.

It was a pleasure meeting you yesterday. Please let me know if I can be of any further assistance.

Sincerely,

EDWARD S. COGEN.

TACTICAL AIR COMMAND,
U.S. AIR FORCE
Langley Air Force Base, Va., January 11, 1963.

Maj. VINCENT J SHERRY, Jr.,
Staff Judge Advocate, 839th Combat Support Group, Sewart AFB, Tenn.

DEAR VINCE: As you probably know, I am very much disappointed in the sentence adjudged in the case of Captain Gavlick. After reading the record of trial, I am convinced that had the members of the court been briefed on their duties and responsibilities and had the trial counsel taken more aggressive action that the sentence in the case would have included a dismissal.

Colonel Isbell briefly discussed the sentence in this case with Colonel Huges at 9th Air Force and the probable causes for its inadequacy. During the course of the conversation Colonel Hughes mentioned to Colonel Isbell that there was perhaps some justification for the trial counsel's lack of aggressiveness in that the offense was so serious that it would be inconceivable that the court would not have adjudged a dismissal based on that fact alone.

No prosecutor should ever take this attitude. But be that as it may, in reading the record I note the trial counsel did not cross-examine a single defense witness except the accused and Colonel Fisher, and then only four innocuous questions were asked on cross-examination between them. After reading the closing argument on the sentence by the defense counsel and that by the trial counsel, my distinct impression was that the trial counsel had abandoned his role as a prosecutor and had in effect joined the defense.

In 3 pages of argument the defense vigorously pleaded in effect for retention of the accused in the service. The trial counsel did practically nothing to counteract that argument.

I note also that the court was concerned with whether or not the long delay in bringing this accused to trial should be a mitigating factor in considering an appropriate sentence. I think the trial counsel should have asked for an opportunity to argue this point before the court. Of course, I realize that hindsight is frequently better than foresight, but this point sticks out like a sore thumb and should have alerted the trial counsel to more aggressively pursue it.

I think it is your duty as the staff judge advocate to closely supervise the procedures, tactics, and preparation of cases by judge advocates in your office. I have found it particularly beneficial to have a critique with counsel after the trial of every case so that I may point out deficiencies and give constructive criticism on improved methods. This should be part of the training you should give them. I think that you should insist that both trial and defense counsel prepare their cases to the fullest extent, presenting all matters to the court which may possibly influence their decision and aggressively represent their particular side of the case. Young and inexperienced counsel seem to be reluctant to vigorously pursue the Government's side of the case when prosecuting but go all out for the defense when defending. It is your job to attempt to overcome this attitude, and I think in most cases you can do so if you devote sufficient time to this matter.

As you know, the delay in bringing this case to trial rests not at the door of the Air Force but at that of the Department of Justice. We in effect by obtaining jurisdiction assured the Department of Justice that we could more expeditiously dispose of this case. We failed.

In order to assist you in briefing officers who may be potential members of courts-martial, I have written a letter to Colonel Tamberg expressing my concern over the inadequate punishment in this case and in those of Lt. Col. Howard Wilson and Airman Ronald J. Ross.

I lay most of the blame for the inadequate results in these three cases to the failure of our officers to fully understand and appreciate their responsibilities to the Air Force, which deficiency can only be corrected by instruction. There is an ever-increasing need to obtain and retain only the most qualified personnel whose conduct adds to rather than detracts from the prestige of the Air Force.

Sincerely

KENNETH B. CHASE,
Colonel, USAF, Staff Judge Advocate.

JANUARY 11, 1963.

Col. LAWRENCE F. TANBERG,
Commander, 839th Air Division,
Sewart AFB, Tenn.

DEAR LARRY: The purpose of this letter is to express my serious concern over the apparent lack of appreciation by some members of your command of the necessity of taking adequate disciplinary action when offenses have been committed. My concern stems from three cases, two of which involve trial by court-martial and the other punishment under article 15.

On December 12, 1962, Capt. John I. Gavlick, AO3042450, Second Aerial Port Squadron, was tried by general court-martial in your command. The offense charged was larceny of a government radio transceiver of a value of about $900. Gavlick pleaded guilty as charged, and the court sentenced him to a forfeiture of pay of $100 a month for a period of 12 months.

The second case involves a special court-martial of A2c. Ronald J. Ross, AF12574755, 839th Supply Squadron, who was tried for the theft of approximately $57 of separate ration receipts. Ross was tried on December 21, 1962, and was sentenced to 5 months confinement and a forfeiture of $30 a month for that period.

The third case involves Lt. Col. Howard R. Wilson, Jr., the dental surgeon for the base. Colonel Wilson was given only a reprimand under article 15 for selling mutual funds contrary to Air Force regulations.

The punishment in each of these cases is grossly inadequate. As to Captain Gavlick, it is inconceivable to me that a court would not at least adjudge as part of its sentence a dismissal from the service. I have read the record of the trial and am willing to concede that he has a splendid record and that his talents would no doubt be of considerable use to the Air Force in the future. However, this is not the question.

There is no place in the service, in my opinion, for any thief and especially an officer. We can never maintain the integrity of the officer corps and the necessary high standards of conduct and prestige if we permit a confessed thief to remain a member of that corps.

The outcome of this case is particularly embarrassing because we obtained a release of jurisdiction from the Department of Justice on the primary grounds that we could more expeditiously dispose of it. The sentence adjudged practically contradicted that argument because the case has not yet been disposed of and Captain Gavlick is and will be on the rolls of the Air Force for several months. A similar situation would have prevailed if he was convicted by civil court, and this we expected to avoid by obtaining jurisdiction.

Because of the failure of the court to adjudge a dismissal, it is now necessary to undertake the costly process of initiating action under AFR 36–2. This has been discussed with Major Vincent Sherry, your Staff Judge Advocate, and he was told about 2 weeks ago to have such action initiated.

What I have said about Captain Gavlick's case applies equally to the special court-martial of Airman Ross. His sentence should have included a bad conduct discharge. As in the case of Captain Gavlick, administrative action should be initiated to separate Airman Ross under AFR 39–17 for unfitness.

As to Colonel Wilson, you no doubt know that it is contemplated that action will be taken against him under AFR 36–2. Colonel Wilson's offenses were particularly gross, and disposing of his case without even a forfeiture under Article 15 is difficult to understand. It has been informally brought to my attention that Colonel Wilson's actions have had a serious effect upon the morale of the personnel in the Dental Clinic, and the attempt to hide the details of this

case from higher authority by disposing of it under Article 15 at base level cannot be condoned.

I fully realize that commanders must not exercise command influence upon the proceedings or sentence of a court-martial. However, all officers should be instructed on their duties and responsibilities as members of courts-martial and of their duty as officers to take all actions necessary to maintain the highest standards of conduct.

The indoctrination of officers on their duties and responsibilities as potential members of court-martial and the selection of only the most competent of these officers to serve thereon was the subject of a recent letter from General LeMay, which was indorsed to all subordinate commands in TAC by General Sweeney. About 10 months prior to General LeMay's letter, I sent instructions to all Staff Judge Advocates in TAC which were suggested for use in briefing potential court members. In spite of these letters, I was informed that the court members in Captain Gavlick's case had not been briefed. We must instill in all of our officers the necessity for maintaining in the service only those persons who possess the highest standards of character, personal behavior, and professional competence.

In conclusion, I wish to make it abundantly clear that this letter is not intended as a criticism of you. I am fully aware that you have only recently been transferred to Sewart and probably are not aware of these cases or the situation in general. If you need any assistance with the problems mentioned, don't hesitate to call on me.

Sincerely,

KENNETH B. CHASE,
Colonel, USAF, Staff Judge Advocate.

314 Field Maintenance Squadron, 314 Troop Carrier Wing Med (TAC),
U.S. Air Force, Sewart Air Force Base, Tenn.

Subject: Savings bond program.
To: All branch chiefs.

1. The savings bond program is a Department of Defense weapon which all military personnel should support in strengthening our government and our economy.

2. Your participation in this program and your encouragement to your assigned personnel to also participate in this program is an indication of your support of this weapon.

3. We are a volunteer Air Force, not selective service or drafted personnel. A volunteer should support this program 100 percent.

4. I cannot recommend for promotion personnel who lack in participating in this program.

ROBERT J. RANDLE, *Lieutenant Colonel, USAF, Commander.*

(Handwritten postscript: In addition, those who do participate will have such notation included in their next APR/OER. Signed: R.)

U.S. COURT OF MILITARY APPEALS,
Washington, D.C., March 11, 1966.

WILLIAM A. CREECH, Esq.,
Chief Counsel and Staff Director,
Constitutional Rights Subcommittee,
U.S. Senate,
Washington, D.C.

DEAR MR. CREECH: Pursuant to your request, I am enclosing two copies of the court's decision in *United States* v. *Albert*, this day decided, which is the only case in which an opinion was prepared discussing the issue of command influence. Two other cases, however, were disposed of on the basis of the same lecture without opinion being drafted. They are *United States* v. *Martin* and *United States* v. *O'Connor*.

I believe my opinion and that of the majority speak for themselves, as does the lecture of the staff judge advocate which is attached to the opinion as an appendix.[1]

Sincerely,

HOMER FERGUSON.

[1] The Lecture referred to in the *Albert* case has been retained in subcommittee files. The substance of the Lecture appears sufficiently in the Opinion.

UNITED STATES COURT OF MILITARY APPEALS
No. 18,960
UNITED STATES, APPELLEE
v.
CARL E. ALBERT, PRIVATE, U.S. ARMY, APPELLANT
ON PETITION OF THE ACCUSED BELOW [1]
March 11, 1966
OPINION OF THE COURT

QUINN, *Chief Judge*: [2]

The accused contends he was deprived of a fair trial and a fair review of his conviction by command influence. The contention is based upon a lecture given by the Staff Judge Advocate, Fort Devens, Massachuetts, on March 20, 1965, to officers at the Post, some of whom were members of the court-martial which later tried him.

On April 27, 1965, before a general court-martial convened at Fort Devens, the accused entered a plea of guilty to desertion, terminated by apprehension, escape from confinement, and breach of parole, in violation of Articles 85, 95, and 134, Uniform Code of Military Justice, 10 USC §§ 885, 895, and 934, respectively. He was convicted as charged. Although subject to a maximum punishment of confinement at hard labor for four and one-half years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge, he was sentenced to confinement at hard labor for eighteen months, reduction to the lowest enlisted grade, forfeiture of $52.00 per month for eighteen months, and a dishonorable discharge. * * * In accordance with a pretrial understanding with the convening authority, the dishonorable discharge was changed to a bad-conduct discharge and the period of confinement was reduced from eighteen months to one year.

At trial, there was no *voir dire* of the court members as to whether they attended the staff judge advocate's lecture and, if so, whether it had any influence upon them. In his petition for grant of review, the accused assumed that the members of the court-martial necessarily attended the lecture because they were assigned to Fort Devens at the time. The Government conceded that five of the seven court members actually attended the lecture. * * * We turn, therefore, directly to the substance of the lecture. [Citation omitted].

The indicated primary purpose of the lecture was to define the duties and responsibilities of members of courts-martial. At the outset, the staff judge advocate expressed alarm at the "numerous requests" for excuse from court duty. He noted that service on a court-martial was important duty. "[N]othing," he said, "will increase morale more than the effective, speedy, impartial and fair administration of military justice"; and nothing diminishes morale more "than slow, ineffective, partial or unfair treatment by courts-martial." After emphasizing the importance of court-martial duty, he pointed out that it was subject to "continuing change." Briefly, he commented on various recommendations for change, from a period before the Uniform Code of Military Justice to bills introduced in the Senate in the current session of Congress by Senator Sam J. Ervin, Chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and other bills sponsored by the Armed Services which had been introduced in the House of Representatives. He listed the objectives of these bills. One, he pointed out, expanded the prohibition against command control of courts-martial. Interpolating, he assured his listeners he had reviewed the text of his own talk "thoroughly" to avoid any implication that he desired to "influence you in your decisions as present or potential court members."

After this general discourse, the staff judge advocate turned to the procedure used at Fort Devens for the selection of members of courts-martial. He covered a number of problems. He pointed out that the commanding general personally appointed and personally excused a prospective court member. He asked that no one selected for court duty "take it out" on the member of his staff who might call to advise the member of his appointment and of the trial dates. He estimated the probable number of times a particular general court-martial might be convened, and the number of cases it might hear at any one session. He also reviewed the jurisdiction and punishment powers of the various courts, and

[1] CM 412823.
[2] Note: Opinion edited by subcommittee staff.

discussed the overall procedure of a general court-martial. Then he discussed the "specific" responsibilities of court members.

The enumeration of the special responsibilities indicated that "[f]irst and foremost" court members were jurors. Court members, it was said, must never let "their personal feelings control their decision"; if that occurs, "our system of justice fails." The staff judge advocate advised his audience that court members took an oath to decide a case impartially and in accordance with the evidence. A court-martial was "no place for prejudice, bias, or personal feelings," and service on a court required common sense and attentiveness to the proceedings. * * *

After commenting on the attitudes and conduct expected of a court member, the staff judge advocate turned to the matter of courts-martial sentences. He began with the general statement that an appropriate sentence must be determined in "*each particular case*," and proceeded to elaborate on the various factors which should be considered. First, he referred to the nature of the offense. He pointed out the general difference between a felony and a misdemeanor, describing the former as an offense in which the maximum punishment exceeded confinement for more than one year, and the latter as an offense carrying a lesser punishment. Illustrations of each offense were given. Next, he called attention to the necessity of considering "aggravating circumstances," such as brutality in a beating, and "mitigating circumstances," such as poor education or extreme youthfulness. He reminded the audience that the sentence procedure was also "no place for * * * personal feelings," and "[y]ou shouldn't consider what you think the convening authority would like; it is your responsibility, and your's alone, to determine an appropriate sentence." At that point, he undertook to explain "the effect" of certain sentences. It is this part of the lecture which the accused contends represents a command effort to influence prospective courts-martial members in the audience to include additional penalties in the sentences.

First, the staff judge advocate discussed the effect of a sentence to a punitive discharge but with no confinement or forfeitures. With such a sentence, the accused remained in a full duty status and was entitled to pay and allowances, pending completion of appellate review. The staff judge advocate argued, "most people in such a situation" do not "give a damn" what they do; they get into more trouble and "lead other soldiers * * * into trouble." However, he cautioned his listeners not to "misunderstand" him; he was certain there were cases in which a punitive discharge alone was an appropriate sentence, but he urged them to judge "each case on its own merits," considering the "individual involved."

Next, the staff judge advocate referred to a sentence extending to a punitive discharge and total forfeitures, but not including confinement. Such a sentence, the staff judge advocate noted, also left the accused in a full duty status, but he could not get paid. "[W]e," he said, "cannot have a soldier on active duty * * * without paying him." Two courses to alleviate the problem were available: Execution of the forfeitures could be withheld until final approval of the conviction; or the forfeitures could be reduced and ordered executed in the reduced amount. Neither action was thought to be consistent with "what the court believed * * * [to be] appropriate," but one or the other had to be taken because a full duty status without pay was contrary to custom.

A third type of problem sentence was that providing for long confinement (two or three years was mentioned as an illustration) and partial forfeiture of pay. Since no discharge was included, at the end of his confinement the accused was entitled to return to duty. The staff judge advocate indicated the Department of the Army did not favor that kind of situation, and, therefore, normally reduced the period of confinement to six months. As a result, the desires of the court-martial were "not carried out." The staff judge advocate said he did not know what prompted a court-martial to impose a sentence of this kind, unless it believed the accused would "be boarded out of the service." He observed such board proceedings could not be taken, in view of a recent change in Army regulations prohibiting an administrative discharge for misconduct which was the subject of a court-martial (AR 635–200, paragraph 8, change 11).

Another aberrant sentence was the one which imposed confinement, but no forfeitures. Under such a sentence, the accused will just "be sitting in jail, doing nothing," but draw full pay and allowances. It seemed to him that this

kind of sentence might be appropriate in "a few cases of extreme hardship," but it appeared to be "incongruous" for the accused to go to jail "for six months or more" and yet receive full pay and allowances.

The next sentence situation discussed was one which "occurs occasionally in a special court-martial." This was the case of a sentence to confinement at hard labor and reduction to an intermediate grade. Referring to Article 58a, Uniform Code of Military Justice, 10 USC § 858a, the staff judge advocate noted that reduction to the lowest enlisted grade results automatically from a sentence to confinement at hard labor or hard labor without confinement. Consequently, reduction by a court-martial to an intermediate grade was "inconsistent." To accord the accused the benefit of any doubt as to the court-martial's intention in imposing a sentence of this kind, the confinement, the staff judge advocate argued, "must be set aside" on review.

Finally, the staff judge advocate considered the sentence providing for hard labor without confinement. This sentence, he said, is hard to administer because the work performed by a regular duty soldier may be harder than that required of the accused in execution of the sentence. He asked the listeners to consider this "effect" in imposing such a sentence; and he cited a case in which the effect on the "morale" of the regular duty soldiers was "devastating."

The staff judge advocate concluded the lecture by expressing the hope that he had provided a better understanding of the duties of a court-martial member and a better understanding of the meaning and effect of the various sentences imposed by courts-martial. He again emphasized that he did not want 'to be charged with command influence."

The responsibility of the members of a court-martial is to determine, impartially and according to the evidence, the accused's guilt or innocence, and if it finds the accused guilty, to impose an appropriate sentence on the basis of all the matters presented to it. Court members are not concerned with administrative problems incident to the execution of a sentence. [Citations omitted.] Consequently, they should not be troubled with, or confused by, instructions on possible consequences that might result from certain types of punishment. [Citation omitted.] It is difficult, therefore, to see the need for the staff judge advocates complaint about certain sentences in a lecture intended to acquaint officers with their duties and responsibilities" as court members. However, we are not concerned with the soundness of his criticism. [Citation omitted.] Our interest is in the substance of the lecture; specifically, whether it presents at least a fair risk that the court members who attended it would be inclined to impose a sentence of a particular kind merely to obviate the problems mentioned by the staff judge advocate.

We have summarized the whole of the lecture because its impact upon prospective court members can be judged only as a whole. [Citation omitted]. So viewed, it impresses us as a rather commonplace discussion of the problems in the selection of members of a court-martial and of the general responsibilities of a court member. Its only alien element is in the criticism of certain kinds of sentence. Assuming, as appellate defense counsel contend, the criticism is, in some respects, erroneous, we cannot interpret it as an exhortation for more severe sentences generally, or for the inclusion in every sentence of a punitive discharge, forfeitures in some amount, and confinement at hard labor for some period. Cf. United States v. Kitchens, 12 USCMA 589, 31 CMR 175. True, the discussion of a sentence to hard labor without confinement comes close to asking prospective members to substitute confinement at hard labor for that type of penalty. Even this discussion, however, is qualified by the clear implication that a sentence to hard labor without confinement is a problem only when the tasks assigned to the accused are less onerous than those of persons on regular duty. This is patently a problem in the execution of a sentence, not its imposition.

As we construe the last part of the lecture in context, we are satisfied that it was intended by the staff judge advocate as a plea for careful consideration of the factors that affect the particular accused, rather than as a direction to include, at all times and under all circumstances, certain combinations of punishment. Our reading of the transcript convinces us that prospective court members among his listeners would, in the words of the lecture, conclude they "alone" had the responsibility to determine "an appropriate sentence, under all the facts and circumstances" of the case, and they were to fulfill that responsibility without considering "what * * * the convening authority would like." [Citation omitted.] The leniency of the punishment imposed by the court-martial in relation to the maximum penalty reflects a freedom of decision that

belies obedience to the alleged dictates of the lecture. Also, the sentence compares favorably with that which, before trial, the accused described as "lenient" and which he asked the convening authority to approve. [Citations omitted.]

Our conclusion as to the import of the lecture is equally dispositive of the accused's contention that it disqualified the staff judge advocate from participating in the post-trial review. Accordingly, we affirm the decision of the board of review.

Judge KILDAY concurs.

FERGUSON, Judge (dissenting):

I dissent.

With cases such as this, the Court sounds a death knell for the provisions of Uniform Code of Military Justice, Article 37, 10 USC § 837, which provides:

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

The only logical or intended inference of these lectures is to dictate to the members the need to eliminate those problems by adopting and announcing sentences which include a punitive discharge, forfeiture of all pay and allowances, and confinement at hard labor. And this is true despite the staff judge advocate's formal admonition that he wished to avoid any implication he desired "to influence you in your decisions as present or potential court members" or "to be charged with command influence."

There was simply no other reason to give the lecture, except to provide command guidelines for what was considered to be an appropriate sentence. The Government advances none; none appear from the context of the lecture; and even my brothers were unable to marshal an argument which would justify what was done here. Indeed, the very admonitions of the staff judge advocate indicate his guilt rode heavy upon his conscience. Despite his disclaimers, therefore, I must regretfully level a charge of deliberate command control at his head—regretfully, as he is a lawyer and an officer, and thus doubly obliged to uphold the law for whose breach he seeks others' punishment but, with impunity, violates himself.

The entire lecture was delivered to the court members at Fort Devens, in the presence of their Commanding General, and is annexed hereto as an appendix. I have no argument with the manner in which my brothers have summarized it, but to add emphasis to what I deem its pernicious effect, I necessarily must not only repeat the points which it made regarding the imposition of "proper" sentences, but also establish beyond cavil the context in which they were uttered.

The staff judge advocate initially referred to sentences extending only to a punitive discharge. * * * , [i]f situations as he depicted have arisen, the fault lay not with the court-martial for doing its independent duty of adjudging what it considered to be an appropriate sentence, but with the command in failing to take those measures authorized to prevent the vice of which the staff judge advocate so querulously complained.

Secondly, the staff judge advocate dealt with sentences which extended no further than punitive discharge and total forfeitures, pointing out that the forfeitures could not be ordered into execution, as adjudged, until the completion of appellate review. This, he criticized on the basis that the convening authority could not effectuate the punishment which the court deemed appropriate. He seemed to believe the appropriate remedy for the court was to add confinement to the sentence, thereby grossly increasing its severity, merely to avoid paying the accused! That such is a scarcely veiled attempt to influence the court members cannot be doubted.

Thirdly, the staff judge advocate took up the "problem" of sentences which adjudged long periods of confinement without also ordering a punitive discharge and total forfeiture of pay. * * * Once more, however, this "problem" was nothing but further dissembling on the part of the staff judge advocate to impress the court members a punitive discharge was an essential part of every sentence.

Fourthly, the staff judge advocate criticized sentences which adjudged confinement without any forfeitures, on the basis the accused then did nothing but sit

around a jail and draw pay for his enforced idleness. Again, we judicially know this is not true. Not only do pertinent service regulations provide for the useful labor of prisoners in stockades and disciplinary barracks, but we have been confronted with such instances in records before us. [Citations omitted.] Again it would appear the staff judge advocate sought, with busy invention, to paint such a picture of indolence that the court members would, righteously and economically, adjudge total forfeitures of pay in all future cases. Once more, the emphasis is squarely placed on that which command considered to be an essential element of every "appropriate" sentence.

Finally, mention was made of other lawful, albeit less harsh, sentences, such as confinement or hard labor without confinement with reduction to an intermediate grade, and hard labor alone. Excuses likewise were found to exclude them from the category of appropriate sentences as inconsistent or difficult to administer. Once more, the emphasis is left on the need for every sentence to include, as essential elements, a punitive discharge, total forfeiture of pay and allowances, and confinement at hard labor.

Nor does the foregoing complete the picture of sentence control painted by the staff judge advocate. What was omitted by him is equally important. Thus, while emphasizing inconvenience to the Government in each instance outlined, he did not discuss the awful and very real consequences to an individual of a punitive discharge; or did he point out the impact of confinement on a youthful offender or one with an innocent family; nor did he discuss how elimination of income may serve to penalize, not the accused, but his wife and children. Never did he mention the need in each case to consider the individual circumstances, which, though not legal in nature, are the source of that temperance and mercy which must needs characterize every sentence returned by a jury as appropriate in its eyes—the only bar at which it may in this world be lawfully called to answer for its actions. Rather, his silence as to anything which a court-martial might find favorable to a particular accused generated the inevitable conclusion that all sentences to be adjudged must be gauged by the test of whether inconvenience to the United States would result and, just as inevitably, that, in order to avoid such inconvenience, every "appropriate" sentence must necessarily extend to a punitive discharge, forfeiture of all pay and allowances, and confinement at hard labor.

Thus, I am led to find beyond any peradventure of a doubt, that the lecture here was intended to, and did, influence its hearers to adjudge harsher sentences within the framework laid down by the command structure of Fort Devens. As such, it violated the express terms of Code, supra, Article 37, and constituted unlawful command control.

I cannot explain or understand the differing view of my brothers, who simply refuse to reach this rather obvious conclusion, but at the same time, offer no alternative construction. Certainly, the staff judge advocate's language must be taken in context, but, as the appended document will demonstrate, I have not sought to characterize it *in vacuo*. Surely it is not enough to say that a staff judge advocate is guiltless, because he states he does not intend to interfere with the freedom of court members and, then for pages, does just that! Yet, that is the only reed to which the principal opinion can cling. I dismiss it as unimportant and unworthy of consideration, in light of the purpose he, on the whole, so glaringly displayed. See my dissenting opinions in United States v Danzine, 12 USCMA 350, 30 CMR 350, and United States v Davis, 12 USCMA 576, 31 CMR 162.

Indeed, had this lecture been delivered as instructions by the law officer of a general court-martial to its members, we would not have hesitated to reverse. [Citations omitted] * * * 22. Why then is the error less reprehensible when done directly by an outsider, forbidden by law to invade the court's function? The answer to me is obvious. One can imagine the result in civil judicial systems if a venire was permitted to hear reports from the Attorney General, delivered at the instance of the Governor, on the need for particular sentences! The same result must obtain in the military judicial system if it is to retain its character as such and not regress to the status of a committee advising the convening authority on punishment.

In sum, then, I would find the existence of disqualifying command interference present in this case, calling for reversal *per se*. Dissenting opinions, United States v Davis and United States v Danzine, both supra; United States v Kitchens, 12 USCMA 589, 31 CMR 175. When my brothers find themselves unable to join in this conclusion, I believe they err so fundamentally, albeit honestly, as to make the provisions of Code, supra, Article 37, a dead letter, except in the most direct and reprehensible cases. Holdings such as this will

only weaken public confidence in military justice, and rightly so. Nor may the armed services derive any comfort from them, for they will as surely lead an aroused Congress to more restrictive and detailed legislation, determined now, as before, to insure the absolute and unqualified independence of military judicial tribunals—and all because one staff judge advocate tired of being "inconvenienced" by sentences which local courts-martial undoubtedly thought appropriate for the offenses and offenders before them.

I would reverse the board of review and order a rehearing on the sentence.

[Appendix omitted.]

FEBRUARY 7, 1966.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights,
Senate Armed Services Committee, Washington, D.C.

DEAR MR. CHAIRMAN: On January 25 my office inquired into the possibility of one of my constituents, Mr. George Blackburne, appearing before your committee in support of S. 753. Because of the committee's heavy schedule, it was determined that it would be better if Mr. Blackburne could submit a written statement.

In accordance with this advice I am sending you herewith the statement prepared by Mr. Blackburne along with a résumé which will provide you with background information concerning him.

Your acknowledgement of this testimony in behalf of S. 753 will be greatly appreciated.

Thanking you, I am,

Yours sincerely,

CHARLES S. GUBSER,
Member of Congress.

STATEMENT OF GEORGE BLACKBURNE

In the 1939–40 era, I commanded the beach platoon for artillery from Pearl Harbor to Diamond Head. I had 15 British 75's and no ammunition. By chance, I was assigned to the division C.O.'s mess. For reasons best known to me, an emergency radiogram from Washington put me on the next available boat back to the mainland after only 18 months overseas. This series of circumstances completely fooled the Japanese into believing I represented more of a threat than I believe I really was. Except for one thing—the Asiatics have a tremendous respect for creative genius. Anyway, they gave me a big farewell banquet. When I landed in New York 1 month later, I reported to my father who was a stomach specialist—and he, suspecting the worst, took me to some civilian experts. My condition was diagnosed as Asiatic amoebic dysentery—incurable. My father decided that I should hide my condition and that he would seek out some cure. Later he confided he expected to bury me. Being a brainwashed West Pointer, I did exactly as I was told. His plan failed because terramycin came out too late.

Eventually I got up to 20 defecations a day and my disposition became unbearable. I was cashiered out of the Army under Public Law 190 for having an adverse personality.

My father died recently. Now I feel free at last to straighten out the records. I believe I was a casualty of the war even though I was knocked out of it before it officially started. Please let me tell you my story—I beg you to pass the bill.

III. ADMINISTRATIVE DISCHARGES

DEPARTMENT OF DEFENSE DIRECTIVE 1332.14

JANUARY 14, 1959.

Subject: Administrative discharges.

References:

(*a*) SecDef memorandum to Secretaries of Army, Navy, and Air Force, August 2, 1948, as amended (canceled herein).

(*b*) OSD memorandum, "Discharge of homosexuals from the armed services," (M–46), October 11, 1949 (canceled 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 memorandums and any other existing regulations in conflict wtih the provisions of this directive are superseded and canceled 90 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 memorandums, 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 the 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. PRESERVICE 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 6 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 to (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 of habit-forming narcotic drugs or marihuana.

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 Uniform Code of Military Justice is death or confinement in excess of 1 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 offsense 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 punishments authorized by the United States 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 1 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 parapgraph 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 July 15 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–M.P. & 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 90 days after date of this directive.

NEIL H. MCELROY,
Secretary of Defense.

COMPARISON OF ADMINISTRATIVE DISCHARGE PROVISIONS IN THE MILITARY SERVICES PRIOR TO MARCH 20, 1966

[Subcommittee Summary]

(NOTE.—Administrative discharge regulations have been superseded, in part, by DOD directive No. 1332.14, dated Dec. 20, 1965, effective Mar. 20, 1966)

GROUNDS FOR UNDESIRABLE DISCHARGES

All services

Frequent involvement of a discreditable nature with civilian or military authorities; sexual perversion; involvement with drugs; patterns of shirking; dishonorable failure to pay just debts; conviction by civilian authorities.

Army, Air Force: Discharge will be withheld until appeal is decided.

Navy, Coast Guard, Marine Corps: Other good reasons.

Air Force: Unfitness (antisocial habits, etc.); after court-martial conviction with confinement of over 6 months if retention inappropriate; AWOL over 1 year without a court-martial.

Army: Defective moral habits.

INITIATION OF ACTION

Army, Marine Corps

Officer with special court-martial jurisdiction.

Air Force

Officer with special court-martial jurisdiction.

Navy, Coast Guard

Any commanding officer.

PROCEDURE

All services

Respondent will be informed of the undesirable discharge contemplated, and of his right to a hearing before a board of three officers; he will be told the basis of the charges; he will be given the right to counsel, who shall be a lawyer if reasonably available; he may waive a hearing; he may have civilian counsel at his own convenience and expense; he may confront and question any witness appearing, but witnesses will appear only if convenient.

REVIEW BY SERVICE

Army

A second board on the same matters may be ordered only for: new evidence; failure of the first board to adequately develop the facts; violation of substantial rights of the respondent.

A second board may not recommend a disposition less favorable than the first unless substantial new evidence was considered and shown in the findings.

Air Force

A second board is allowed only if substantial prejudice to the respondent's rights is shown, or there have been jurisdictional defects.

The recommendations of the second board may not be less favorable.

Navy, Coast Guard

Only the headquarters of the service may order an undesirable discharge.

If the final result is less favorable than the recommendations of the board, the respondent must be allowed to show cause.

Marine Corps

If the board recommendation of retention in the service is disapproved by the reviewing authority, the decision will be made at corps headquarters.

PREDISCHARGE REVIEW

Except for review by the convening authority, there is no formal predischarge review body in any of the services.

However, in the Navy and Marine Corps, all undesirable discharges must be approved or authorized by headquarters.

POSTDISCHARGE REVIEW

All services

Discharge Review Board.—The board reviews the propriety and fairness of the discharge, and may change the nature of the discharge awarded.

Board for Correction of Military Records.—The BCMR has wider equity powers and may award back pay and allowances. Their decision is subject to review by the service Secretary who may overrule it only if their finding is unsupported by the record.

Neither board may order the reacceptance of a discharged member.

COLLATERAL RELIEF

U.S. district courts may issue an injunction to prevent the discharge regardless of the exhaustion of administrative remedies.

Court of Claims may award money if the discharge was illegal or if the Secretary of the service arbitrarily overruled the decision of the Board for Correction of Military Records.

NOTE.—In recent months Federal district courts in Utah, Oregon, and the District of Columbia have heard cases based on deprivation of constitutional rights in administrative discharge cases, and have required various constitutional rights to be afforded; i.e., right to qualified counsel and right of confrontation.

Army Discharge Regulations

(Prior to March 20, 1966)

BOARDS (15–6)

Boards are factfinding only. Errors found by the convening authority will be corrected by him, but no error not adversely affecting the substantial rights of the respondent will invalidate the board's action.

Unless established by specific regulation or statute, board members are not subject to challenge. However, if their partiality is established, the member will be replaced. Before the hearing commences, the respondent will receive the following rights:

Written notice of the specific charges against him;
The names of the witnesses to appear;
His right to have witnesses appear on his own behalf;
His right to counsel when provided by regulation; and
His own choice of counsel when reasonably available.

The decision by the convening authority as to the availability of counsel is final. There is no absolute right to counsel unless given by regulation, except that when a penal act is being considered or discipline is possible, counsel will ordinarily be given.

No polygraph evidence is allowed; however, they may be used in investigating. The strict rules of evidence need not be followed and all reasonable evidence, including hearsay, will be admitted. However, this kind of evidence should be given the proper weight.

Hearings may be conducted without the respondent unless regulations otherwise require or unless this would be manifestly unfair. There is no vested right to cross-examine unless granted by regulation but ordinarily the respondent should be given the opportunity to rebut. Personal appearance of witnesses is preferable to affidavits or depositions, but the latter may be used when the witness is at a substantial distance. Findings and recommendations must be supported by evidence.

DISCHARGE REVIEW BOARD (AR 15–180)

A discharge review board will consider on its own motion or on written application by a member the type and nature of a discharge awarded and whether

it has been equitably and properly given. It will assure that no benefits have been unjustly denied to the respondent because of the type of discharge.

The board may change or modify the type of discharge or issue a new discharge. It may not review court-martial discharges and it may not revoke a discharge or reinstate a member.

Its actions will be subject to review by the Secretary of the Army. The review board will consist of at least five members with a recorder. The applicant may appear in person and with counsel and may present witnesses on his own behalf or written testimony. Strict rules of evidence will not be followed. The respondent will get copies of the entire case except when in the interest of national defense it is determined that he shall get a summary only. If the applicant or his counsel appears in person, the proceedings will be recorded. Written conclusions and findings will be made. The full record of the proceedings will be sent to the Secrtary and will be sent to the applicant upon request.

The board may consider a case on its own merits and may take favorable action without the knowledge of the respondent. If the board takes unfavorable action, the case will be refiled in the records without prejudice to the respondent.

DISCHARGE—GENERAL PROVISIONS (AR 635–200)

The type of discharge will be governed by the members' record of service during their current enlistment plus extensions and not by any prior entries. All nonjudicial punishment from earlier periods of service will be disregarded.

Except for misrepresentation connected with an enlistment, preservice acts will be disregarded.

However, the question of whether to retain the member may be determined by his entire record of service, not including any nonjudicial punishment unless strongly probative. Prior service records will be considered only when they show a pattern of misconduct continuing over a period of time.

Behavior of the respondent which was the subject of prior administrative or judicial proceedings which "resulted in acquittal or effect thereof" may not be considered for the question of discharge. Nor may general court-martial sentences be considered if they were suspended or disapproved.

However, these rules do not bar the consideration of substantial new evidence which is likely to result in a less favorable result, nor subsequent conduct which puts into question the desirability of retaining the member. These rules may be suspended if express exception is granted by the Headquarters of the U.S. Army.

The convening authority may direct a result more favorable than the board recommends in his own discretion. When a substantial defect is found in the board's proceeding, the convening authority may decide to retain the member or may return the matter to the board for correction. If he finds material prejudice to the substantial rights of the member, he may order a new board hearing. The new board may not recommend a result less favorable to the respondent unless it has considered substantial new evidence.

Standards for types of discharge

Honorable discharge.—To be awarded for good conduct and a fair degree of efficiency of service. A member will have had no general court-martial convictions and not more than one special court-martial conviction. However, when a member's meritorious service outweighs other considerations, the doubt will be resolved in the member's favor.

General discharge.—To be awarded in the discretion of the authority when the member has not more than one general court-martial or two special court-martial convictions in the current enlistment.

Undesirable discharge.—Awarded for unfitness, misconduct, or security reasons. It will not be awarded in lieu of a court-martial unless required by the best interests of the service and of the member. It will be awarded only after granting a right to a board hearing with the assistance of counsel, the right to a personal appearance, and to defend.

ADMINISTRATIVE DISCHARGE—MISCONDUCT (AR 635–206)

Commanders with general court-martial authority may discharge members for acts of misconduct after a right to a hearing. A hearing is required for an

undesirable discharge except when the discharge is based on a conviction by a civilian court or for prolonged AWOL.

Each man will be notified of his right to a hearing, his right to defend, his right to be present at the hearing, to be confronted by witnesses against him to the maximum extent possible as determined by the convening authority, and his right to counsel of his own choosing if reasonably available.

The board will recommend only the type of discharge appropriate. The convening authority may approve or disapprove of the results but he may not order a new hearing unless substantial new evidence is discovered. However, if the board has not adequately developed the facts of the case, or if there is a substantial prejudice to the rights of the respondent, a new board may be ordered.

Grounds for misconduct discharge

Fraudulent entry into service (undesirable discharge unless honorable or general discharge warranted).

Conviction by a civilian court for an offense subject to 1 year's confinement or more under the Uniform Code of Military Justice, or an offense of moral turpitude, or conviction as a juvenile offender for an offense or moral turpitude (undesirable discharge unless general or honorable discharge warranted).

A person shall be considered convicted even though he has filed an appeal, but normally he will not be finally discharged until the appeal has been determined.

For desertion or AWOL (undesirable discharge unless general or honorable discharge is warranted). Only when AWOL for more than 1 year and when retention is not in the interests of the service, when trial by court-martial is waived or results in acquittal, or is disapproved on review, or when the statute of limitations has been successfully pleaded, or when the sentence of the court-martial does not include a punitive discharge.

ADMINISTRATIVE DISCHARGE—UNFITNESS (AR 635–208)

An undesirable discharge will be given for the following reasons unless a general or honorable discharge is warranted: Involvement of a discreditable nature with civilian authorities; sexual perversion; drug addiction; a pattern of shirking; dishonorable failure to pay just debts.

Commanders will report members to the general court-martial authority together with a written statement that the respondent has been advised of the report and given copies of it; that he has been given the names of witnesses and copies of adverse statements. The general court-martial authority may disapprove and proceed under regulations governing discharge for unsuitability. He may convene a board, or he may discharge the number directly when the right to a hearing has been waived.

The rights of a respondent are: to appear in person before the board; to confront adverse witnesses when feasible; to have counsel who may be a lawyer, if reasonably available.

The board may recommend discharge for unfitness or unsuitability, or recommend retention of the member.

Upon review, the convening authority may not issue a discharge less favorable than that recommended, but he may issue a discharge more favorable. He may order a new board only when the facts have not been adequately developed, when the rights of the respondent have been substantially prejudiced, or upon newly-discovered evidence or subsequent acts of misconduct.

If a member is discharged, he will receive copies of all pertinent documents. If given an undesirable discharge, he will be reduced to the lowest pay grade.

ADMINISTRATIVE DISCHARGE—UNSUITABILITY (AR 635–209)

If a member is determined to be unsuitable, he will be awarded a general or an honorable discharge as appropriate. Grounds for a discharge under this regulation are: Inaptitude, a character disorder, apathy, enuresis, alcoholism, and class III homosexuality.

Special court-martial authorities may convene boards and order discharges under this regulation. The commander will forward a full report including a statement by the respondent that he has been advised of the action and the

reasons therefor, that he has been furnished copies of all the papers, that he has been given the names of witnesses and the substance of adverse statements against him, that he has been offered counsel, that he has a right to a board hearing and to make statements in his own defense. If a respondent waives a board hearing, the convening authority may order his discharge, his retention in the service, a transfer to a new unit, or the authority may nonetheless convene a board hearing.

At a board hearing a member will be granted the right to confront adverse witnesses to the maximum extent practical. He will be given the right to counsel who shall be of his own choice if reasonably available, and he will have the right to present matters in his own defense.

The convening authority will not convene a second board except for substantially new evidence or subsequent acts of misconduct, or when the facts have been inadequately developed by the first board, or when he finds prejudice to the substantial rights of the respondent.

If a member is discharged, he will receive copies of all pertinent papers.

Navy discharge regulations
(Prior to March 20, 1966)

ADMINISTRATIVE DISCHARGE—HOMOSEXUALITY (SECNAV INSTR 1900.9)

Homosexuality includes the expressed desire although not accompanied by homosexual acts. Prompt separation of these individuals is essential. Intoxication will be considered in mitigation only. If mental illness is shown to be present, this regulation is not applicable. If physical disability is shown, the commander will proceed under this regulation and under other appropriate regulations. The basis for discharge will be determined at higher headquarters.

An undesirable discharge is normal for these cases. A higher type of discharge will be granted only after departmental review.

All suspected cases of homosexuality will be investigated by the Office of Naval Intelligence.

Classes of homosexuality

Class I.—Coercive acts of homosexuality, acts with a minor under 16. The commander will normally proceed under court-martial regulations. However, the respondent may be classified as a class II for administrative action.

Class II.—Acts of homosexuality or solicitation of acts, or where action is not contemplated as a class I or a class III. Officers and enlisted men may resign with an undesirable discharge. The respondent will be given a summary of the offense charged.

Usually administrative action will be taken but a court-martial may be ordered when appropriate. The respondent may elect a board hearing with the right to appear in person to present matters in his own defense and to have the assistance of counsel who will be a lawyer if reasonably available.

If a member does not resign, the case will be sent to the general court-martial authority for his decision as to whether a court-martial or a board hearing will be ordered in the Navy's best interests.

Class III.—When homosexual tendencies are exhibited or when homosexual acts were committed prior to the current enlistment, or in cases of nonaggravated solicitation.

A detailed statement will be obtained from the respondent.

Officers with preservice homosexual activity may voluntarily resign with a general discharge.

Enlisted members will be processed as unsuitable. If homosexual acts were committed prior to service, the member will be discharged but the type of discharge may be based only on the service record.

All cases will be reviewed by BUPERS who may order a board convened in any case.

BUPERS MANUAL C–10310—UNSUITABILITY DISCHARGES

Discharges for unsuitability will be honorable or general and will be issued only upon authorization of the Chief of Naval Personnel.

Reasons for unsuitability discharges: inaptitude; character disorders; apathy; homosexual tendencies; enuresis; alcoholism; other good reasons as determined by the Chief of Naval Personnel.

Regulations C–10311 and C–10312 should be considered if discharge under those regulations is more appropriate.

Enlisted members will be informed of the reasons for discharge and will be allowed to make statements in their own defense.

BUPERS MANUAL C–10311—UNFITNESS DISCHARGES

Discharges for unfitness will be undesirable discharges or higher but only upon Chief of Naval Personnel authorization. Administrative discharge under this regulation is not to be used in lieu of a court-martial unless the best interests of the Navy and of the respondent will be served.

Reasons for discharge for unfitness: frequent involvement of a discreditable nature with civilian or military authorities; sexual perverison; drug addiction; shirking; failure to pay just debts; other good and sufficient reasons as determined by the Chief of Naval Personnel.

Enlisted members will be subject to an undesirable discharge and may elect to have their case heard before a board with the right to appear in person, to present matters in his own defense, and to have the assistance of counsel who shall be a lawyer if reasonably available. The member will be informed of the reasons for the action and of his right to request a board hearing.

BUPERS MANUAL C–10312—DISCHARGES FOR MISCONDUCT

Discharges will be undesirable or better only on Chief of Naval Personnel authorization.

Reasons for discharge for misconduct: Action under this regulation is mandatory if a member has been convicted for an offense which the Uniform Code of Military Justice punishes with 1 year's confinement, or conviction for a charge involving moral turpitude, or if the member has been adjudged a juvenile offender because of an offense of moral turpitude. Discharge under this regulation will also be given for fraudulent enlistment because of misrepresentations or for AWOL for longer than 1 year.

Enlisted members will be informed of the basis for the proposed action and of their right to have a hearing before a board, to appear in person, to present matters in his own defense, and to have the assistance of counsel who shall be a lawyer if reasonably available.

BUPERS MANUAL C–10313—BOARD HEARINGS—GENERAL PROVISIONS

A board shall consist or not less than three officers and a recorder. A respondent shall have the right to counsel of his own choosing if reasonably available or the assistance of civilian counsel at his own expense. He may be appointed counsel who is considered qualified.

(NOTE.—Qualifications for appointed counsel are not stated.)

There is no authority for obtaining the personal appearance of witnesses. Civilian witnesses may appear voluntarily at their own expense. Military witnesses shall attend if reasonably available. Office of Naval Intelligence reports may be summarized before given to the respondent. The board may consider only the summary report in these cases.

Procedures under the Uniform Code of Military Justice or the Judge Advocate General's Manual are not mandatory but may be complied with. Article 31 of the UCMJ shall be complied with whenever applicable. Strict rules of evidence need not be followed but evidence must be relevant and material in the judgment of the board. Objections to the proceedings shall be noted in the record. Board members may be challenged for partiality and shall be replaced when the commanding officer deems that appropriate. Voir dire of board members shall be allowed. There shall be no formal rulings on objections.

Cross-examination of witnesses is allowed. The respondent may submit a sworn or unsworn statement.

The board is not a formal fact-finding or trial body. Its findings and recommendations shall be sent to the commanding officer for his approval. The commander may decide to retain the member and close the case except when proceeding under regulations C–10311 or C–10312, or when matters of drug addiction or sexual perversion are involved. In the latter cases, the Chief of Naval Personnel shall take the final action.

The Chief of Naval Personnel will take final action after receiving the recommendations of the commanding officer of the reviewing board and of the Enlisted Personnel Evaluation Board. An undesirable discharge will not be ordinarily be awarded unless the Enlisted Personnel Evaluation Board recommends.

If the final action taken is less favorable than that recommended by the board hearing, the enlisted member may show cause. If an undesirable discharge is involved, he may appear in person with his counsel before the Enlisted Personnel Evaluation Board.

The enlisted member may be retained on probation.

Air Force Discharge Regulations
(Prior to March 20, 1966)

ADMINISTRATION DISCHARGES—HOMOSEXUALS (AFR 35–66)

This regulation applies to enlisted members and officers.

All known homosexuals must be eliminated from the service. Exceptions will be made only in the most unusual circumstances. Intoxication and extensive prior military service will not warrant exceptions. Homosexual acts committed prior to service with a subsequent clean record will constitute an exception.

When cases are pending, known witnesses will not be reassigned out of the area. If the term of service of a military witness is expiring, the case will be expedited. Respondents will not be separated when a case is pending.

OSI reports (see AFR 124–44) will be summarized when classified confidential. Detrimental medical reports will be made available to counsel but not to the respondent.

When suspected, cases of homosexuality will be reported to OSI for investigation.

Types of homosexuality

Class I.—When nonconsenting acts are performed. A court-martial is indicated for these cases except when not in the interest of the service. When a court-martial is not indicated, the case will be rated Class II.

Class II.—Acts of homosexuality whether active or passive. Counsel will be obtained for the respondent when reasonably available. He will be notified of the charges and confronted with the nature of the evidence. Officers may resign but a court-martial may be ordered despite the resignation. Enlisted members may request a board hearing.

Class III.—When members exhibit homosexual tendencies or have associated with known homosexuals prior to military service. Counsel may be obtained by the respondent and the evidence against him will be disclosed. Officers may resign and enlisted members may request a board hearing.

All cases will be forwarded to the general court-martial authority. Classes I and II will be considered for court-martial. When a hearing is waived by the respondent, the case may be closed or a discharge may be ordered.

If a hearing is requested, the case may be closed or a hearing ordered.

Enlisted member hearings

The board is a fact-finding body and its duty is to develop the facts and make findings. All board members will be instructed on Air Force policy regarding homosexuals.

Strict rules of evidence are not applicable, but the evidence must be relevant and competent. All legal advice given the board must be an open hearing.

The accused shall have counsel of his own choosing if reasonably available. Board members may be challenged for cause.

The personal appearance of witnesses with pertinent evidence in defense should be allowed. Witnesses may be questioned by the accused.

He may submit any evidence in defense and may testify or make an unsworn statement.

Copies of all board papers, except medical and evaluation reports, will be given the member.

The board may recommend the following:

Class II.—Undesirable, general or honorable discharge, or honorable discharge or retention.

Class III.—General or honorable discharge or retention. Oher cases of discharges for unsuitability may be general or honorable. Discharges for unfitness may be undesirable, general, or honorable.

Review

The convening authority will review the consistency of the findings with Air Force policy, and may make minor corrections.

He will review the legal sufficiency and consistency of the findings and recommendations and may approve the recommended discharge.

If retention is recommended, he may not order a discharge. He may not order a discharge less favorable than that recommended.

If legal or jurisdictional defects are found which prejudice the respondent, he may order a new board to consider the established facts, but the new board may not recommend a less favorable disposition.

Notice of rights

Airman will be notified that he has a right to a hearing with the right to counsel, to confrontation of witnesses appearing in person, and of his right to make a statement or submit evidence in his own behalf. Airman will be counseled that a discharge may deprive him of veterans rights and may result in future prejudice in civilian life.

ADMINISTRATIVE DISCHARGES—GENERAL PROVISIONS (AFR 39–10)

Section C—Factors Governing Types of Discharges

Honorable discharge.—Recipient will receive full veterans rights.

General discharge.—Recipient will also receive full veterans rights, except that there will be a definite disadvantage for him in getting civilian employment. A female Air Force member will not be reenlisted if she received a general discharge.

Undesirable and bad conduct discharge.—This discharge may affect the recipient's veterans rights and this will prevent reenlistment in the Air Force.

Dishonorable discharge.—Recipient will be deprived of all veterans rights and will not be reenlisted. He may also be deprived of certain civil rights.

Discharges other than general or honorable will severely restrict the recipient's opportunity for civilian empolyment and will prevent his being admitted to college, etc.

Criteria governing discharges

Preservice activities will not be considered except for misrepresentations concerning the enlistment. Prior service records will not be considered.

Honorable discharge.—This is a separation with honor of the member has performed conscientiously and to the best of his ability. Article 15 punishments do not preclude an honorable discharge and the length of time in service shall be considered. All doubts will be resolved in favor of the airman.

General discharge.—This is a discharge under honorable conditions and is given when the service is not sufficiently meritorious to warrant an honorable discharge, or when the member has been convicted by a general court-martial, or not more than one special court-martial. However, if the member has been rehabilitated or if he has received a decoration during the current enlistment, he may nonetheless receive an honorable discharge. The reasons for a general discharge must be stated.

Undesirable discharge.—This is a discharge under other than honorable conditions given for unfitness, misconduct or security reasons. It will not be given in lieu of a court-martial unless an officer with general court-martial authority decides in the best interest of the Air Force and of the airman. Discharges for unfitness or civil conviction do not necessarily demand an undesirable discharge if mitigation is present. In these cases the member may receive an honorable or general discharge.

An undesirable discharge will be given only if a member has had an opportunity for a hearing with the right to appear in person, to have the assistance of counsel and to submit matters in his own defense. It is authorized only after review by an officer of general court-martial authority.

However, the Secretary of the Air Force may give an undesirable discharge without granting the above rights.

ADMINISTRATIVE DISCHARGES—UNSUITABILITY, ENLISTED MEMBERS (AFR 39–16)

Discharges under this regulation will be honorable unless a general discharge is warranted. Discharges for unsuitability may be given for inaptitude, character or behavior disorders, enuresis, alcoholism, class III homosexuality, and obesity.

The airman will be notified of the fact that he may receive a general or honorable discharge and of his appearance before an evaluation officer. He will be counseled by the officer and permitted to submit statements in his own behalf.

If the member is an airman, first class, or if he has 8 years of service, or if he is a Reserve officer, counsel will be obtained for him who shall be a lawyer if reasonably available. The airman will be notified of the reasons for the discharge, of his right to counsel, his right to a personal appearance before the board, and he may make statements in his own behalf. Counsel will be legally qualified if possible.

The board's function is to find the facts and to make recommendations. It is not limited to matters appearing on the record. Strict rules of evidence are not applicable but the evidence must be relevant and pertinent.

The airman may challenge members for cause and may request the personal appearance of witnesses with pertinent information. The airman may testify or present an unsworn statement and may present evidence in his own defense.

The board may recommend a general or honorable discharge or retention in the service, or the convening of a board for discharge on the grounds of unfitness.

Review

The discharge authority will review the board's results for their legal sufficiency and propriety. He will state the reasons for his nonconcurrence with the findings.

He may not authorize a less favorable disposition than that recommended by the board.

If legal prejudice or jurisdictional defects are found, he may order a new board hearing but the new board may not recommend a result less favorable.

If the member is discharged, he will be given the full record of the case without medical or evaluation reports.

ADMINISTRATIVE DISCHARGES—UNFITNESS, ENLISTED MEMBERS (AFR 39–17)

Discharges under this regulation will be undesirable unless a general or honorable discharge is warranted.

Reasons for unfitness

Unfitness separations may not be given on physical grounds. Discharge for unfitness is warranted for frequent involvement of a discreditable nature with military or civilian authorities; sexual perversion (lewd acts, sodomy, homosexuality not within AFR 39–66, indecent exposure, assaults, etc.); drug addiction or possession; shirking; psychopathic defects; malingering, etc.; conviction by a court-martial with confinement of more than 6 months but without a discharge; failure to pay debts or other financial irresponsibility; civil convictions not involving moral turpitude; or AWOL for more than 1 year when a court-martial is not advisable.

When considering disposition under this regulation, conduct in prior periods of service will not be considered unless a pattern of conduct is established over a period of time.

Procedure

The commander will prepare a report and obtain a counsel who shall be a lawyer if reasonably available for the airman. The member will be notified of the proposed action, the reasons thereof, the type of discharge contemplated, of his right to counsel and to a hearing with the right to submit matters in his own defense. If a medical examination shows the presence of mental illness, processing will stop under this regulation. If the examination shows physical debility, the commander will proceed under this regulation and other appropriate regulations. The final decision as to discharge will be made by Headquarters, U.S. Air Force.

Board procedure

The board is a factfinding body and is not limited to matters appearing on the record. It will consist of at least three officers, one of whom shall have had

legal experience, especially if the respondent's counsel is legally qualified. Strict rules of evidence need not be followed but the evidence must be material and relevant.

The accused may appear in person. He may challenge board members for cause. He may request the presence of witnesses with pertinent information. He shall have his rights under article 31 of the Uniform Code of Military Justice, and he may submit evidence in his own behalf.

The board may recommend retention, the type of discharge, a discharge for unsuitability when the case is minor or when the airman has had a long period of service, previous heroism, or has made an attempt to correct his defects.

Review

The convening authority will note any nonconcurrence with the board and will state the reasons therefor.

The discharge authority will review the legal sufficiency and propriety of the board's results. He may approve a less harsh disposition, or he may appoint a new board if he finds jurisdictional defects or legal prejudice to the respondent. The second board may not recommend a less favorable disposition.

If the member waives a hearing, the discharge authority may deny the waiver and order a board hearing, or he may select the appropriate discharge or retain the member.

ADMINISTRATIVE DISCHARGES—CIVIL CONVICTION (AFR 39–22)

This regulation applies to convictions by civilian courts for offenses punishable under the Uniform Code of Military Justice with imprisonment for over 1 year, conviction for offenses involving moral turpitude, or the conviction of a member as a juvenile delinquent for offenses involving moral turpitude. An offense of moral turpitude is one involving narcotics or sexual matters only. When unusual conditions are present, separation on an offense of moral turpitude may be waived. However, homosexual offenses or confirmed drug addition may not be waived.

Procedure

The airman will be assigned a counsel who shall be a lawyer if reasonably available. He will be notified of the proposed action, the type of discharge contemplated and the reasons therefor, and of his right to have a hearing and to submit matters in his own defense. If the airman has 19½ years of service, he may apply for a retirement.

If the civilian conviction is appealed, processing for discharge will be delayed. However, in unusual cases, the member may be discharged if this is approved by the Director of Personnel of the Air Force. If the appeal is successful, the member will not be discharged, except as follows:

If this regulation is not applicable, the member will be retained but the commander may consider action under other regulations.

Airmen convicted by civilian authorities may also be subject to courtmartial action.

An airman in civilian confinement will remain in the Air Force until he is released. Discharges will not ordinarily be executed until the member is released from civilian confinement.

DEPARTMENT OF THE NAVY,
BUREAU OF NAVAL PERSONNEL,
Washington, D.C., March 16, 1966.

DEAR SENATOR ERVIN:[1] This is in response to your letter of February 18, 1966, to Commander R. P. Javins of the Bureau of Naval Personnel wherein you desired additional information in the case of a former member of the naval service.

* * * * * * *

Instructions and policy concerning the disposition of members of the U.S. Navy involved in homosexual conduct are contained in Secretary of the Navy Instruction 1900.9; 32 C.F.R. 730.10, 730.12 and 730.15 and Department of Defense Directive 1332.14 of December 20, 1965. In addition, it is the policy of the Chief of Naval Personnel either to retain in the service or to separate only pursuant to court-martial or civil conviction members accused of misconduct,

[1] Material not pertinent to the general inquiry has been deleted.

particularly moral offenses, which they have at all times consistently denied and concerning which they have been thoroughly cooperative in all investigative efforts. In the event that an individual admits to homosexual involvement and subsequently requests a court-martial, the case is resolved based on the individual merits of each case.

* * * * * * *

Concerning the purported testimony of the Judge Advocate General of the Navy on January 19, 1966, the understanding of the subcommittee with respect to the disposition of Navy personnel who admit involvement in a single act of homosexuality is not correct. The fact that a member of the U.S. Navy has been involved in only one act of homosexuality does not, per se, bar him for consideration for administrative discharge which could be under conditions other than honorable. Whether or not action would be initiated under the Uniform Code of Military Justice in these cases is dependent upon the individual facts and circumstances of the particular case under consideration at that time.

A review of the field board proceedings indicates that E. neither admitted nor denied his guilt at the board hearing, even though he was given the opportunity to do so, nor does the board hearing indicate whether E. wished or demanded a court-martial. Basically, the E. case does not lend itself to court-martial proceedings in any way as the whole case is centered around the provisions for discharge of Navy personnel for reasons of unsuitability (32 C.F.R. 730.10). The record does show that counsel for E. did challenge the veracity of E.'s reported admissions concerning homosexual involvement.

With respect to the Chief of Naval Personnel's letter of January 25, 1966, your interpretation of the current Department of Defense Directive and the new Department of Defense Directive (DOD 1332.14 of December 20, 1965) is not correct. An individual's preservice activities can be considered by the Chief of Navy Personnel in determining whether or not an individual should be retained in the Navy. However, if the determination is made that the individual should be administratively separated and no fraud is involved, then the type of discharge certificate must reflect his current military record. You were properly informed of the foregoing on January 25, 1966. In the E. case, not only was there an admission to homosexual involvement prior to enlisting in the Navy, but E.'s current military record also indicates that he solicited a police officer to commit a homosexual act.

* * * * * * *

In summary, the findings of the field board of officers was that E. had homosexual tendencies and recommended that the character of separation be under honorable conditions (general discharge). The Chief of Naval Personnel approved the findings of the field board but overruled the recommendation of the field board that the character of separation be under honorable conditions as such recommendation was contrary to 32 C.F.R. 730.10. The foregoing regulation, among other things, states that the character of separation of an enlisted man or woman of the U.S. Navy for reason of unsuitability will be as warranted by the member's military record. * * *. In February 1966 E. was honorably discharged by reason of unsuitability due to homosexual tendencies. The foregoing action was in accordance with current directives of the Department of the Navy and the Department of Defense.

Your interest in the affairs of the United States Navy is appreciated.

Sincerely yours,

B. M. STREAN,
Deputy Chief of Naval Personnel.

DEPARTMENT OF DEFENSE DIRECTIVE No. 1332.14

DECEMBER 20, 1965.

Subject: Administrative Discharges.
References:
(*a*) DOD Directive 1332.14, subject as above, January 14, 1959, as amended (hereby canceled)
(*b*) DOD Directive 1332.19, Use of Records of Nonjudicial Punishment, February 12, 1963 (hereby canceled)
(*c*) DOD Directive 5210.9, Military Personnel Security Program, June 19, 1956

I. PURPOSE

This directive prescribes policies, standards, and procedures governing the administrative discharge of enlisted persons from the Armed Forces.

II. CANCELLATION

References (*a*) and (*b*) are hereby canceled and superseded.

III. APPLICABILITY

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

IV. DEFINITIONS

As used herein, the following definitions will apply:

A. Member: an enlisted man or an enlisted woman of an armed force.

B. Discharge: complete severence from all military status.

C. Release from active duty: termination of active duty status and transfer or reversion to a Reserve component not on active duty.

D. Separation: a general term which includes discharge and release from active duty.

E. Administrative separation: discharge or release from active duty upon expiration of enlistment or required period of service, or prior thereto, in the manner prescribed herein or by law, but specifically excluding separation by sentence of general or special court-martial.

F. Military record: comprises a member's behavior while in military service, including general comportment and performance of duty.

G. Prior enlistment or period of service: service in any component of the armed forces, including the Coast Guard, which culminated in the issuance of a discharge certificate or certificate of service.

H. Administrative discharge board: a board appointed to render findings based on facts obtaining or believed to obtain in a case and to recommend retention in the service or discharge and reason for and the type of separation or discharge certificate to be furnished.

I. Discharge authority: as established herein and implemented by regulations issued by an Armed Force, an official authorized to take final action with respect to specified types of discharge.

J. Respondent: a member of the Armed Forces who has been notified that action has been initiated with a view toward discharging him under a specified service regulation.

K. Counsel: a lawyer within the meaning of article 27(b)(1) of the Uniform Code of Military Justice unless appropriate authority certifies in the permanent record the nonavailability of a lawyer so qualified and sets forth the qualifications of the substituted nonlawyer counsel.

L. Honorable discharge: is separation from an Armed Force with honor.

M. General discharge: is separation from an Armed Force under honorable conditions.

N. Undesirable discharge: is separation from an Armed Force under conditions other than honorable.

V. POLICY

A. General.—The Armed Forces have the right and the duty to separate from the service with an appropriately characterized discharge certificate members who clearly demonstrate that they are unqualified for retention. At the same time, such members have rights which shall be protected.

1. Administrative discharge action under the provisions of section VII.G.1, 3, 5, and 7, and section VII.I.1, 4, 5, and 6 of this directive will not normally be initiated until a member has been counseled concerning his deficiencies and afforded a reasonable opportunity to overcome them.

2. No member shall be discharged under conditions other than honorable unless he is afforded the right to present his case before an administrative discharge board with the advice and assistance of counsel and unless such discharge is supported by approved board findings and an approved board recommendation for

undesirable discharge. Except that, if appropriate, an undesirable discharge may be issued without board action if the member is beyond military control by reason of prolonged unauthorized absence, resigns or requests discharge for the good of the service, or waives his right to board action in writing.

3. The discharge authority may direct issuance of the type of discharge recommended by an administrative discharge board or a more favorable discharge but shall not direct a discharge less favorable than that recommended.

4. Notwithstanding an administrative discharge board recommendation for retention, the discharge authority may direct separation when warranted by the circumstance of a particular case. In this event the discharge must be effected under honorable conditions and the member thus separated will be awarded an honorable or general discharge certificate in accordance with the prescribed standards of the Service concerned.

5. Notwithstanding a member's written acknowledgement that he will receive an undesirable discharge as required by these regulations under the provisions for resignation and request for discharge for the good of the service, the discharge authority may direct separation under honorable conditions, with either an honorable or general discharge as warranted.

6. A member subject to discharge because of conviction by civil court may be processed for discharge notwithstanding the fact that he has filed an appeal or has stated his intention to do so. However, it will be the general policy to withhold the execution of the approved discharge pending outcome of the appeal. If the execution of the discharge is considered appropriate without waiting for final action on the appeal, the member may be discharged with the appropriate type of discharge certificate upon the direction of the Secretary of the military service concerned.

7. No member will be administratively discharged under conditions other than honorable if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by court-martial resulting in acquittal or action having the effect thereof, except when such acquittal or equivalent disposition is based on a legal technicality not going to the merits.

8. No member will be subjected to administrative discharge board action based upon conduct which has previously been the subject of administrative discharge board proceedings, when the evidence before the subsequent board would be the same as the evidence before the previous board, except as provided in paragraph IX.D.7 and in those cases where the findings of the previous board favorable to the respondent are determined to have been obtained by fraud or collusion.

9. The discharge authority or higher authority may suspend execution of an approved administrative discharge to afford a deserving member a specified probationary period of sufficient length to demonstrate successful rehabilitation.

B. Type of discharge certificate.—Except as indicated below, the type and character of the certificate or report issued upon administrative separation from current enlistment or period of service will be determined solely by the member's military record during that enlistment or period of service, plus any extensions thereof prescribed by law or by the Secretary concerned, or effected with the consent of the member. The following shall not be considered:

1. Prior service activities, including but not limited to records of conviction by courts-martial, records of nonjudicial punishment, records of absence without leave, or commission of other offenses for which punishment was not imposed.

2. Preservice activities, excepting misrepresentations including omission of facts which if known would have precluded, postponed or otherwise affected the member's eligibility for enlistment or induction.

C. Retention or separation.—1. In determining whether a member should retain his current military status or be administratively separated, his entire military record, including records of nonjudicial punishment imposed during a prior enlistment or period of service, all records of conviction by courts-martial, and any other factors which are material and relevant, may be evaluated. Commanding officers, investigating officers, administrative discharge boards, and other agencies charged with making such determinations will consider records of nonjudicial punishment imposed during a prior enlistment or period of service only if such records of punishment would have, under the particular circumstances of the case, a direct and strong probative value in determining whether retention or administrative separation is appropriate.

(*a*) Cases in which the circumstances may warrant use of such records shall ordinarily be limited to those involving patterns of conduct which would become manifest only over an extended period of time.

(*b*) When a record of nonjudicial punishment imposed during a current enlistment or period of service is considered, isolated incidents and events which are remote in time, or have no probative value in determining whether retention or administrative separation should be effected, shall have minimal influence on the determination.

2. If a decision is made that a member should be administratively separated, subsection B., above, applies in determining the type of discharge.

D. Periodic explanation.—Each military department will prescribe appropriate internal procedures for periodic explanation to members of the types of discharge certificates and basis for issuance and the possible effects of various certificates upon reenlistment, civilian employment, veterans' benefits, and related matters. As a minimum such explanation should take place each time the articles of the Uniform Code of Military Justice are explained pursuant to 10 U.S.C. 937. Failure on the part of the member to receive or to understand such explanation, however, shall in no event be considered a defense in an administrative discharge proceeding or a bar thereto.

E. Separation counseling.—The purpose and scope of the Discharge Review Board and the Board for Correction of Military Records, established pursuant to 10 U.S.C. 1552 and 1553, will be explained during the separation processing of any member being discharged under other than honorable conditions.

VI. STANDARDS FOR DISCHARGE

The type and character of discharge or separation will be determined according to the following standards.

A. Honorable discharge.—Issuance of an honorable discharge will be conditioned upon proper military behavior and proficient performance of duty with due consideration for the member's age, length of service, grade, and general aptitude. A member will not necessarily be denied an honorable discharge solely by reason of a specific number of convictions by courts-martial or actions under article 15 of the Uniform Code of Military Justice during his current enlistment or period of obligated service.

B. General discharge.—Issuance of a general discharge is appropriate when a member's military record is not sufficiently meritorious to warrant an honorable discharge as prescribed by the regulations of the service concerned.

C. Undesirable discharge.—An undesirable discharge may be issued for misconduct, unfitness, or security reasons based on the approval of a recommendation of an administrative discharge board, or waiver of the right to board action, or resignation or request for discharge for the good of the service as provided for in section VII.K. of this directive.

D. Special consideration.—In any case in which an undesirable discharge is authorized under this directive a member may be awarded an honorable or general discharge, as appropriate, if during his current enlistment, period of obligated service, or any voluntary or involuntary extensions thereof, or period of prior service he has been awarded a personal decoration as defined by his particular service, or if warranted by the particular circumstances of a specific case.

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 member's military record.

B. Convenience of the Government.—Discharge with an honorable or a general discharge as warranted by the member'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 Forces, 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 members serving in unspecified enlistments.

7. To provide for early separation of personnel under various authorized programs and circumstances.

8. In the case of women, pregnancy, parenthood, or custody of the children under age 18.

9. To provide for the discharge of conscientious objectors.

10. For such other reasons as may be specified and published by the Secretary of the Department concerned.

11. Notwithstanding the specific provisions of this directive, the secretary of a military department may direct the separation of any member for the convenience of the Government prior to the expiration of his term of service, if the secretary determines that such a separation is in the best interest of that department. A member so discharged by direction of the secretary will be furnished an honorable discharge or general discharge, as appropriate.

C. Resignation—own convenience.—Discharge with an honorable or a general discharge as warranted by the member'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 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 to remedy the situation; that the discharge 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 contract upon determination that the individual's age was misrepresented upon enlistment or induction as follows:

1. Males:

(*a*) If enlisted and under 17 years of ago, or inducted and under 18 years and 6 months of age, when verified, release from military control by voidance of enlistment or separation.

(*b*) If enlisted without proper consent and having passed his 17th birthday but not his 18th birthday, discharge upon application of parent or guardian entitled to his custody and control.

(*c*) If an enlisted man having passed his 18th birthday when verified—retain if otherwise qualified.

2. Females:

(*a*) If enlisted and under 18 years of age, release from military control by voidance of enlistment or separation.

(*b*) If enlisted without proper consent, having passed her 18th birthday but not her 21st birthday when verified, discharge upon application of parent or guardian entitled to her custody and control.

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, with an honorable or general discharge as warranted by the individual's military record, when the member has been determined to be unfit by reason of physical disability to perform the duties of his office, rank, grade, or rating and is not entitled to retirement under the provisions of chapter 61, title 10, United States Code.

G. Unsuitability.—Discharge by reason of unsuitability, with an honorable or general discharge as warranted by the individual's military record. Such discharge may 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 of readiness of skill, unhandiness, or inability to learn.

2. Character and behavior disorders: As determined by medical authority, character and behavior disorders and disorders of intelligence listed in

Department of Defense Disease and Injury Codes (TB MED 15 (NAVMED P-5082) AFM 160-24), except for combat exhaustion (3263) and other acute situational maladjustments (3264). Discharges normally should not be effected for combat exhaustion (3263) and other acute situational maladjustments (3264) per se, but they may be effected for more basic underlying disorders of which the transient state is a manifestation.

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.

6. Homosexual or other aberrant tendencies.

7. Financial irresponsibility.

H. Security.—Discharge, with the character of discharge and under conditions and procedures stipulated by the Secretary of Defense as set forth in reference (c) which deals 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 an individual's military record in his current enlistment or period of obligated service includes 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 to (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, habituation, or the unauthorized use or possession of narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and other similar known harmful or habit forming drugs and/or chemicals.

4. An established pattern for shirking.

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

6. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court conerning support of dependents.

7. Unsanitary habits.

J. Misconduct.—Discharge by reason of misconduct, with an undesirable discharge, unless the particular circumstances in a given case warrant a more favorable 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 Uniform Code of Military Justice is death or confinement in excess of 1 year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender or is placed on probation or punished in any way as the 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 punishments authorized by the United States Code or the District of Columbia Code, whichever is lesser, applies.

2. Procurement of a fradulent enlistment, induction or period of active service through any deliberate material misrepresentation, omission or concealment which if known at the time might have resulted in rejection.

3. Prolonged unauthorized absence. When unauthorized continuous absence of 1 year or more has been established.

K. Resignation or request for discharge for the good of the service.—Discharge by reason of resignation or request for discharge for the good of the service, with an undesirable discharge, where a member's conduct rendered him triable by court-martial for an offense punishable by a punitive discharge, subject to the procedures and safeguards specified elsewhere in this directive.

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 member's commanding officer or higher authority when the mem-

ber 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 commanding officer or higher authority when the member is eligible for or is subject to discharge and it has been determined under the prescribed standards that such discharge is warranted. When a general discharge is issued for one of the reasons listed in section VII.A. through F., the specific basis therefor shall be included in the member's permanent personnel records.

C. Discharge for unsuitability.—An honorable or a general discharge, based on the standards prescribed in the preceding section VII.G., may be issued by the commander exercising special court-martial jurisdiction or higher authority.

1. A member with less than 8 years of continuous active military service will be notified in writing of the proposed discharge action and will be afforded an opportunity to make a statement in his own behalf or decline the opportunity in writing. This correspondence will be filed in the member's permanent personnel records.

2. A member with 8 or more years of continuous active military service will be discharged by reason of unsuitability only in accordance with the safeguards and procedure specified below in sections VIII.D.1. and VIII.D.2.

D. Undesirable discharge.—An undesirable discharge will be directed by a commander exercising general court-martial jurisdiction or by higher authority in accordance with this directive and the following procedures and safeguards:

1. A member who is under military control will be notified in writing of the basis for the proposed discharge action and advised that he has the following rights:

(*a*) To present his case before an administrative discharge board.

(*b*) To be represented by counsel.

(*c*) To waive the above rights in writing. If he so requests, the member shall be given an opportunity to consult with counsel prior to waiving his rights.

2. If a member waives his rights, the discharge authority may disapprove the waiver and refer the case to an administrative discharge board, or direct retention on active duty, or direct discharge by reason of unfitness, misconduct, or security. If discharge is directed, the type of certificate will be specified.

3. A member unable to appear in person before an administrative discharge board by reason of confinement by civil authorities will be advised (by registered mail) of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give him the opportunity to exercise the following rights:

(*a*) To request appointment of a military counsel to represent him and in his absence present his case before an administrative discharge board.

(*b*) To submit statements in his own behalf.

(*c*) To waive the foregoing rights, either in writing or by declining to reply to the letter of notification within a prescribed time limit.

4. A member beyond military control by reason of unauthorized absence of more than 1 year may be issued an undesirable discharge in absentia. Notification of the imminent discharge action and the effective date thereof will be sent by registered mail to the record address of the member or the next of kin, as appropriate. Separation of members of the Reserve components will be subject to the limitations of title 10, U.S.C. 1163.

5. A member who submits a resignation or requests discharge for the good of the service may be issued an undesirable discharge without board action provided he has been afforded the opportunity to consult counsel and provided that the member certifies in writing his understanding that he will receive a discharge under other than honorable conditions and that he understands the adverse nature of such a discharge and the possible consequences thereof.

IX. ADMINISTRATIVE DISCHARGE BOARD

A. Composition.—An administrative discharge board shall be comprised of at least three experienced commissioned officers, at least one of whom shall be serving in the grade of major/lieutenant commander or higher, and may include a nonvoting recorder. The following provisions will apply if the respondent is:

1. An enlisted member of a Reserve component or holds an appointment as a Reserve commissioned or warrant officer, the membership shall include a majority of Reserve officers if reasonably available. Where a Reserve majority is not available, the board shall include at least one Reserve

component officer. Voting members shall be senior to the respondent's Reserve grade.

2. An enlisted woman, the board shall include a female officer as a voting member.

B. Procedures.—The board functions as an administrative rather than a judicial body. Strict rules of evidence need not be observed. However, the chairman may impose reasonable restrictions as to relevancy, competency, and materiality of matters considered. When the board meets in closed session, only voting members will be present. The proceedings of the board will be maintained as prescribed by the secretary of the military department but as a minimum shall contain a verbatim record of the findings and recommendations. The board will recommend one of the following alternative dispositions:

1. Retention, or

2. Discharge for a specified reason and the appropriate type of discharge certificate, according to the provisions of this directive and the applicable service regulations.

C. Rights of the respondent.—Subject to the specifications prescribed herein, a respondent who has not waived a hearing before an administrative discharge board and whose case is presented to such a board has the following rights:

1. He may appear in person, with or without counsel, or in his absence, be represented by counsel, at all open proceedings of an administrative discharge board. The respondent may have counsel of his own choice provided proper authority determines the counsel requested is reasonably available. He may employ civilian counsel at his own expense.

2. He may challenge any voting member of the board for cause only.

3. He may request the appearance before the board of any witness whose testimony he believes to be pertinent to his case. He will specify in his request the type of information the witness can provide. The board will invite the witness to attend if it considers that the witness is reasonably available and that his testimony can add materially to the case. If a witness on active duty declines the invitation, the board may refer the matter to the convening authority for a decision or orders. However, witnesses not on active duty must appear voluntarily and at no expense to the Government.

4. The respondent may at any time before the board convenes or during the proceedings submit any answer, deposition, sworn or unsworn statement, affivdavit, certificate, or stipulation. This includes but is not limited to depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

5. He may or may not submit to examination by the board. The provisions of 10, U.S.C. 831 will apply.

6. The respondent and his counsel may question any witness who appears before the board.

7. Failure of the respondent to invoke any of these rights, after he has been apprised of same, cannot be considered as a bar to the board proceedings, findings and recommendation.

D. Discharge Authority.—Upon receipt of the record of board proceedings, the discharge authority may take one of the following actions:

1. Approve the board's recommendations and direct their execution.

2. Approve the board's recommendation for discharge but change the type of discharge to a more creditable one, e.g., upgrade an undesirable to a general or even an honorable discharge. He shall not downgrade the type of discharge from a better to a less creditable type.

3. Approve the board's recommendation for discharge but change the basis therefor when the record indicates such action would be appropriate, except that he shall not designate unfitness or misconduct as the basis when the board has recommended discharge for unsuitability.

4. Approve the discharge but suspend its execution for specified period of probation.

5. Disapprove the recommendation for discharge and retain the member in the service.

6. Disapprove the recommendation for retention and direct discharge under honorable conditions with an honorable or general discharge certificate, as warranted.

7. He may set aside the findings and recommendations and refer the case to a new board if he finds legal prejudice to the substantial rights of the respondent. No member of the new board shall have served on a prior

board which considered the same matter. The record of the proceedings of the earlier board, minus the findings, recommendations, and prejudicial matter, may be furnished the successor board. The discharge authority may not approve findings or recommentations less favorable to the respondent than those rendered by the previous board.

X. SUSPENSION OF EXECUTION OF APPROVED DISCHARGE

The discharge authority or higher authority may, prior to the expiration of the member's enlistment or period of obligated service, suspend execution of an approved discharge for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During the period of suspension, the member will be afforded an opportunity to demonstrate that he is capable of behaving properly for an extended period under varying conditions and that he can perform assigned duties efficiently.

A. Upon satisfactory completion of the probationary period, execution of the approved discharge will be cancelled automatically.

B. Additional misconduct on the part of the member during the probationary period or actions which constitute substandard performance of duty or demonstrate characteristics of unsuitability may establish the basis for one of the following actions:

1. Punitive or new administrative action may be initiated notwithstanding the suspension of execution of the approved discharge.

2. Suspension of the approved discharge may be vacated, and the approved discharge executed, to include discharge in absentia when the member has been beyond military control for fifteen or more days.

XI. EFFECTIVE DATE AND IMPLEMENTATION

The provisions of this directive will be effective 90 days from the date of issuance. Two copies of implementing directives will be forwarded to the Assistant Secretary of Defense (Manpower) within 90 days of the effective date.

ROBERT S. MCNAMARA,
Secretary of Defense.

AMERICAN VETERANS COMMITTEE,
Washington, D.C., March 17, 1966.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommitee on Constitutional Rights, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR ERVIN: During the course of the testimony on the bills to amend the Uniform Code of Military Justice, a number of witnesses were asked what they thought of the directive issued on December 20, 1965, relating to administrative discharges by the Department of Defense. Mr. John Stillman, our national chairman, alluded to this directive during his testimony, and discussed briefly in response to a question. At the time, we stated that while we felt it was a step in the right direction, it did not go far enough, and that it had a number of shortcomings.

The main shortcoming, in our view, is the provision that, for almost every ground of discharge, the commanding officer has virtually untrammeled discretion to issue either an honorable discharge or a general discharge under honorable conditions. The services view the latter as an acceptable form of discharge, the award of which need not be surrounded by any safeguards. You will recall that a number of witnesses before your subcommittee have stated that employers seldom look beyond general discharge before they reject an applicant. We believe that the general discharge should not be treated as a slightly less favored form of honorable discharge, but should be treated in accordance with the effect it produces on the civilian employer, as the mildest form of less-than-honorable discharge, and that its issuance should, therefore, be surrounded by safeguards.

We are enclosing a detailed analysis of the directive, with some specific suggestions for its improvement, pending the enactment of necessary legislation. Our analysis touches upon other points as well. I hope you find it helpful.

Yours very truly,

BEN NEUFELD,
National Vice Chairman.

NOTES AND COMMENTS ON DEPARTMENT OF DEFENSE DIRECTIVE NO. 1332.14, DATED DECEMBER 20, 1965, SUBMITTED BY THE AMERICAN VETERANS COMMITTEE

V. POLICY

A. *General*

2. Lines 1–2: This should read "with other than an honorable discharge" instead of "under conditions other than honorable". All the protections which this directive gives to a member whose discharge under other than honorable conditions is proposed should be given the member who is proposed for separation by means of the general discharge under honorable conditions.

Lines 7–12: Issuing an undesirable discharge without board action may be warranted if the member is beyond military control by reason of prolonged unauthorized absence. The authority to issue such a discharge if the member resigns, requests discharge for the good of the service or waives his right to board action in writing should be authorized only with the safeguards set out in VIII D 2 and 5.

4. Lines 4–8: This should be limited to issuing an honorable discharge.

6. After present text: If an appeal from the civil conviction results in a reversal and the case is finally decided in the member's favor, the discharge, if it has been executed, shall be revoked, and the member's status and rights shall be determined under applicable regulations as though the revoked discharge had not been issued.

B. *Type of discharge certificate*

2. Line 3: Preservice activities involving misrepresentation of facts which would merely have postponed the members eligibility for enlistment or induction do not seem relevant (e.g., females with dependents under the age of 18 are not eligible. If a female with a dependent aged 17 misrepresents that dependent's age as 18 in order to avoid a 1 year wait until she is eligible, and then serves well and honorably there should be no consideration of her preservice misrepresentation in the character of her discharge). The term "otherwise affected" seems much too broad and vague.

D. *Periodic explanation*

Lines 9–12: Failure on the part of the member to receive or to understand such explanation should be admissible for consideration in the light of the whole record.

E. *Separation counseling*

Line 5: This should be extended to all those discharged with any other than an honorable discharge.

VI. STANDARDS FOR DISCHARGE

B. *General discharge*

This should be more narrowly defined. The Services appear not to view with sufficient seriousness the fact that a general discharge is, in fact, a second-class discharge and is likely to lead to refusal of employment or refusal further to investigate the reason for the award of a general rather than an honorable discharge.

C. *Undesirable discharge*

See second comment under V A 2.

VII. REASON FOR DISCHARGE

J. *Misconduct*

2. Line 14: To warrant an undesirable discharge, the misrepresentation, omission, or concealment should relate to matters which, if known at the time, *would* have resulted in rejection, rather than merely those which *might* have resulted in rejection. In addition, there should be a burden on the government to show diligence in adherence to its procedures that a man who has served creditably for some years is not given an undesirable discharge because the Government relied on his misrepresentation under circumstances in which the Government should have made its own investigation or findings (i.e., if a man 1 inch too short for enlistment falsely claims to be 1 inch taller, and the Government fails to measure his height and instead relies on this misrepresentation, this should not be grounds for discharge at all—or at least should not be grounds for discharge with other than an honorable discharge).

VIII. PROCEDURES FOR DISCHARGE

B. *General discharge*

A general discharge should not be viewed as a discretionary form of alternative to an honorable discharge, but as the mildest form of a discharge less than honorable and should have all the safeguards discussed in VIII D 1 and 2.

C. *Discharge for unsuitability*

Where the form of discharge is to be honorable, the discretion of the services to discharge for this reason can be fairly broad; where it is to be general, the safeguards of VIII D 1 and 2 should be applied, regardless of the number of years of service.

D. *Undesirable discharge*

1. No waiver of the right to appear before an administrative discharge board should be recognized unless the member has consulted counsel, and counsel has certified that he has fully advised the member.

3. Unless this requirement demonstrably imposes undue hardship on the service concerned, and an appropriate authority of that service so certifies, the service should be required to send qualified counsel (not necessarily the same counsel who may ultimately represent the member before the discharge board, but qualified counsel assigned from the nearest installation of any of the armed forces having qualified counsel assigned) to visit the member at his place of confinement and advise the member fully. If the member waives his right to appear before the board, the service can proceed as in VIII D 1 c and VIII D 2 above. If the member does not waive his right to appear before the board, the service concerned should at least attempt to persuade the civil authorities to authorize his temporary release under military custody in order to appear before the board, and then return to civil confinement.

5. The resignation or request for discharge for the good of the service should not be made effective until the member concerned has had an opportunity to consult counsel, and the statement tendering the resignation or requesting discharge should be endorsed by counsel to show that he has fully advised the member.

IX. ADMINISTRATIVE DISCHARGE BOARD

A. *Composition*

The presence on such boards of at least one lawyer should be required if the power of the board is to extend to awarding undersirable discharges.

C. *Rights of the respondent*

1. Instead of providing that the respondent may have counsel of his own choice provided proper authority determines that the counsel requested is reasonably available, this section should provide that the respondence may have counsel of his own choice, unless the proper authority determines that such counsel is not reasonably available, and submits for the record a statement of the reasons for which such counsel is not reasonably available.

2. Instead of providing that the board will invite a witness to attend if it considers that the witness is reasonably available and that his testimony can add materially to the case, this section should provide that the board will invite such witnesses to attend unless it finds that the witness is not reasonably available, or that the testimony which the respondent seeks to elicit is irrelevant or needlessly cumulative, and that the board shall make these findings a part of the record. Witnesses on active duty should be considered as though subject to a subpena through the Secretary of the Armed Force concerned.

In connection with this latter section, the need for legislation to confer subpena powers on administrative discharge boards is quite evident.

Washington, D.C., March 10, 1966.

Re Department of Defense Directive
No. 1332.14 of December 20, 1965

Senator SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights, Committee of the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: At the conclusion of my testimony before your subcommittee last Thursday, March 30, 1966, you asked that I look over the Depart-

ment of Defense Directive No. 1332.14 in detail and convey my views thereon to your subcommittee.

I consider the Department of Defense directive a step in the right direction. Undoubtedly it was prompted from disclosures resulting from your investigation into the constitutional rights of military personnel. The directive is commendable in that it precludes any action by the discharge authority to issue an undesirable discharge if not recommended by an administrative board, and gives enlisted personnel the opportunity for representation by qualified counsel. However, there are several areas wherein the serviceman's constitutional rights appear to remain unprotected.

Section IV.K. permits nonlawyer counsel. However, as a practical matter, it is dubious that the directive will be implemented in any place where qualified lawyers cannot be made available. The damage inflicted by an undesirable discharge is for all practical purposes as odious, if not more so, than the dishonorable discharge which may be imposed only by general court martial. Since for the latter qualified lawyers as counsel are mandatory it would seem appropriate that they also should be mandatory in the case of the former.

Section V.A. concerning "Policy" lumps the honorable and general discharge together and effectively permits a discharging authority to substitute one for the other irrespective of the action of an administrative discharge board or, indeed (at least for members with less than 8 years of continuous active military service) permits the issuance of a general discharge without a board hearing or referral of the case to a board.

In failing to differentiate between the honorable discharge and the general discharge the directive is inconsistent with the holding of Circuit Judge Washington in *Bland* v. *Connally*, C.C.A.D.C. 1961, 293 Fed. 2nd 854, 858: "We think it must be conceded that any discharge characterized as less than honorable will result in serious injury." It is also inconsistent with the decision of the Court of Claims in *Murray* v. *U.S.* C.Cls. No. 237–57, decided June 7, 1961. It would seem appropriate that the directive's policy should provide that no member shall be discharged other than with honor unless he is afforded a right to present his case in a full and fair hearing before an administrative discharge board. Moreover, the advice and assistance of counsel should be made available to the member *before* he is asked to resign or request his discharge for the good of the service.

In the event that the Administrative Discharge Board recommends retention as indicated under section V.A.4., it is submitted that the discharge authority's jurisdiction should be limited either to retaining the individual as recommended or separating him with an honorable discharge.

Section V.A.6 is deficient in that it prescribes no standard to determine whether the discharge should or should not be executed because of conviction by civil court where there is an appeal. It would seem that the discharge should at least be deferred until the judgment of the civil court is final in any case. I have problems in understanding why this subsection is necessary in any event. Perhaps this is an area which should be covered by specific legislation.

Section V.A.7 attempts to apply double jeopardy to administrative discharges where there has been a trial by court martial. However, the exceptions to such rule are so vague as to render the section practically meaningless and undoubtedly will result in uneven administration. What is meant by "a legal technicality not going into the merits"? Would this take in an acquittal because certain evidence were excluded because of unlawful search and seizure or a coerced confession? It is suggested that "legal technicality" would be considered by many administrators to encompass the serviceman's constitutional rights. Also, suppose the court martial convicts an individual but does not give him a punitive discharge, is it not then double jeopardy administratively to discharge the individual as undesirable for exactly the same conduct? It is submitted that the subsection should merely state that no member will be administratively discharged without honor if the grounds for such discharge are based wholly or in part upon acts or omissions for which the member has previously been tried by court martial.

Section V.B.2 appears unduly extensive. An exception to preservice activities which may be considered adversely to the member by the administration board is misrepresentations including omissions of fact which if known would have precluded or postponed or otherwise affected the member's eligibility for enlistment or induction. It is suggested that such misrepresentation should be

material and should be such as would have precluded or postponed the member's enlistment or induction, not merely "affected" same.

Since the discharge authority has jurisdiction under the directive to determine whether an individual will be retained or discharged irrespective of the recommendation of the administrative discharge board, it is suggested that section V.C.1 should exclude administrative discharge boards as an agency to review portions of the members' records which have no bearing on the type of discharge certificate the member should receive. It is not believed that the board members can fully separate the effects of the different types of evidence in their minds and where material of an adverse nature exists in the previous records, it would seem inevitable that the respondent would be thereby prejudiced.

I am disappointed that section V on "Policy" does not prescribe that the administrative discharge board will afford members appearing before it a "fair hearing"—a term I find nowhere in the directive.

It is believed that personnel officers will have great difficulty in differentiating the standards for discharge as set forth in section VI. A. and B. It is to be assumed that an individual who has had no difficulty in the armed services either through courts-martial or nonjudicial punishment and whose performance marks have been sufficiently high will in all cases receive an honorable discharge. However, if there is one or two instances of nonjudicial punishment or a courts-martial conviction, then what is the criteria? It is suggested that the criteria should be so spelled out to leave little discretion in the hands of the personnel officer. This might be done by simply requiring that a general discharge be issued only where the performance ratings fail to achieve a certain average level. Even then, the individual should probably be given an opportunity for a hearing to show that the ratings were arbitrarily and unjustly assigned.

It is noted that under "Reasons for Discharge, Unsuitability," section VII.G., with the exception of No. 7, "Financial Responsibility," each of the other listed defects might well be physical disabilities, particularly No. 2, "Character and Behavior Disorders," No. 4, "Enuresis," and No. 5, "Alcoholism." Psychiatrists testify that there is frequently little difference between behavior disorders, psychoneuroses, and psychoses and that it requires the observation of the trained psychiatrist, often over an extensive period of time, in order to determine the correct diagnosis. All of these conditions are often treated by doctors and to that extent would appear to be properly classified as physical and mental disorders. It is suggested that before an individual is discharged under this section (with the exception of those discharged for financial responsibility) he should be given an opportunity for a full and fair hearing by a physical evaluation board. It is prescribed in 10 U.S.C. 1214 that no member of the Armed Forces may be retired or separated for physical disability without a full and fair hearing if he demands it—such full and fair hearing being provided by the physical evaluation board. With conditions which may or may not be physical disabilities in the meaning of section 1214, it would appear appropriate that there should at least be an opportunity for full and fair hearing before a physical evaluation board to determine that issue.

The question of whether an enlisted member is guilty of "financial responsibility" so as to be subject to an other-than-honorable discharge would appear to be often difficult to answer. Giving worthless checks or failing to pay just debts under circumstances so as to bring discredit upon the military services are courts-martial offenses. Otherwise it would seem that what the enlisted member does with his own money is his own business and not one which a disapproving commanding officer might use to terminate a career and give an individual a derogatory discharge.

Section VII.I. sets forth six reasons to discharge by reason of unfitness with an undesirable discharge. If reference is made to the "Table of Maximum Punishments" in the Manual for Courts Martial, United States, 1951, it will be noted that a general court-martial or a special court-martial can give a dishonorable discharge, or a bad-conduct discharge, as the case may be, upon proof and conviction of any of the matters set forth in items 2, 3, 5, and 6. Assuming that item 1, frequent involvement of a discreditable nature with civil or military authorities, is essentially the same as being disorderly under Article 134 of the Uniform Code of Military Justice, then pursuant to section B on page 228, Manual for Courts Martial, United States, 1951, at least three offenses would have to be committed before a punitive discharge could be awarded. The same is also

true of item 4, "Established Pattern for Shirking," and item 7, "Unsanitary Habits." However, the very circumstance that these are violations of the punitive articles of the Uniform Code of Military Justice indicates, in my mind, a design on the part of the armed services to circumvent the Uniform Code of Military Justice. Your attention has undoubtedly been previously called to the report of the Court of Military Appeals for 1960 wherein Maj. Gen. Reginald C. Harmon was quoted at our association's meeting in Los Angeles in 1958 as stating that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid requirements of the Uniform Code. This is undoubtedly largely true and, at least to me, indicates a need in the military personnel package for trained attorneys and the processing of all serious criminal cases by attorneys in accordance with the prescriptions of the Uniform Code of Military Justice.

With reference to section VII.J.1, I have previously given my views as to a discharge issued by reason of conviction by civil authorities. Beyond this, however, it is believed that subsection 1 is far too extensive in applying to an offender adjudged a juvenile delinquent, wayward minor, or youthful offender. Juvenile courts are quite different from ordinary criminal courts. Primarily their approach is more paternalistic and an individual might well be adjudged the juvenile delinquent for a very minor offense because in the eyes of the judge he is running with the wrong crowd, or because of other reasons it is desirable that the individual be placed on probationery status. Moreover, some juvenile judges might well feel restrained not to adjudge an individual as a juvenile delinquent where to do so might result in an undesirable discharge.

Section VIII. pertains to procedures for discharge. As previously indicated, it is felt that opportunity for a hearing should be accorded any case when the discharge will be other than an honorable discharge. Under subsection B. certain procedures and safeguards are set forth. This requires a member be notified of his proposed discharge and advised that he has the right to present his case before an administrative discharge board, to be represented by counsel, and to waive these rights in writing. It is submitted that the individual should be given an opportunity to representation by counsel before he decides whether he should present his case before an administrative discharge board, or make any waiver of his rights. A young enlisted man who may not have even a high school education and is still a minor in the eyes of the law, is probably in no position to make such a far-reaching choice until he has had an opportunity to discuss his case with counsel.

I fail to understand the reason for issuing an undesirable discharge to individuals who have been on unauthorized absence for more than a year unless there is means to determine by rather strict proof that they have in fact been on unauthorized absence. There are many cases where individuals may be missing through no fault of their own and indeed, dead. What effect would an undesirable discharge have on the rights of such a person to, say, be buried in a national cemetery if his body were eventually found, and upon the benefits for his widow and children? If a man is missing for 7 years, he is presumed dead. It is not felt that the mere fact that he may be missing for a year raises the presumption of unauthorized absence so as to authorize an undesirable discharge.

Section IX.D. is deficient in that it provides no guidelines for the exclusion of incompetent evidence. If a "fair hearing" is provided then the evidence must be competent—or at least that evidence upon which the final action is based. It is suggested that the board should exclude all ex parte statements where objection is made by the respondent unless such statements are in the nature of a deposition with full opportunity by the respondent's counsel to cross-examine.

It is submitted that section IX., paragraph C, pertaining to the rights of the respondent, should give the respondent a right for confrontation. Subsection 3 under C discloses the difficulty of an administrative board in contrast to that of a court-martial where subpena power is available. Thus in a hearing where an individual's status in society is virtually at stake, he is powerless to subpena witnesses who may be favorable to his position, offer explanations not otherwise available, or be subject to cross-examination.

As previously indicated, it is not believed that the authority set forth in section IX.D.6. is appropriate where recommendation for retention has been made. In such instances it is believed that only an honorable discharge should be given.

I hope that the foregoing comments will be of some assistance to you and your subcommittee. Again may I emphasize my belief that a good many of the

difficulties which have led to the instant hearings and proposed legislation could be cured by recognition that military justice requires professional administration and if so administered the Uniform Code of Military Justice will prove adequate and there should be no need for simplified punitive short cuts as exemplified by undesirable discharge procedures.

Sincerely yours,

PENROSE LUCAS ALBRIGHT.

MARCH 18, 1966.

Hon. Sam J. Ervin,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: In connection with the evaluation of the evidence developed during the hearings and investigation conducted by the Subcommittee on Constitutional Rights and Special Subcommittee of the Armed Services Committee pertaining to S.745 to S.762, I respectfully ask your consideration of certain provisions of Department of Defense Directive No. 1332.14, dated December 20, 1965.

Your attention is specifically invited to the text of sections V.A.4 (page 3); IX.B (page 12); and IX.D.6 (page 14) of the directive. Extract copies of sections V.A.4 and IX.D.6 are attached hereto (enclosure 1). Section IX.B is quoted below.

Sections V.A.4 and IX.D.6 give a discharge authority the power to set aside or reverse a recommendation by a board of officers that an individual be retained in the service following a hearing conducted by the board of officers. This is in complete contradiction of existing regulations of the Army (AR 635–208 and AR 635–209) and the Air Force (AFR 39–16 and AFR 39–17) which prior to the promulgation of the Department of Defense Directive in question, expressly prohibited the convening authority (discharge authority) from reversing a recommendation for retention (or, as set out in the Air Force regulations, except in those cases where there was a jurisdictional defect or where the record shows that the rights of the respondent have been prejudiced).

For your convenience, I am also attaching hereto extract portions of the prior existing Army and Air Force regulations (paragraph 12d, change 5, AR 635–208, dated October 6, 1961; paragraph 10a(2), AR 635–209, dated April 8, 1959; paragraph 17d, AFR 39–16C, dated March 16, 1964; and paragraph 15e, AFR 39–17B, dated July 19, 1963) (enclosure 2). Further evidence of the intent to finalize a recommendation for retention by boards of officers in the Military Establishment is reflected in the Air Force regulations now in effect relating to the administrative elimination of officers in situations comparable to those provided for in AFR 39–16 and AFR 39–17. In this regard, I respectfully refer you to the provisions of paragraphs 29a(1), AFR 36–2 and AFR 36–3, dated August 1, 1963, extract copies of the texts of which I also enclose herewith.

A comparison of the Army and Air Force regulations prior to DOD Directive 1332.14 and the aforementioned provisions of the directive (section V.A.4 and IX.D.6) conclusively establishes the fact that the directive in question constitutes a significant restriction or impediment on the rights of an individual rather than being a step forward in the preservation of the rights of our citizens in the military service.

I urge your subcommittee to study this obvious endeavor to impair the rights of our service personnel and, consistent with your views as expressed during the recent hearings, that this matter be enacted into law so that regulations and/or directives of this caliber cannot, henceforth, be used as instruments for creating undue and unwarranted restrictions on the constitutional rights of our citizens in the military service.

Regarding the provisions of section IX–B, relating to procedures of administrative discharge boards (i.e., boards of officers), it is respectfully submitted that the DOD directive fails to furnish any definitive statement of procedural safeguards to be accorded an individual whose case is considered by such board. The text of this section states, in pertinent part, as follows:

"*Procedures.* The board functions as an administrative rather than a judicial body. Strict rules of evidence need not be observed. However, the chairman may impose reasonable restrictions as to relevancy, competency, and materiality of matters considered. When the board meets in closed session, only voting members will be present. The proceedings of the board will be maintained as prescribed

by the Secretary of the Military Department but as a minimum shall contain a verbatim record of the findings and recommendations. The board will recommend one of the following alternative dispositions:

1. Retention, or
2. Discharge for a specified reason and the appropriate type of discharge certificate, according to the provisions of this directive and the applicable service regulations."

A reading of the foregoing extract of section IX–B. shows that, among other things, no provision is made for the following fundamental procedural aspects inherent in a due process hearing and which should be the right of any individual in cases considered by a board of officers: (1) No provision is made for a verbatim transcript of the hearing conducted by the board of officers. Express provisions should be made for such a requirement; (2) no provision is made for a specific and detailed statement of reasons (notice) for the initiation of the elimination proceeding; (3) no provision is made for a definitive standard with respect to the degree of relaxation of rules of evidence; (4) no provision is made for the requirement that all evidence, including statements, affidavits, interrogatories, and depositions, be under oath or affirmation; (5) no provision is made for a specific prohibition that documentation pertaining to the case will not be made available to board members prior to the convening of the board and then only after proper introduction in evidence, and (6) no provision is made for the Government having the burden of proceeding and burden of proof.

I respectfully urge that your subcommittee consider these deficiencies in the Department of Defense directive in question and that consideration be given to the enactment of legislation which would prohibit the derogation of the rights of an individual in proceedings before boards of officers as outlined above.

Pending any action by your subcommittee with respect to the above, it is my most earnest belief that these deficiencies in the directive should be called to the attention of the appropriate authority so that, in the interim, positive and immediate action might be taken to change the directive consistent with what is believed to be basic requirements of due process of law under the U.S. Constitution.

I am convinced that every member of the bar engaged in a practice primarily devoted to the field of military law and more particularly, in matters involving appearances before boards of officers, shares my views as set out above. Many of my associates, including Neil B. Kabatchnick, Esq., of this office, have already expressed their concern at what is happening in taking away constitutional rights of individuals merely because they are serving or have served in the military.

Should you desire any more specific comment, personally or in writing, I am at the disposal of the subcommittee.

Cordially yours,

THOMAS H. KING.

DOD DIRECTIVE NO. 1332.14, DATED DECEMBER 20, 1965

Section V.A.4 (p. 3):

"Nothwithstanding an administrative discharge board recommendation for retention, the discharge authority may direct separation when warranted by the circumstance of a particular case. In this event the discharge must be affected under honorable conditions and the member thus separated will be awarded an honorable or general discharge certificate in accordance with the prescribed standards of the Service concerned." [Italic added.]

Section IX.D.6 (p. 14):

"Disapprove the recommendation for retention and direct discharge under honorable conditions with an honorable or general discharge certificate, as warranted." [Italic added.]

AR 635–208, change 5, paragraph 12d:

"The convening authority will not direct a discharge for unfitness when the board of officers has recommended discharge because of unsuitability; *nor will he discharge for unfitness or unsuitability when the board of officers has recommended retention."* [Italic added.]

AR 635–209, paragraph 10a(2):

"If the board recommends retention of the individual, the commander may approve the recommendation but may not direct discharge."

AFR 39–16C, paragraph 17d:

"The discharge authority may set aside the findings and recommendations of the board and direct that a new board be appointed to hear and consider the case only if he finds jurisdictional defects or legal prejudice to the substantial rights of the respondent. * * *"

AFR 39–17B, paragraph 15e:

"The discharge authority may set aside the findings and recommendations of the board and direct that a new board be appointed to hear and consider the case only if he finds jurisdictional defects or legal prejudice to the substantial rights of the respondent. * * *"

AFR 36–2, AFR 36–3; paragraph 29a(1):

"Action by major air commander. On receipt of the Board of Inquiry report, the major air commander will take the following actions, as appropriate.

"a. Board of inquiry recommends retention—Reasons other than fear of flying. If the board of inquiry recommends his retention, and the respondent was required to show cause for retention under this regulation for reasons other than because of fear of flying, the major air commander will:

"(1) Advise the respondent in writing that the board of inquiry recommendation that he be retained, terminates the show cause action initiated against him under this regulation."

STATEMENT OF ROBERT J. MUTH, ATTORNEY, WASHINGTON, D.C.

Mr. Chairman, I am honored by the invitation extended to me to submit a statement concerning the bills presently pending before this subcommittee. By and large, my remarks will be directed toward S. 756 and the question of administrative double jeopardy in military discharge proceedings.

Initially I should say that I am not an expert in the field of military justice. As an attorney associated with a private law firm in Washington, D.C., my day-to-day practice is far removed from the matters presently pending before this subcommittee. I was fortunate, however, in being asked in mid-1963 to represent—on a volunteer basis—a former Army enlisted man (whom I shall call Sergeant Johnson) in a proceeding before the Army Board for Correction of Military Records. The case raised in sharp focus the issue of administrative double jeopardy in discharge proceedings. Perhaps having before you the concrete facts of this case will assist you in evaluating the need for legislation along the lines of S. 756.

During 1962 Senator Ervin's Subcommittee on Constitutional Rights held extensive hearings dealing with the rights of military personnel. In opening those hearings Senator Ervin made plain that the impetus for the hearings was provided chiefly by complaints concerning military discharges. Senator Ervin pointed specifically to the annual report of the Court of Military Appeals for 1960 in which concern had been expressed over the increasing number of administrative discharges. This fact gave rise to the suspicion that military commanders were resorting to this route to avoid complying with the Uniform Code of Military Justice.

One of the witnesses to appear before the subcommittee at that time was the then Deputy Under Secretary of the Army for Manpower. In the course of his testimony, and in response to a question by Senator Ervin, the Deputy Under Secretary made the following statement:

"[I]t 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."

Presumably the witness had reference to AR–635–200 which provides that an undesirable discharge shall not be issued in lieu of trial by court-martial unless it is determined that the interests of the service as well as of the individual will be best served by administrative discharge.

There further appears in the record of those proceedings before the subcommittee a questionnaire addressed to the Department of the Army, together with the answers given. I should like to quote from that questionnaire.

"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 * * *.

* * * * * * *

"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." Pages 829–830.

The Johnson case had its origins approximately 1 year before the hearings to which I have referred, when a general court-martial was convened in Mannheim, Germany. The charges against Sergeant Johnson consisted of eight specifications of alleged violations of Articles 125 and 134 of the Uniform Code of Military Justice.

In the course of the trial some 14 witnesses appeared and testified, including the complaining witnesses, expert psychiatric personnel, and character witnesses. The defendant testified and categorically denied all of the charges. The record of the proceedings discloses plainly contradictory testimony and the issue came down to the not unusual one of weighing conflicting evidence and evaluating the credibility of witnesses.

The record discloses no technical deficiencies on the part of the prosecution. No technical element of proof was overlooked and no procedural infirmity stood in the way of a decision on the merits. After hearing all of the relevant evidence the court returned a verdict of not guilty to all charges and specifications.

Sergeant Johnson was returned to duty. Some 4 months later, in August 1961, a letter issued from Group Headquarters to the Commanding General of the Support Command to which Sergeant Johnson was assigned. In substance, this letter directed that a board of officers be convened pursuant to AR–635–208 to rehear the charges on which Sergeant Johnson had been acquitted by the court-martial. The purpose of such a board is, as you know, to hear evidence and submit recommendations in cases where it is believed that administrative separation from the Army may be appropriate.

In pertinent part the letter read as follows:

"This individual has a record of misconduct involving indecent and lewd acts * * *. This man has been involved in several incidents of a discredibility, lewd and indecent nature. This action led to trial by general Court Martial, but acquittal was adjudged. However, administrative elimination from military service is appropriate * * *. The individual has associated himself with incidents of a lewd and indecent nature, becoming deeply involved therein."

Thus in one breath it was asserted that Sergeant Johnson had been acquitted by a court—and that he was guilty.

Sergeant Johnson was advised of the proposed elimination proceedings, he indicated his desire for a hearing at which he would be represented by appointed, military counsel, and in due course the hearing before the 208 board was held. It clearly appears from the record that the proceedings before the board involved precisely the same allegations as had been tried by the court-martial. Much of the evidence of both prosecution and defense consisted simply of the transcript of testimony given the court-martial. Two prosecution witnesses appeared in person before the board. One professed inability to recall the events he had testified to at the court-martial but, when threatened with a perjury prosecution, he allowed that whatever he had previously testified must have been true. The second live prosecution witness told a story which departed in material respects from his prior testimony and he was unable to explain any of the discrepancies.

I mention these details merely to underscore the fact that the prosecution's evidence before the board was if anything weaker than that which the court-martial had rejected.

Sergeant Johnson's counsel specifically raised the issue of the prior proceedings and argued at length that the acquittal constituted a bar to the board proceedings. This objection was overruled. The board determined that Sergeant Johnson had indeed committed the acts of which he had previously been acquitted and recommended that he be discharged with an undesirable discharge.

At the time of the board's action Sergeant Johnson was an 18-year veteran. It was therefore necessary that the Department of the Army approve the recommendations of the board before they might be effectuated. Pursuant to this

requirement the Office of the Judge Advocate General rendered an opinion that the proceedings of the board of officers was legally sufficient to support the findings and recommendations of the board and in January 1962—1 month before the senatorial hearings to which I have referred—the Department of the Army directed that Sergeant Johnson be discharged with an undesirable discharge. This direction was carried out.

In June 1963 Sergeant Johnson appealed to the Army Discharge Review Board but his appeal was denied.

On September 25, 1963, Sergeant Johnson's case came before the Army Board for Correction of Military Records. As you know, this Board has rather plenary powers to correct injustices. It performs an equitable function once performed by the Congress by way of private bills.

After a hearing limited largely to the procedural issues the Board concluded that although Sergeant Johnson had not been twice placed in jeopardy within the meaning of article 44 of the Uniform Code of Military Justice, the procedures of the board of officers had violated "the purpose and objectives" of Army regulations relating to administrative discharge and that, *in the light of Sergeant Johnson's prior service record*, "there is a suspicion that the Department was overzealous in its desire to eliminate [him] from the service * * *." Some 2 years after his discharge, Sergeant Johnson was granted full relief including reinstatement on active duty.

Thus Sergeant Johnson's case ended well for him, although he suffered considerably in the interim. And let me be quite plain about this: For all I know the Johnson case may be unique. I would be surprised if it were, but it may be. In any event, one can hardly found an indictment against the entire system of military justice and military discharge proceedings on the basis of one incident.

It is nevertheless significant that when the Johnson case came before the Department of the Army for review and approval, that approval was given. At the time—1962—the issue of the abuse of administrative discharge procedures was a live one. Serious concern over these procedures had been expressed. In the following month the Department of the Army was to represent to the Congress that administrative discharges were not being used to run around the end of the Uniform Code. Yet it was the Department—not some field commander—that approved the discharge of Sergeant Johnson.

But the most significant thing about the Johnson case is not the case itself, but rather what followed. On February 11, 1964, a directive issued from the Department of the Army to unit commanders. It read as follows:

"ADMINISTRATIVE SEPARATIONS OF MILITARY PERSONNEL (BN DIST)

"1. Department of Army records indicate some instances where officers and enlisted men have been separated from the service administratively as a result of board action based on evidence which was the same as that used previously when the individual concerned had been acquitted by court-martial or had been recommended for retention by an earlier board under the same general allegations. Although administrative board action is not legally objectionable following acquittal by court-martial and does not—within the meaning of article 44, Uniform Code of Military Justice—place the individual twice in jeopardy, the entire administrative discharge system has been endangered as a result of these few cases.

"2. People outside the military family are frequently inclined to view separations under such circumstances as a violation of a constitutional right—i.e., that an individual is being subjected to double jeopardy. As a result, severe criticism of the Army's administrative discharge system has been voiced by many, even though double jeopardy is not actually involved in these instances. Specific legislation pertaining to administrative discharge procedures and the rights of an individual recommended by a commander for elimination proceedings has been introduced in the Congress. Enactment of these measures would severely curtail the authority granted commanders under current regulations to separate individuals administratively when that action is warranted.

"3. In view of the aforementioned situation, commanders who are convening authorities for board hearings for the administrative discharge of enlisted men or for the elimination of officers should consider carefully the history of a case prior to convening the appropriate board. When an individual has been acquitted by a court-martial or recommended for retention by a board, another board should not be convened unless new evidence or subsequent conduct by

the individual concerned indicates that this action is appropriate. To initiate new proceedings with the same evidence as used in a previous court-martial or board hearing may in some instances result in a reversal of the discharge and possible restoration of full rights to the individual by the Army Board for Correction of Military Records.

"4. DA is required to furnish information of instances indicating a continuation of this problem to those who seek to change the Army's administrative discharge system. The cooperation of all commanders concerned in this matter will assist in the retention of a necessary, currently available administrative procedure by which those individuals who demonstrate that they are not worthy to remain in the service may be separated."

Without being too severe I think this directive may be translated as follows: There is nothing really wrong with bringing a man before a 208 board and charging him with the same offenses for which he has previously been acquitted in a trial by court-martial. Although Army regulations prohibit the issuance of undesirable discharges in lieu of trial by court-martial, the Department of the Army has no real objection to the issuance of an administrative discharge in addition to a trial by court-martial where the court fails to convict. However, the practice should be discontinued in light of the current interest in the subject.

For the Army Board of Correction of Miiltary Records to have limited its decision in the Johnson case to the narrowest available ground is in no way objectionable. It was in the best traditions of adjudicative bodies. But for the Department of the Army to adopt a "wait and see" attitude on this question is, I believe, reprehensible.

If there is something to be said in favor of a system which permits a serviceman to be brought before a board of officers because the convening authority is dissatisfied with the results of a previous board or a previous court-martial, then it should be said. Indeed, there well may be things that can be said in support of such a procedure. All of the equities may not be on one side.

However, if the Military Establishment is itself unwilling to take a frank stand on the issue, the inescapable inference is that those who know the system best are unable to defend it publicly. If this be the case, Senate bill 756 clearly is deserving of enactment.

In closing, I should like to make just one general observation on the issue raised by S. 756. In opposition to this measure the point may be made that what occurred in the Johnson case was not only constitutionally permissible, but quite similar to other situations uniformly tolerated in the civilian courts. An alien may be tried criminally, acquitted, and nevertheless be deported as a result of a "civil" proceeding based on the same allegations. A citizen may be acquitted on criminal tax evasion charges and nevertheless be subjected to a "civil" penalty for failure to pay the same taxes. A corporation may be acquitted in a criminal antitrust case and then face an equity suit for injunctive relief, or an action for double damages under the False Claims Act, all relating to the same charges. Why, then should the military be prohibited from following a similar course?

There are, I think, several answers to this but the one that to me is most persuasive is this: The danger of command influence.

Command influence in court-martial and administrative discharge proceedings is, I think, universally condemned. Yet the very fact that the convening authority sees fit to order a second proceeding against a serviceman who has been once exonerated is the clearest warning to all concerned that the command has been displeased by the results of the former proceeding and is desirous of a different result the second time around.

It is of course understandable that military courts and boards will sometimes make mistakes in favor of the individual. I suspect this does not happen frequently, but I am sure it happens. And when it appears to the command that such a mistake has been made, I can understand a certain feeling of frustration. But having to live with the consequences of imperfection and occasional error is, I daresay, a not uncommon problem for most of us; and I suspect that the military commander, having at his disposal various extrajudicial means that most of us lack to enforce discipline and obedience, is as well equipped to do so as any.

STATEMENT OF ROGER BRYANT HUNTING, ESQ. ATTORNEY, NEW YORK. N.Y.

Recently I represented an officer in the armed services against whom administrative proceedings were initiated to consider his elimination from the service under conditions other than honorable for reason of misconduct. In the course

of that undertaking I gradually became aware of certain flaws and inequities in the administrative process which seriously hampered me in my attempt to render the type of effective legal service to which my experience had until now, led me to believe all American citizens are entitled. As a consequence, I am convinced that the improvements in military administrative discharge processes that Senator Ervin's bills are attempting to bring about are essential in order to restore to military personnel the constitutional rights that civilians in this Nation have long enjoyed.

In particular, I strongly urge reform in the four following areas of the administrative process:

1. Due to the tremendous volume of personnel under military jurisdiction, it is unquestionable that the administrative board hearing is a necessary substitute for courts-marital in many cases. However, it should be used as such only when the individual concerned admits his guilt in regard to the act charged, or does not himself want a trial by court-martial. I was shocked to learn from candid admissions by naval officers that board proceedings are used in many cases as a convenient way of discharging an individual, when the Navy is not sure it has enough evidence to convict him before a court-martial. This abuse of the board hearing can be stopped by enacting Senator Ervin's S. 758, which would provide that an individual may demand trial by court-martial in lieu of board hearing whenever a discharge under other than honorable conditions is being considered. Although nonjudicial punishment under article 15 can impose far less permanent and damaging consequences than can an undesirable discharge, and although an individual's article 15 record unlike the nature of his discharge, is not a permanent part of his personnel dossier, it is the practice of the services to allow their members to demand court-martial rather than accept article 15 punishment, but to give them no choice when it comes to administrative discharge for misconduct. If a man wishes to risk confinement and bad conduct discharge to prove his innocence and save his good name, it seems unnecessary and unjust to deny him that right.

2. As a second point, I would add a suggestion to Senator Ervin's proposed S. 749, which attempts to prevent command influence in regard to both courts-martial and administrative hearings. The problem is more acute in an administrative setting, where there are not the rules of evidence and traditional judicial solemnity to insulate the members from the influence of the ever-present commanding officer. Because of the nature of the military chain of command and authoritarian establishment, I doubt that rules as to efficiency ratings of board members and as to prehearing conversation will insure the impartiality which must be achieved. Therefore, in addition to these rules suggested in the proposed bill I suggest a requirement that the board be convened at a level of command at least one step removed from that of the accused's current assignment. That is to say, the commander in the field who initiates the investigation and recommends board action should not be authorized also to appoint the board members from his unit or from his staff. Such a system would insure that the members of the board are not under the command of an officer who might have personal feeling about the situation or whose views as to the innocence or guilt of the accused might be known to members of his command prior to the board hearing.

3. The right to subpena witnesses, which Senator Ervin's S. 760 would give to administrative boards of officers, should be given also, as a matter of right, to the accused in such a hearing. It is true in most cases under the present system that individuals are given the right to cross-examine those who testify at the hearing. This would lull some into the belief that the administrative board is, therefore, a truly adversary hearing, with the constitutional rights normally included therein. It must be remembered, however, that due process demands not only that one be able to cross-examine his accusers, but also that he be permitted to call witnesses in his own behalf. For the Government to be able to pick and choose among all possible witnesses those which it feels will cast the accused in the worst light, and for him to be powerless to subpena witnesses or evidence so as to rebut or refute such evidence in a positive manner, is most unjust and makes the hearing an adversary proceeding in name only.

4. Finally, I was shocked to discover that in the Navy there is nothing to prevent the reviewing authorities, subsequent to board hearing, from adjudging and ordering a type of discharge more severe than that recommended by the board of officers. I understand, for example, that the Army limits the actions

of the reviewing authority to the same (or lesser) punishment recommended by the board. However, a board of officers in the Navy can examine an individual and recommend he be retained in the service and the final authority in Washington, D.C., who has never met the individual, can ignore this recommendation and issue an undesirable discharge. In a criminal court situation, this would be analogous to an appellate court taking upon itself to convict where there had been acquittal below, or to increase the sentence imposed by the trial judge. All the safeguards so painstakingly provided at the administrative hearing are meaningless if the recommendation of the board is not made, by statute, the limit of punitive measures open to the final discharge authority.

I have made the above comments in order to point up what I, as a practicing attorney, have found to be most frustrating and shocking of the threats to the constitutional rights of military personnel inherent in administrative discharge procedures as they now exist. I respectfully urge that these comments be considered in your deliberations, and that the legislative reform proposed by the Senate Subcommittee on Constitutional Rights be adopted.

In the District Court of the United States for the Western District of Washington, Southern Division

[No. 3321]

RICARDO J. MARTINEZ

v.

MAJOR GENERAL ARTHUR S. COLLINS, UNITED STATES ARMY, COMMANDING GENERAL, ETC., ET AL.

Transcript of court's oral decision in the above-entitled and numbered cause, November 29, 1965; Honorable George H. Boldt, United States District Judge.

APPEARANCES

Robert W. Copeland, Esq., 630 Rust Building, Tacoma, Wash., appearing for and on behalf of the plaintiff; and

Charles W. Billinghurst, assistant U.S. attorney, Federal Building, Tacoma, Wash., appearing for and on behalf of the defendants.

The COURT. I think I can expedite the disposition of No. 3321, *Martinez* v. *Collins* and others, by briefly stating to you my tentative views on the record now presented. Then either one of you will be free to address yourself to these views or any others that you care to speak to.

Upon the record now presented, it is clear beyond doubt that a sharp and fully controverted issue is presented upon the affidavits and the showing made; namely whether in fact Martinez was subject to discharge for the reasons assigned by and proposed to be found by the military authority. In my view, that issue could not possibly be determined, at least by this or any other court, except upon a full evidenciary showing; namely the confrontation of witnesses, appraisal of their credibility from hearing them testify, assistance of counsel, and the like.

In my view, it is not the function of this court to conduct such a hearing, at least in the first instance. The fact pattern now before me is such as to indicate that an evidenciary hearing of the type I have referred to should be conducted by the military authorities. It seems clear under the statute cited in the *Covington* case, the court is expressly given jurisdiction and authority to order that such an evidenciary hearing be held either by the Army in the first instance or by this court. Therefore, my tentative view is that I should stay further proceedings in this court and remand the matter to the military authorities, with the proviso that if within 30 days of this date such an evidenciary hearing either has been held or has been set for hearing within a reasonable time, the stay of these proceedings will continue awaiting completion of the military hearing. On the other hand, if within the time specified no such hearing has been held or scheduled to be held within a reasonable time, the stay of proceedings in this court will be vacated and a date will be fixed for an evidenciary hearing in this court of the kind referred to.

(Whereupon, there was argument of counsel.)

The COURT. Both counsel agreeing that the tentative views expressed are, at least, within the authority of the court and also appropriate action for this court to take, it will be so ordered. One of the few things that I have learned early in my judicial service, and which continues to be emphasized constantly, is the unwisdom of making any rulings or decisions not squarely presented for decision after full and fair hearing. I knew this as a boy in law school, but I have learned it more fully through the years. Attempting to decide any matter of importance, or even unimportant detail, not necessary for decision or without full opportunity for all concerned to be heard is very unwise.

Since I am utterly uninformed concerning any of the matters relating to the Martinez discharge proceeding other than that which is in the affidavits on file before me, I cannot and do not assume there has been any lack of fairness, good faith, or any deliberate misconduct of any kind on the part of the military authorities. I will not undertake to direct the military authorities as to what they are required or should do. I merely remand the matter to the military authorities for an evidenciary hearing. It is perfectly plain to any experienced lawyer or judge that upon issues sharply controverted, as they are here, nobody, neither a judge nor a jury, administrative authority or anybody else can make a sound decision upon fairly controverted facts excepting by seeing and hearing the witnesses asserting the facts in issue. Certainly, I could not, and I cannot imagine anyone else who could. However, in the first instance at least, it is a matter for the judgment of the military authorities as to what they do. If a hearing is conducted, which appears to be appropriate under the law, and reasonably complies with the spirit of an evidenciary hearing, then we may be confronted with a further question the court may have to resolve. I am not going to express any view about how any possible problem should be resolved until it is actually presented in the hope—in fact, the confident hope—it will not be necessary for me to deal with any further problem in this case

If you will draft an order in conformity to this ruling, you may present it at your convenience. The ruling is as announced subject to entry of a formal order to that effect. So ordered.

United States District Court

Western District of Washington

Southern Division

[No. 3321]

RICARDO J. MARTINEZ, PLAINTIFF,

v.

1. MAJOR GENERAL ARTHUR S. COLLINS, UNITED STATES ARMY, COMMANDING GENERAL 4TH DIVISION, AND COMMANDING GENERAL FORT LEWIS, FORT LEWIS, WASHINGTON, AND 2. LIEUTENANT COLONEL HERBERT A. ROBINSON, A–6 UNITED STATES ARMY, ADJUTANT GENERAL 4TH DIVISION AND FORT LEWIS, 3. STANLEY R. RESOR, SECRETARY OF THE ARMY, 4. PAUL R. IGNATIUS, UNDER-SECRETARY OF THE ARMY, 5. MAJOR GENERAL J. A. LAMBERT, UNITED STATES ARMY, ADJUTANT GENERAL OF THE ARMY, DEFENDANTS

This matter having been brought by plaintiff for a preliminary injunction restraining the defendants herein from discharging him from the military service pursuant to the findings and recommendation for his discharge made by a board of officers convened at Fort Lewis, Wash., August 24, 1965, and the court having examined the transcript of the proceedings of said board, and the petition and amended petition, and supplementary affidavits filed both in support and in opposition to said petition, and it appearing to the court that the factual issues here are so sharply controverted that no one, neither a judge nor a jury nor administrative authority, could make a sound decision upon fairly controverted facts, except by seeing and hearing the witnesses asserting the facts in issue; and it appearing that such a hearing should properly be had by the military authorities, and that no further proceeding should be had herein until such opportunity has been accorded, it is, hereby

Ordered, adjudged and decreed, That the proceedings heretofore taken against the petitioner herein, Ricardo J. Martinez, be, and the same hereby are remanded

to the Department of the Army at Fort Lewis, Wash., with the direction that they conduct a hearing which is appropriate under the law in the nature of a full evidentiary hearing; provided that if practicable, such proceedings as the military shall undertake shall be undertaken within 30 days, or if they cannot be undertaken within 30 days, that a date certain for such action shall be determined within 30 days, and that upon the completion thereof, the matter be submitted to this court to determine whether or not it has been appropriate under the law and has reasonably complied with the spirit of an evidentiary hearing as directed by this court; it is further

Ordered, adjudged and decreed, That the temporary restraining order previously entered herein be, and the same hereby is extended and continued in full force and effect until a return shall have been made to this court with respect to the proceedings undertaken by the Army, whereupon the court shall then determine whether or not said temporary restraining order shall continue further, or whether the application for a preliminary injunction shall be ganted or denied.

Dated this 16th day of December, 1965.

U.S. District Judge.

Presented by:

W. COPELAND.

On behalf of Happy, Copeland & King, attorneys for petitioner.

Copy received and notice of presentment for signature upon written argument to be presented December 16, 1965, hereby acknowledged:

CHARLES S. BILLINGSHURST,
U.S. Attorney.

In the United States District Court for the District of Columbia

[Civil action No. 1124–64]

LEONARD A. GAMAGE, PLAINTIFF

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, DEFENDANT

WASHINGTON, D.C.
Thursday, September 30, 1965.

The above-entitled cause came on for hearing before The Honorable Alexander Holtzoff, U.S. district judge, at 11:50 a.m.

Appearances:

ALFRED L. SCANLAN, ESQ.,
JOHN G. SOBIESKI, ESQ.,
For the Plaintiff.
JOSEPH M. HANNON, ESQ.,
Assistant U.S. Attorney.
For the Defendant.

PROCEEDINGS

Ruling of the court

The COURT. There is no question as to the constitutionality of the statute under which the proceeding here involved was conducted.

The only question is whether the statutory requirements were complied with and that in turn depends on the definition of what constitutes "a fair and impartial hearing before a board of inquiry" as provided in 10 United States Code, 8782, subsection (b).

The court has no doubt that the hearing in this instance was impartial.

It is argued however on behalf of the plaintiff that the words "fair hearing" would bar the use and the introduction in evidence of ex parte written statements of accusing witnesses, for not being produced to testify orally either at the hearing or by deposition, there is no opportunity, therefore, to cross-examine.

Now it must be said at the outset that a fair hearing does not mean that all the common-law rules of evidence must be observed.

The requirement means, as the court sees it, that the fundamentals must be observed and the court is of the opinion that in the traditions of Anglo-American jurisprudence to find a person guilty of a serious dereliction of any kind where part of the testimony against him consists of ex parte written statements does not constitute a fair hearing, as we use that term.

The fact that there was other evidence in the case which was sufficient to sustain the charges does not change the result.

There was evidence both ways. We do not know but that the statements in question might have swung the result.

The court appreciates that there are practical difficulties in producing witnesses at these proceedings because there is no provision for compulsory process, although one might well believe that if Congress were requested to give such authority it would be forthcoming.

But it seems to the court that since there was other evidence supporting the charges procured from live witnesses who were produced, the ex parte statements should have been excluded.

This is not a case of a minor infraction tried in an intramural proceeding such as Captain's Mast in the Navy or disciplinary punishment by a company commander.

This involves a very serious charge, namely, a falsification of records.

The court is of the opinion that it was an error that went to the very roots of a fair hearing to introduce exparte statements of witnesses which constitute part of the evidence against the plaintiff.

The court was very much impressed by the able argument of counsel for the Government. It always is, but he had a very difficult burden to carry in this case, and he carried it well.

Whatever result this court is going to reach in this proceeding does not prevent the Air Force from bringing another proceeding and conducting it in accordance with this court's interpretation of the statute.

In view of these considerations, the plaintiff's motion for summary judgment is granted and defendant's motion is denied.

The foregoing is certified to be the official transcript of the proceedings indicated.

ELAINE O. WELLS, *Official Court Reporter.*

THE LIBRARY OF CONGRESS
LEGISLATIVE REFERENCE SERVICE
Washington, D.C.
JANUARY 3, 1966.

To: Constitutional Rights Subcommittee, Attn: Mr. Baskir.
From: American Law Division.
Subject: Right of cross-examination and confrontation.

THE RIGHT OF CROSS-EXAMINATION AND CONFRONTATION

In a criminal case the accused has a right to cross-examine witnesses for the prosecution, and it has been held that this right is embraced in the constitutional right of an accused to be confronted by the witnesses against him, and is implicit in the constitutional right of an accused to be confronted by the witnesses against him. *Brown* v. *U.S.*, 234 F. 2d 140, 145, 352 U.S. 908, 356 U.S. 148; *The Ottawa*, 3 Wall. 268, 271; *Alford* v. *U.S.*, 282 U.S. 687, 691. It has been held that since cross-examination is a basic right rooted in the Constitution of the United States it should not be eliminated except by the highest authoritative legislative provision or judicial decision.

Cross-examination is "the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore, Evidence section 1367 (3d ed. 1940). One of the essential purposes of confrontation is cross-examination. The right of confrontation did not originate in the sixth amendment; it was a common-law right having recognized exceptions. The purpose of the constitutional provision was to preserve the right, but not to broaden it or wipe out the exceptions. *Salinger* v. *U.S.*, 272 U.S. 542, 548 (1926). The amendment does not accord a right to be apprised of the names of witnesses who appeared before a grand jury. *Wilson* v. *U.S.*, 221 U.S. 361 (1911). It does not preclude the admission of dying declarations, *Kirby* v. *U.S.*, 174 U.S. 47, 61 (1899); *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897), nor of the stenographic report of testimony given at a former trial by a witness since deceased. *Mattox* v. *U.S.*, 156 U.S. 237, 240 (1895). An accused who is instrumental in concealing a witness cannot complain of the admission of evidence to prove what that witness

testified at a former trial on a different indictment. *Reynolds* v. *U.S.*, 98 U.S. 145, 160 (1879). If the absence of the witness is chargeable to the negligence of the prosecution, rather than to the procurement of the accused, evidence given in a preliminary hearing before a U.S. Commissioner cannot be used at the trial. *Motes* v. *U.S.*, 188 U.S. 458 (1900).

It has been held by the Supreme Court of the United States that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination, and that, if he wished to examine him in regard to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. *Philadelphia & T.R. Co.* v. *Stimpson*, 39 U.S. (14 Pet.) 448.

The right of the accused to be confronted by his accusers before the tribunal which pronounces upon the facts has always been deemed one of the most valuable safeguards of the citizen.[1] It protects him against the peril of conviction by means of ex parte testimony of affidavits given in his absence or when he had no right to cross-examine. *Dowdell* v. *U.S.*, 221 U.S. 325; *Mattox* v. *U.S.*, 156 U.S. 237. It is generally agreed that the requirement as to confrontation has a main and essential purpose and a secondary one. The main and essential purpose is to secure the opportunity of cross-examination *Pointer* v. *Texas*, 380 U.S. 400 (1965), *Douglas* v. *Alabama*, 380 U.S. 415 (1965), which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers. *Dowdell* v. *U.S.*, *supra*.

The secondary advantage of confrontation is to be obtained from the personal appearance of the witness. This enables the judge and jury to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced in the witness.

An April 1965 decision of the U.S. Supreme Court, *Pointer* v. *Texas*, *supra*, held that the right granted to an accused by the sixth amendment to confront the witnesses against him, which includes the right of cross-examination, is a fundamental right essential to a fair trial and is made obligatory on the States by the 14th amendment. Justice Black in the *Pointer* opinion elaborated on the present law relating to cross-examination and confrontation as follows:

It cannot seriously be doubted as this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, evidence, section 1367 (third edition, 1940). The fact that this right appears in the sixth amendment of our Bill of Rights reflects the belief of the framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby* v. *United States*, 174 U.S. 47, 55, 56, referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford* v. *United States*, 282 U.S. 687, 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene* v. *McElroy*, 360 U.S. 474:

"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." 360 U.S. at 496–497.

There are few subjects, perhaps upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the 14th amendment's guarantee of due process of law. In *In re Oliver*, 333 U.S. 257, this Court said:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our

[1] 21 Am. Jur. 2d, criminal law, sec. 333.

system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S., at 273.

And earlier this term in *Turner* v. *Louisiana*, 379 U.S. 466, 472–473, we held: "in the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

CROSS-EXAMINATION, CONFRONTATION, AND ADMINISTRATIVE HEARINGS

Generally, a party to a hearing before an administrative agency is entitled to know or confront the witnesses and to know the evidence against him. *Greene* v. *McElroy*, 360 U.S. 474 (1959). The right to know the witnesses and evidence is not violated by the taking of testimony in secret or the use of materials not offered as evidence but by the deprivation of the right to refute and the basing of a decision on such testimony and materials. Thus a statute does not violate due process in authorizing an administrative agency to act upon ex parte statements where an opportunity is given to contest such statements. *Pacific Livestock Co.* v. *Lewis*, 241 U.S. 440.

In quasi-judicial hearings subject to section 6 of the Administrative Procedure Act (5 U.S.C. 1106), every party has the right to conduct such cross-examination as may be required for a full and true disclosure of the facts. *Hannah* v. *Larche*, 363 U.S. 420. The right to cross-examine may also exist under regulations of an agency. *Vitarelli* v. *Seaton*, 359 U.S. 535.

The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit it if there is no explicit authorization therefor. *Greene* v. *McElroy, supra.; Reilly* v. *Pinkus*, 338 U.S. 269; *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1.

In *Hannah* v. *Larche, supra.*, the Supreme Court considered the specific constitutional question of whether persons whose conduct is under investigation by a governmental agency are entitled, by virtue of the due process clause, to know the specific charges that are being investigated, as well as the identity of the complainants, and to have the right to cross-examine those complainants and other witnesses. The Court stated that—

Although these procedures are very desirable in some situations, * * * we are of the opinion that they are not constitutionally required in the proceedings of this [the Civil Rights] Commission.

The Court compared administrative, adjudicative, and investigative proceedings, reasoning that the due process clause of the fifth amendment requires greater safeguards for the individual in an adjudicative proceeding than in an investigative proceeding. Specifically, the Court held that the due process clause of the fifth amendment does not demand that an individual be awarded the rights of apprisal, confrontation, and cross-examination in an investigative administrative proceeding.[2] In an appendix to its opinion on the *Hannah* case, a compilation of the rules of procedure of administrative and executive agencies, Presidential commissions, and congressional committees was set out (p. 454). One table in this compilation sets out the right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings; the miscellaneous comments table includes some references to rights of cross-examination in the formal, adjudicative hearings.

The U.S. Court of Claims decision, *Hanifan* v. *U.S.* No. 92–63, decided December 17, 1965, has recently held that an Internal Revenue Service employee was improperly discharged because he was denied the right to cross-examine IRS management officials during a hearing on his appeal to the Civil Service Commission. The court said a recent Supreme Court action which remanded a similar type of dismissal case to the district court for additional facts (*Williams* v. *Zuckert*, 372 U.S. 765 (1963)) implicitly upheld the rights of Federal em-

[2] See notes on *Hannah* v. *Larche* in 47 Cornell Law Quarterly 71, and 7 Utah Law Review 402.

ployees to cross-examine management officials who were involved in the dismissal action against them.

Professor Davis, in his Administrative Law Treatise, § 7.05, states that when adjudicative facts are in dispute, our legal tradition requires that the party affected be entitled, not only to rebut or explain the evidence against him, but also to "confront his accusers" and to cross-examine them. Davis, in commenting on *Greene* v. *McElroy, supra*, states that the holding rested upon an interpretation of a statute and executive order which said nothing about confrontation and cross-examination, and not upon due process, but the Court's discussion showed that requirements of due process were in the background. The *Greene* case, he states, would seem to be a guide to the law of the future.

For some legislative history concerning cross-examination and confrontation, see Senate Document No. 248, 79th Congress, 2d Session 209 (1946); the Senate committee said: "To the extent that cross-examination [under section 7(c) of the APA] is necessary to bring out the truth, the party should have it). The House committee said, (p. 271): "The provision on its face does not confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths."

FRANK L. CALHOUN, *Legislative Attorney.*

In the U.S. Court of Claims, No. 226–62

(Filed January 20, 1966)

RUFIE SHERMAN NEAL

v.

THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

Penrose Lucas Albright, attorney of record for plaintiff. Mason, Mason and Albright, of counsel.

LeRoy Southmayd, Jr., with whom was Assistant Attorney General John W. Douglas, for defendant.

OPINION

BERNHARDT, *Commissioner:* After 17 years of praiseworthy enlisted service on active duty in the Marine Corps,[1] in 1958 the plaintiff accepted perforce an undesirable discharge in lieu of a threatened court-martial and possible imprisonment on morals charges.[2] In this action to recover pay and allowances accuring since the discharge he relies on its illegality in that it was procured on the threat of a court-martial if he refused to sign a confession exacted under alleged duress, when unbeknown to him but known to his Navy inquisitors no corroborative evidence existed in fact of his confessed offense with which to suffice a court-martial conviction. He charges with factual error the finding of the Navy Discharge Review Board, following a hearing, that sufficient evidence existed to warrant trial by court-martial, and with arbitrary and capricious action the refusal of the Board for Correction of Naval Records to correct his

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and rule 57(a).

[1] Including 22 months overseas in World War II, participating in the Iwo Jima campaign, 3 months in 1950 as a combat cameraman in Korea participating in the Inchon landing and Naktong River operations, award of four Good Conduct Medals and three Presidential Unit Citations.

[2] There are five types of discharge for enlisted Marines: honorable, general, undesirable, bad conduct, and dishonorable. The first three are given by administrative action; the last two are given only by court-martial action. Of the 10 formal reasons for discharge, one is unfitness. Marine Corps Manual 1949, §§ 10250, 10251. Unfitness as a ground for administrative discharge consists, *inter alia,* of evidence of habits or traits of character manifested by enumerated forms of conduct, one of which is homosexuality. Discharge actions for unfitness involving homosexuality must be referred to the Commandant of the Marine Corps for decision. Id., § 10277. Plaintiff's discharge was for unfitness as a class II homosexual, which is defined in SecNav Instruction 1620.1 as one who has engaged in an actual or attempted homosexual act not falling in class I (aggressive or dangerous types).

discharge, which was done without a requested hearing. The precise issue thus framed is not whether an uncorroborated confession of homosexual acts will ground an undesirable discharge, but whether such a discharge is valid which rests solely on a confession procured on threat of a court-martial which could not have succeeded because of the absence of corroborative evidence.

The plaintiff's first knowledge of his implication in charges of homosexuality occurred on July 23, 1958, when he was summarily brought before two special agents of the Office of Naval Intelligence and told by them that they wished to interrogate him as to reports of his participation in homosexual conduct with an unknown male person in a men's toilet at the Pentagon on March 11, 1958. He was duly warned of his statutory rights against self-incrimination, etc., under the Uniform Code of Military Justice (10 U.S.C. 831). After initial denials of guilt the plaintiff orally admitted certain acts. The admissions followed the showing to plaintiff of a photograph of an unidentified man in a compromising situation in a toilet stall allegedly in the same men's room at the Pentagon where the plaintiff had been accused of being seen *in flagrante delicto*, thus planting in plaintiff's mind the prospect that concealed cameras making a photographic record of his own actions would make denials of his misconduct useless. This, coupled with his natural panic and the representation by the agents that by making a written confession he might be permitted to resign rather than be court-martialed, or possibly get a medical discharge, or even (more remotely) be retained on active duty, induced the plaintiff to prepare in his own handwriting and sign a statement composed at the prompting of the agents, which confessed his passive participation in specific misbehavior. Five days later he orally confirmed to the same agent the accuracy of the written statement, since recanted.

At the time of the interrogation on July 23, 1958, the special agents should have known, and undoubtedly did know, that in actual fact the Navy had no way of corroborating by independent evidence the facts admitted by plaintiff in his confession. No written statements by witnesses to the admitted violations had been obtained, as section 4b of SecNav Instruction 1620.1, June 5, 1953, requires. Nor, as was later learned, were there known eyewitnesses to the alleged acts. This absence of corroborative evidence was not known to plaintiff at the time of his interrogation, nor in the course of his subsequent applications to the Navy Discharge Review Board and the Board for Correction of Naval Records, for the reason that in those proceedings plaintiff had no access to the classified records of the Navy investigation, although his counsel had endeavored with only partial success to get at such records in the Correction Board proceeding. It was not until the plaintiff invoked the discovery procedures of this court that he learned for the first time the names of the particular operatives who supposedly had the damning eyewitness evidence against him, and then discovered in the course of their testimony at trial that not only had they not personally witnessed the alleged action but were unable even to identify plaintiff himself as a person they could remember ever having seen before. Whether they would have been able to identify plaintiff in 1958 cannot be determined, but it is relatively clear that neither of these operatives ever saw the plaintiff in a compromising homosexual situation, and at most could have known of it only by hearsay since their assignments with respect to the toilet surveillance were merely to follow suspects from the tiolet at the direction of other operatives posted to observe the acts themselves. One of the ONI special agents who initially interrogated the plaintiff on July 23, 1958, candidly admitted in his testimony before the court that it was "very shoddy investigative work", and that he had undertaken the assignment to interrogate plaintiff reluctantly at the insistence of his superior, to whom he complained in effect: "What the hell do you want me to do with this piece of junk [the memorandum reciting facts of plaintiff's misconduct]? I don't have an official contributor, and I don't know who did this, and I would prefer to do some investigative work to find out more." He was not permitted to perform his own investigation and proceeded unwillingly to interrogate plaintiff and procure his confession largely on bluff, succeeding more on the weakness of the plaintiff's resistance than on the strength of the provable facts against him.

The quality of the investigation hardly comports with the direction in SecNav Instruction 1620.1 that reports of homosexual activities shall be inquired into "thoroughly and comprehensively" in order to "ascertain all the facts and circumstances of the case", or that "It is essential that all of the facts indicating homosexual tendencies or acts be properly recorded and that signed statements

of all witnesses be obtained." Nor does it measure up to the requirements of Article 32, Uniform Code of Military Justice (10 U.S.C. 832) for a "thorough and impartial investigation".

"In testing the validity of a discharge given by an armed service, one of the prime questions is whether the department complied with its own regulations. * * * We have several times held that a discharge issued in violation of regulations is a nullity. [Citations]. Not merely the character of the discharge but the fact of discharge is voided by the failure to accord the serviceman his material rights or to follow the required procedures. [Citations]." *Middleton* v. *United States*, 170 Ct. Cl. 36 (1965). There the plaintiff had admitted in writing his passive participation in an uncompleted homosexual act. After conviction by a civilian police court, followed by acquittal on appeal, he signed a form statement agreeing to accept an undesirable discharge "for the good of the service and to escape trial by general court-martial."[3] He was thereafter separated with an undesirable discharge, later changed to a general discharge for unsuitability at the direction of the Secretary of the Navy following a Correction Board's unaccepted recommendation for an honorable discharge. The court held that plaintiff's less than honorable discharge had been obtained improperly in that SecNav Instruction 5810.1 barred court-martial trials against individuals who had been convicted or acquitted of the same acts in a State court, except in unusual cases where the Secretary of the Navy considers court-martial "essential in the interests of justice, discipline, and proper administration within the naval service." The parallel to the case under consideration is that the "Navy investigators and officials affirmatively led him [Middleton] to believe that he would be court-martialed if he did not acquiesce in the undesirable discharge.", but was not told of the technical provisions in the SecNav Instruction which would have virtually precluded a court-martial trial. Similarly, the instant plaintiff was misinformed by being threatened with a court-martial if he did not agree to accept an undesirable discharge, without being told that his confession was not sufficient for trial by court-martial in the absence of (nonexisting) corroborating evidence.

The essentiality of corroborating evidence in such cases is made clear by the Manual for Courts-Martial, United States, 1951. Thus, section 25 of chapter VI, dealing with the preparation of charges, states:

"Ordinarily, charges for an offense should not be preferred against an individual if, after investigation, the only available evidence that the offense was committed is his statement that he committed it. In rare cases, however, it may be advisable to prefer charges prior to the completion of an investigation made pursuant to such a statement, as, for example, when the statute of limitations may run before all contemplated witnesses can be interrogated."

The present case is not within the excepted class of "rare cases" referred to in this citation, for there was ample time for a thorough investigation to have been completed prior to the serving of charges on plaintiff. Further, section 140 in chapter XXVII of the Manual for Courts-Martial, relating to rules of evidence, reads at page 251:

"An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone. * * * The corroborating evidence need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, and it need not tend to connect the accused with the offense."

We are not concerned here with the quality of the corroborating evidence available to support the plaintiff's confession; the problem is rather a total lack of corroborating evidence, clearly contrary to the plain words of the Manual.

The defendant places some reliance on *Grant* v. *United States*, (162 Ct. Cl. 600 (1963)), but a reading of the case demonstrates its inapplicability. The *Grant* case involved the issuance of a general discharge for an act of sodomy with a female prostitute rather than an undesirable discharge for a homosexual offense as here, and the *Grant* opinion stated affirmatively that SecNav Instruction 1620.1 did not apply, but it does here. It is true that in *Grant* the court made collateral reference to the fact that plaintiff's confession made irrelevant the

[3] The "boiler-plate" form of statement prescribed by SecNav Instruction 1620.1, para. 5, and identical to that signed by the instant plaintiff.

lack of confrontation of witnesses, but if this statement was intended to say that a written confession requires no corroborating evidence to support a trial by court-martial it would be dicta to the issues in *Grant* and thus not binding as a precedent. Moreover, *Grant* arose on cross-motions for summary judgment, and one cannot determine in the court's recitation of facts the precise nature of the corroborating evidence which existed in support of the plaintiff's confession. So far as can be gleaned from the opinion, the plaintiff in *Grant* did not complain of the lack of confrontation of witnesses, but the pleadings would have to be consulted to ascertain this with certainty.

It is not remarkable that plaintiff agreed to accept an undesirable discharge rather than a court-martial when one considers the inferior assistance he received from the naval officer appointed to be his counsel. The counsel, a non-lawyer whose qualifications and experience do not appear in the record but may be judged from the caliber of his representation of plaintiff, was engaged on the spur of the moment at the very time and place the plaintiff was served with charges on August 14, 1958. He was present in the room and agreed to represent plaintiff as counsel at the suggestion of the officer who served charges on the plaintiff, and with the plaintiff's consent, for he was not financially able to engage private counsel. Within a matter of minutes counsel urged upon plaintiff the course he adopted, *namely, to sign a form statement agreeing to accept an undesirable discharge for the good of the service and to escape trial by general court-martial.* Quite obviously plaintiff's counsel was woefully unfamiliar with the facts of the case, for in the brief period from his hiring to his advising the plaintiff to sign away his rights he would scarcely have had time to do more than examine the charges and the meager investigative file in plaintiff's case, much less perform an adequate investigation of the facts so as to insure the plaintiff proper representation. It is highly unlikely that plaintiff's counsel thus engaged was familiar enough with military law to have appreciated the fact that the Manual for Courts-Martial required corroborative evidence to support a confession, even if he had ascertained that there was no corroborative evidence to support plaintiff's confession, for otherwise he would have sought time within which to ascertain what corroborative evidence existed. We do not have the benefit of this counsel's testimony, for due to an oversight in his instructions he failed to appear as a witness for the defendant in the trial before this court, although scheduled to do so.

Application of Stapley, (246 F. Supp. 316 (1965)), is instructive on the subject of what is expected of a counsel in special courts-martial, and the quality of advice given the present plaintiff, plus the paucity of his visible efforts in plaintiff's behalf, lead easily to the conclusion that plaintiff's counsel was about as beneficial to him as was inept counsel in the *Stapley* case, which there led to Stapley's discharge from military confinement on a writ of habeas corpus. The present plaintiff's less-than-honorable discharge may be attributed to his less-than-adequate military representation.

Events moved swiftly for plaintiff. On July 24, 1958, the day following his confession, he submitted to a polygraph (lie-detector) test. He was reinterrogated on July 28 and confirmed his confession. On August 14 he underwent a psychiatric examination, with a resulting recommendation that he be considered a class II homosexual and processed administratively accordingly (see footnote 2). On August 14 he was served with charges, engaged counsel, and signed the statement agreeing to an undesirable discharge to escape court-martial. The following day, August 15, the accusing officer in the court-martial charges recommended to plaintiff's commanding officer his undesirable discharge as a class II homosexual. The commanding officer concurred in the recommendation the same day in a first indorsement to the Commandant of the Marine Corps. On August 18 a board of three officers set up under section 10277 of the Marine Corps Manual concurred in the discharge recommendation. The Marine Corps Commandant on August 25 directed plaintiff's commanding officer to issue plaintiff an undesirable discharge, and on September 5 the plaintiff was separated. Forty-four days of processing had elapsed, and there is no indication in the record that consideration had been given to a want of corroborating evidence.

The plaintiff applied immediately, September 29, 1958, to the Navy Discharge Review Board, where he was represented by a staffman from the American Legion in a hearing accorded him January 7, 1959. The Discharge Review Board found that the investigation "disclosed sufficient evidence of his involvement to warrant trial by General Court-Martial", a finding sharply at variance with the facts as

we now know them to be. There is reason to believe that the Discharge Review Board was aware of the lack of corroborating evidence at least constructively, but gave no thought to the legal significance of such lack in court-martial proceedings. Nor was this deficiency cured by the Correction Board to which the plaintiff applied in November 1960. Plaintiff's civilian counsel in that proceeding demanded the Navy's classified files of the investigation, and received his confession in full and an edited summary of information, but not the names of the eyewitnesses to the offense, which was what he needed. The Board did furnish for plaintiff's use a statement from the Navy that in the event of trial by court-martial they would have produced as witnesses the two ONI Special Agents to prove the voluntary nature of the confession they had procured from plaintiff. Nothing was said about producing any other witnesses to corroborate the facts in the confession, such as the operatives who purportedly witnessed the offense, and it is permissible to interpret this failure to mean that the Navy was well aware that it had no evidence to corrobarate independently the facts stated in plaintiff's confession. In April 1962 the Correction Board sent plaintiff a standard form letter rejecting his application.

The failure of the administrative filtering process to comprehend the effect of the lack of corroborative evidence on plaintiff's rights, and the lack of opportunity for the plaintiff to ferret out the facts upon which his salvation depended, demonstrates the need for the useful offices of a Federal court whose discovery processes permit litigants a complete disclosure of all facts relevant to their contentions. There is no difficulty in finding the Discharge Review Board in error in holding that the evidence before it would have warranted plaintiff's trial by court-martial. For the same basic reasons the Correction Board's action was, if not arbitrary and capricious as plaintiff alleged, at least not supported by substantial evidence now known to exist. It should be no great handicap to the military authorities to require them to perfect their investigations before using a threat of court-martial as a stick and the possibility of a less odious form of discharge as a carrot to persuade a suspect into an unwise confession, and should be a salutary deterrent to careless investigational procedures.

The plaintiff is entitled to a judgment for his full pay and allowances from the time of his discharge to the expiration of his last enlistment period, reduced by his outside earnings during that period to be determined pursuant to rule 47(c)(2). *Clackum* v. *United States*, 161 Ct. Cl. 34 (1963), *Middletown* v. *United States*, *supra*. The defendant is not entitled to judgment on its counterclaim for the proportionate part of plaintiff's reenlistment bonus allocable to that part of his last enlistment period not served.

FINDINGS OF FACT

1. *Period of service.*—Plaintiff served in the U.S. Marine Corps as an enlisted man on active duty from August 22, 1941 to September 5, 1958, when he received an undesirable discharge while serving in the grade of technical sergeant. During his military career he had spent 22 months overseas in World War II, participated in the Iwo Jima campaign, served 3 months in 1950 as a combat cameraman in Korea where he engaged in the Inchon landing and the Naktong River operations, and was awarded four Good Conduct medals and three Presidential Unit Citations.

2. *Pentagon morals investigation.*—In 1958 Pentagon policemen employed by the General Services Administration collaborated with agents of the Criminal Investigation Division of the Army in investigating reports of homosexual activities occurring in a men's toilet in the Pentagon designated as room No. 2D617. Six or seven agents maintained a surveillance of the site by peeking through cracks between the stalldoors and the supporting jams, peering under and over the top of the stalls, and by concealing themselves in the ceiling crawl space from which vantage point a photographic record was made of some of the activities below. Agents were stationed outside of and in the immediate vicinity of the toilet entrance for the purpose of following and securing the identification of suspects leaving the toilet.

3. *Investigation of plaintiff.*—On July 11, 1958, the Commanding Officer, Headquarters Battalion, Headquarters, U.S. Marine Corps, Washington, D.C., requested the investigative assistance of the District Intelligence Office, Potomac River Naval Command, "to inquire into the possible homosexual activity" of the plaintiff. Walter R. Bruce, then a special agent with the Office of Naval Intelligence, was assigned by his superior to investigate certain information contained

in a memorandum concerning alleged perversion occurring in the toilet referred to in the previous finding involving two men, one of them a marine who had been followed out to a parking lot and into a car bearing license plates said to correspond to license plates issued to plaintiff. The memorandum containing this information was unusual in that it was not an investigator's report or an official document, was not accompanied by supporting documents, and was not signed. It originated with the Army Criminal Investigation Division and, in Agent Bruce's opinion, represented "very shoddy investigative work" because of its incompleteness, informality, lack of authorship identification, and lack of identification of all persons involved in the alleged perverted acts. Agent Bruce undertook the assignment reluctantly at the insistence of his superior, asking the latter in effect: "What the hell do you want me to do with this piece of junk? I don't have an official contributor, and I don't know who did this, and I would prefer to do some investigative work to find out more." Bruce's instructions from his superior were merely to interview the plaintiff, who he said had been identified and observed in the commission of perverted acts on or about March 11, 1958.

4. *Interrogation of plaintiff.*—On July 23, 1958, by prearrangement, plaintiff was picked up at his barracks by a military truck and taken to the Naval Gun Factory to be interviewed by Special Agent Bruce of the Office of Naval Intelligence. There the plaintiff was interviewed for approximately three or four hours by Special Agents Bruce and James. After being formally advised by Bruce that he need not answer any questions and that anything he said might be used against him at a court-martial, plaintiff was asked questions concerning reports of his participation in homosexual activities occurring in a men's toilet at the Pentagon, which activities the plaintiff initially denied. After being shown by Bruce a photograph of an anonymous individual in a compromising position in a toilet stall which established that one could in fact be observed under such normally private conditions, the plaintiff made certain admissions, the nature of which is in dispute. Bruce's version of the admissions made by plaintiff, which corresponds to the contents of a written confession which plaintiff signed, was that on two occasions while plaintiff was sitting in a toilet stall in the men's toilet in question, an unknown man in the adjoining stall had reached under the partition separating the stalls and felt his leg and, proceeding further, had performed an indecent act on the plaintiff with his passive cooperation. At trial the plaintiff's version of his admission to Bruce was that on each of two occasions an unidentified man in the adjoining stall had borrowed a book of maches from him, and then returned the matches under the partition with a note suggesting in effect that plaintiff go for a ride in the unknown man's car, but that there had been no other overt acts and that plaintiff had either told the unknown man to "get lost" or had ignored the advance, if such it was. Whatever the nature of the actual admission, it is likely to have been induced to an important degree by the photograph shown plaintiff by Bruce, which would have naturally led plaintiff to suspect the possibility of there being a similar photographic record of his own activities which it would have been difficult to refute. No such pictures existed. For reasons given in the accompanying opinion it is unnecessary to resolve the dispute as to the exact nature of the admissions made by plaintiff to the two special agents. Nor is it necessary to resolve the disputed truth of plaintiff's testimony that Bruce threatened him with being locked up for the night and subsequent court-martial and lengthy imprisonment if he did not make a written confession, or the alleged promise by Bruce that making such a written confession would not only save plaintiff these results but might also lead to a mere transfer of plaintiff to another base instead of a forced resignation and undesirable discharge. Bruce testified that he had informed plaintiff that if he made a written confession he might be allowed to resign rather than be court-martialed, or that he might get a medical discharge, or that there was a remote chance of his being retained on active duty.

5. *The confession.*—At the conclusion of the interrogation on July 23, 1958, as described in the preceding finding, the plaintiff wrote and signed a six-page statement in his own handwriting. During its preparation either Bruce or James, and sometimes both of them, were present and advising plaintiff as to portions of its contents. Both of them witnessed the plaintiff's signature to the statement. Certain parts of the statement, such as the opening and closing paragraphs, relating to formal warning of his rights not to talk, etc., under article 31 of the Uniform Code of Military Justice, and as to the absence of

threats and promises, and the initialing of changes, were copied by plaintiff from prepared forms given him by the agents. Other parts of the statement providing information as to plaintiff's place of birth, family, education, and duty assignments, were written and composed by plaintiff at the prompting of the agents who apparently suggested the information which they wished the statement to contain. The vital and incriminating part of the statement occurs in the third paragraph, wherein the plaintiff described in somewhat greater detail his degree of participation in the acts referred to in finding 4. This section was composed and written by plaintiff, and there is no proof of plaintiff's contention that it was dictated to him by the agents, although they must necessarily have told plaintiff that he would have to describe the facts relating to the offense. Finally, the statement expresses repentance and remorse, and provides by way of extenuation a reason for his actions relating to his wife's temporary indisposition at the time.

6. *Duress.*—During his interrogation on July 23, 1958, and the writing of the statement described in the preceding finding 5, the plaintiff was very nervous, but rational. If he was in a "state of duress" as he testified to have been, it was not due to any proven coercion on the part of special agents Bruce and James who conducted the interview, nor was it due to anything other than a natural distress and trepidation on plaintiff's part over the investigation and its potential consequences.

7. *Lie-detector test.*—On July 24, 1958, the plaintiff voluntarily submitted to examination by polygraph, commonly referred to as a "lie detector". The polygraph operator rendered his opinion to the Navy that the plaintiff "did attempt deception in answering" certain questions.

8. *Reinterrogation of plaintiff.*—On July 28, 1958, plaintiff was reinterrogated by Special Agent Bruce, and said he had nothing further to add to his statement of July 23, 1958, which he maintained was the truth.

9. *Psychiatric examination.*—On August 14, 1958, a Navy psychiatrist examined plaintiff and reported that he was "clear, coherent, oriented, and cooperative, but anxious and gravely distressed by his present situation." He recommended that plaintiff would be considered a homosexual class II according to Secretary of the Navy Instruction 1620.1, and should be processed administratively accordingly.

10. *Court-martial charges; election for undesirable discharge.*—On or about August 14, 1958, plaintiff was served with a charge sheet containing two specifications for violations of the Uniform Code of Military Justice, article 134, charging him in one count with the commission of an "indecent, lewd and lascivious act with a white male person", name unknown, in a specified manner, and in the second count with the reciprocal commission of the same offense in mutual cooperation with an unknown male. The official accuser named in the charge, Lieutenant J. K. McDonald, served the charge sheet on plaintiff in the presence of a Captain Treble who, at Lieutenant McDonald's suggestion and with plaintiff's approval, agreed to serve as plaintiff's counsel, since plaintiff had stated that he was financially unable to engage counsel. Captain Treble conferred briefly with plaintiff, left the conference room temporarily, and then returnd to advise plaintiff to accept an undesirable discharge as the only way out. There is some confusion as to the details of Captain Treble's discussion with the plaintiff. The account reported here is the plaintiff's version. Captain Treble failed to appear as defendant's witness at the scheduled trial because of an oversight in the Office of the Navy Judge Advocate General. Before the Navy Discharge Review Board (finding 13, *infra*) the plaintiff testified that he thought he had told Captain Treble that he wanted medical care if he was guilty of the charges. On the advice of Captain Treble the plaintiff then signed a statement prepared by Captain Treble in which the plaintiff agreed to "accept an undesirable discharge for the good of the service and to escape trial by general court-martial." The record does not indicate that Captain Treble, who was not a lawyer, made any independent investigation whatsoever of the case. The brevity of his deliberation prior to rendering advice to plaintiff as counsel justifies the belief that he could have done no more than examine the charges and the report of investigation. Treble advised plaintiff that by signing the statement agreeing to take an undesirable discharge the plaintiff might improve his chances of receiving consideration. The following day, August 15, 1958, Captain Treble informed plaintiff's wife, whom plaintiff had summoned to Washington, that the plaintiff was guilty and that nothing could be done about it in view of the statement signed by plaintiff. Again, this is the plaintiff's unrefuted version of

the discussion with Captain Treble who, as stated above, did not appear for trial through a mistake in instructions.

11 *Clemency request.*—On August 15, 1958, at the suggestion of Captain Treble, plaintiff filed a summary of his praiseworthy military experience and a separate signed statement in which he stated, in part, as follows:

"I will not attempt to rationalize or offer excuses for my actions except to state briefly why or how it happened, I do not know or understand.

* * * * * * *

"I realize the Marine Corps cannot permit me to continue my intended career and this in itself is extremely difficult to visualize, but I respectfully request clemency, not for myself but for my wife and two young boys. Even without the forthcoming effects of an early discharge I have suffered as only a man can who knows he has violated the rules of society. I have begged forgiveness from God for my weakness and I pray that the board will consider my past record and my future usefulness as a citizen."

12 *Undesirable discharge.*—On August 15, 1958, Lieutenant McDonald, the accusing officer who had served the charges on plaintiff the previous day, recommended to his commanding officer by letter that plaintiff was a homosexual within the meaning of class II, SecNav Instruction 1620.1, and that he be discharged from the service in accordance with paragraph 10277, Marine Corps Manual. The cited instruction defines class II homosexuals as "those cases wherein personnel, while in the naval service, have engaged in one or more homosexual acts or where evidence supports proposal or attempt to perform an act of homosexuality, and which do not fall in the category of class I [aggressive or dangerous homosexuality involving some form of force or coercion of another person]." The cited paragraph 10277 of the Marine Corps Manual authorizes discharge for reason of unfitness of enlisted personnel, where the unfitness consists of habits or traits of character manifested by enumerated forms of conduct, one of which is homosexuality. On August 15, 1958, plaintiff's commanding officer concurred with the findings and recommendations of Lieutenant McDonald in a first endorsement to the the Commandant of the Marine Corps. On August 18, 1958, a board of three officers concurred in the recommendation for plaintiff's undesirable discharge by reason of unfitness, citing plaintiff's passive participation in two homosexual acts committed with unidentified males. On August 25, 1958, the Commandant of the Marine Corps directed plaintiff's commanding officer to issue plaintiff an undesirable discharge. On September 5, 1958, plaintiff was discharged from the Marine Corps with an undesirable discharge.

13 *Discharge review board.*—On September 29, 1958, the plaintiff applied to the Navy Discharge Review Board to be reinstated in the Marine Corps. On January 7, 1959, the Navy Discharge Review Board conducted a hearing in plaintiff's case. Plaintiff was represented by a staff employee of the American Legion and testified before the Board. The Board concluded "that the character of the discharge was proper. No evidence was adduced which would warrant any change therein," and that the investigation "disclosed sufficient evidence of his involvement to warrant trial by general court-martial." The Board had in its record for consideration the investigating report of the Office of Naval Intelligence. This report was not made available to plaintiff, nor is there any indication that plaintiff or his counsel asked the Board for permission to examine the said investigating report. The Secretary of the Navy reviewed and approved the Board's proceedings and final action, of which the plaintiff was notified on March 17, 1959. On April 15, 1959, the plaintiff wrote to the Board inquiring why he was not granted a more favorable decision, and saying that he was "framed" and in a state of duress after questioning. The Board replied on May 1, 1959, offering to reconsider the case only if plaintiff had new, material, and relevant evidence.

14. *Correction Board.*—(a) On November 22, 1960, plaintiff made application to the Board for Correction of Naval Records to show that he was not discharged from the Marine Corps on September 5, 1958, and that application was made for transfer to the Fleet Marine Reserve to become effective February 17, 1961. A hearing was requested.

(b) Plaintiff was represented before the Correction Board by private counsel who represents him before this court. Plaintiff's counsel requested the Correction Board to obtain and make available to him for review any classified information in the Navy records relating to the plaintiff's discharge proceedings.

On March 14, 1961, the Correction Board transmitted this request to the Director of Naval Intelligence, asking that a summary or extract of classified files be prepared for plaintiff's use if the files themselves could not be made available under the law and regulations. On March 17, 1961, the Office of Naval Intelligence supplied the Correction Board with a copy of plaintiff's written statement of July 23, 1958 (the "confession" described in finding 5, supra), and a summary of information regarding the plaintiff dated March 18, 1961, which documents were furnished plaintiff's counsel by the Correction Board, in addition to plaintiff's statement of August 14, 1958, agreeing to accept an undesirable discharging in lieu of a general court-martial, as referred to in finding 10, supra.

(c) The summary of information furnished plaintiff's counsel by the Correction Board recited that the Naval Intelligence Office received information that plaintiff had been observed on March 11, 1958, engaged in committing specified perverted acts, that he had been identified as driving a specified car, and that plaintiff had signed a statement admitting the acts and had subsequently verified the truth of the statement.

(d) On April 4, 1961, after having examined the material which had been furnished him by the Correction Board, plaintiff's counsel requested the Correction Board for the names of witnesses which the Navy was prepared to call in the event of a court-martial "to corroborate the 'confession', or any other competent evidence that the ONI was prepared to present." He also asked for a copy of the lie-detector material resulting from the plaintiff's polygraph examination.

(e) On April 13, 1961, the Correction Board advised plaintiff's counsel that, if plaintiff had been tried by court-martial and the voluntariness of his written confession had become an issue, the Government could have called special agents Bruce and James who had originally interrogated plaintiff and had witnessed plaintiff's statement of July 23, 1958. Plaintiff's counsel was also given a copy of five questions and plaintiff's answers thereto in the course of the polygraph examination, and the polygraph operator's opinion that plaintiff had attempted deception in answering the questions, but the polygraph material itself was not given plaintiff's counsel.

(f) On May 5, 1961, plaintiff's counsel wrote to the Correction Board requesting permission to confer with Special Agents Bruce and James, and for copies of the lie-detector tapes and questions. This request was transmitted to the Director of Naval Intelligence, who on June 1, 1961, advised the Correction Board that he would not make Special Agents Bruce and James available to plaintiff's counsel for interview, nor would he furnish the charts of the lie-detector tests because they would not have been admissible evidence at trial. A renewed effort by plaintiff's counsel for advice as to what Special Agents Bruce and James would have testified to in the event of a court-martial met with the Correction Board's reply that they would have testified as to the voluntariness of plaintiff's "confession."

(g) On April 18, 1962, the Correction Board advised plaintiff in writing that his application was denied without a hearing, stating that the material submitted by plaintiff in support of his application did not establish a sufficient basis for a hearing, and proffering to review the case if plaintiff advanced additional material evidence showing that an error or injustice had occurred. Plaintiff made no further representations to the Correction Board.

15 *Corroborative evidence.*—(a) After the filing of the instant petition the plaintiff filed a motion for call on the Navy which requested, inter alia, the names and locations of any persons having knowledge of facts corroborating the acts set forth in plaintiff's confession, and documentary evidence of a corroborative nature. In response to the motion, and over defendant's objection, a call was issued and there was deposited with the court by the Navy a letter accompanied by a Naval Intelligence investigation report, dated July 31, 1958. The investigation report referred to information having been received from "Confidential Informant A–1, of known reliability" that plaintiff had been observed on March 11, 1958 performing certain perverted acts which were described, and which formed the basis of the plaintiff's ultimate undesirable discharge. The letter from the Navy revealed to the plaintiff for the first time that the only eyewitnesses to plaintiff's alleged acts were Mr. Michael Bartko, a General Services Administration Guard, and Mr. Anthony J. Zibura, an enlisted man with the Army Intelligence Division. Messrs. Bartko and Zibura participated in the surveillance of the toilet room at the Pentagon as described in finding 2, supra.

(b) When Bartko testified as a witness at trial in this court, he was unable to identify the plaintiff (who was present in the courtroom) as a person he had ever seen before or whom he had seen engaged in the commission of a homosexual act in the Pentagon toilet. Nor was plaintiff's name included in a list of suspects contained in Bartko's logbook reflecting his surveillance activities at the said toilet. He recalls having followed a uniformed man, probably a marine, from the toilet in question at the request of Army agents, then turned the "tail" over to another unnamed agent who, according to the Navy report, followed the suspect to a car bearing plaintiff's tag number. When Zibura testified as a witness at trial in this court, he was shown several photographs of plaintiff and was unable to identify him as anyone he had ever seen before, but could not say positively that he had or had not seen the man in the photographs engaged in homosexual acts in the Pentagon toilet, because "This has been a long time ago." He never personally saw any homosexual acts committed in the said toilet, because he was stationed outside the toilet to follow particular individuals emerging from the toilet.

16 *Counterclaim.*—Defendant's counterclaim filed in this case on November 6, 1962, asks for judgment against plaintiff in the amount of $325.76, together with interest thereon. A certificate of indebtedness issued by the General Accounting Office, dated August 28, 1962, notified the plaintiff in pertinent part as follows:

"You reenlisted in the U.S. Marine Corps, service No. 321 654, January 20, 1957, for 4 years and received a reenlistment bonus of $665.60. You were discharged on September 5, 1958, as a result of misconduct. You did not serve 2 years, 4 months, and 14 days under your reenlistment contract.

"Section 208(f) of the Career Compensation Act of 1949, as added by section 2 of the act of July 16, 1954, 68 Stat. 488 (37 U.S.C. 239(f)), and paragraph 044070 Navy Comptroller Manual, issued pursuant thereto, require that any person to whom a reenlistment bonus is paid and who voluntarily or as a result of his own misconduct, does not complete the term of enlistment, shall refund a pro rata portion of the bonus paid.

"A statement of your indebtedness is as follows:

"Time not served for which reenlistment bonus is to be recouped—2 years, 4 months, and 14 days, or 28 and 14/30 months:

"Computation of amount for recoupment:

$$\frac{\$665.60}{48 \text{ mos.}} = \$13.866 \text{ per month} \times 28 \text{ and } 14/30 = \$394.73$$

LESS: Pay due at date of discharge 68.97

325.76"

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover on his claim and that defendant is not entitled to recover on its counterclaim, and judgment is entered to that effect, with the determination of the amount of recovery to be reserved for further proceedings under Rule 47(c).

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Senate Judiciary Committee, Washington, D. C.

DEAR SENATOR ERVIN: I inclose for the information of your subcommittee a paper which is most pertinent to your current inquiry into administrative discharges of the Armed Forces. It is a request for review of an administrative discharge which, perhaps in the interest of speed, seems to have ignored completely some of the most fundamental constitutional and legal rights accumulated since the Magna Carta.

I have filed it at the suggestion of Mr. Lawrence M. Baskir and Mr. Paul Woodward of the subcommittee staff, as an example of the abuses which the existing system permits. For the boy's sake, I prefer that his name be kept out of any printed record. I have no objection to having part of the paper or of this letter quoted, if it is desirable, but would suggest that I be identified only as an official of the United States Patent Office and a member of the Bar of the District of Columbia and of the U.S. Supreme Court, appearing unofficially as an individual, to discuss a case in which I was attorney.

It seems to me that the entire proceedings in the case add up to a remarkably calloused administrative convenience, trampling casually over some of those very same rights which our country is supposedly spending billions of money and hundreds of lives to defend in Vietnam. I shall fight the inequitable results in this case through normal Navy channels, and also through the courts, if necessary. To avoid such unjustified shame and agony for others, however, I hope the basic law of such procedures will be amended to require, in all punitive actions, whether judicial or administrative, that:

1. In any case which arises in peacetime and involves a charge where conviction might result in a discharge other than honorable, no waiver or recorded statement of any kind shall be permitted until the person charged has been afforded a reasonable opportunity to consult with qualified legal counsel, Navy or civilian as he may choose, and any waiver or statement in violation of this provision shall be null and void.

2. In addition to the above, where in such case the person charged is a minor, under 21, no such waiver or statement shall be permitted until the parent or guardian of such minor has been notified of the nature of the charge and afforded reasonable opportunity to consult with said minor in all matters affecting his legal and constitutional rights, and any waiver or statement in violation hereof shall be null and void.

3. In any case such as indicated in (1) and (2) above, the person charged shall be afforded such rights to have counsel, confront and cross-examine adverse witnesses, and have witnesses in his own behalf, as required by the 5th and 6th Amendments of the U.S. Constitution for persons accused of crimes.

To handicap a man for life by disgrace and dismissal from the Government for an indiscretion of an immature minor whose adolescent years have, at the Navy's initiative, been entrusted to Navy guidance is a disgrace to the Navy, a disgrace to America.

If there is anything I can do to aid in bringing administrative discharge procedures to conformance with our fine American traditions, I shall be glad to do so.

My thanks to a fellow alumnus of UNC for pioneer work in this area of need.

Sincerely yours,

X

REQUEST FOR RECONSIDERATION OF DECISION OF DISCHARGE REVIEW BOARD IN CASE OF WH. JULY 1965[1]

It is requested that the decision of the Discharge Review Board in the case of Wh. ——— dated ——— 1965 be reconsidered and reversed.

For reasons which follow, it is believed that the original decision holding that "homosexaul acts" occurred, and ordering an undesirable discharge should be vacated and expunged from the record; that all simultaneous actions in the nature of penalties should be canceled; that petitioner should be granted an honorable discharge with full compensation for loss of leave, travel pay, military and veterans' benefits, regular pay, training, and mental anguish, suffered as a result of unwarranted, inequitable and improper actions previously taken; such compensation to comprise not less than restoration of all normal benefits and full pay for the uncompleted term of enlistment.

To avoid unduly encumbering the record, the Appendix which follows the Summary of Reasons omits supplementary documentation wherever the law is believed so well known or the evidence is so apparent that discussion seems needless.

SUMMARY OF REASONS

1. In ordering an undesirable discharge and other penalties for an immature minor, consequent to procedures which, until after final adjudication, wholly denied his father's request for knowledge of the attendant circumstances, the Navy illegally deprived both father and son of their normal legal rights for mutual consultation, advice, and action, rights which all parties dealing with a minor, including the Navy, are legally and equitably obligated to afford, regardless of any contrary regulation, and regardless of any waiver, statement, or action by the minor himself.

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[1] Material edited by subcommittee in deference to request.

2. By ordering in peacetime an undesirable discharge with attendant penalties more than comparable in severity and permanent effect with penalties for felonious crimes, without affording petitioner and his parent an opportunity to have disinterested legal counsel and advice regarding (1) the total invalidity of any statement or confession obtained by mental coercion for use as evidence; (2) the relative desirability of different alternative administrative or judicial trial procedures; (3) the right to confront and cross-examine adverse witnesses; and (4) the right to have witnesses in his own behalf, * * * the Navy illegally and inequitably deprived the petitioner of inalienable constitutional rights.

3. By the procedures specified in paragraph 1 and 2 above, petitioner's rights were significantly and adversely affected, in that he was denied the awareness, right, opportunity, and means to point out the many errors in this case, any one of which alone might well constitute a basis for modification or total vacating of the initial decision, and which errors constitute in sum a mandate for the remedies sought by this petition.

4. Conviction for an offense (homosexual acts) legally distinct and different from the offense charged (indecent, lewd, and lascivious acts) violates the basic legal principle that conviction for an offense legally different from that charged is void.

5. The charge that petitioner did wrongfully commit an indecent, lewd, and lascivious act was apparently dropped, presumably because there was no evidence in the record or elsewhere of the evil, depraved, or perverted connotations which constitute the sine qua non of such a charge.

6. The holding that petitioner was unfit for naval service because of homosexual acts was in error, because there is no evidence to support, and much evidence to controvert, the presence of that perversion, personal sexual satisfaction, or expressed desire, tendency, or proclivity toward such acts (SECNAV instruction 1900.9, item 3) which constitutes the legal sine qua non of such an act. Any decision which holds and puts on permanent record a holding of homosexual acts without proof beyond any reasonable doubt of the presence of this factor is in clear violation of law, and void.

7. The holding of the Discharge Review Board that there is in the record no evidence sufficient to support any conclusion contrary to the conclusion that petitioner's conduct and character during the period of service which was terminated by his discharge is accurately reflected by homosexual acts is error. On the contrary, the record contains abundant evidence suggesting a reasonable probability that whatever occurred in connection with either of the two alleged acts can not be properly described as homosexual acts of the petitioner.

8. The testimony apparently relied upon to support the conclusion that the two alleged acts were homosexual in character contains much which confirms, rather than refutes, the contention of paragraph 7, and is moreover so conflicting, and so charged with self-serving implications, that any competent legal counsel permitted to be present would necessarily have raised such strong doubts as to the actual nature of each act as to invalidate any decision which, because the severity and permanence of the penalties imposed are comparable to those for felonies, clearly must comply with the same standard of proof beyond a reasonable doubt.

9. In the light of paragraphs 7 and 8, the decision erred in holding that petitioner was guilty of homosexual acts, and that homosexual acts accurately reflected petitioner's character and conduct during the period of his service.

10. By using procedures which made important favorable evidence unfavorable to petitioner and to the Evaluation Board, evidence which would confirm the contention of paragraph 7 and discredit the testimony of witnesses adverse to that contention, the Navy violated petitioner's constitutional right to have witnesses in his own behalf. It also violated its own regulations, which require (SECNAV 1900.9) that every safeguard must be taken to insure against unjust action which will stigmatize an individual (4a), that in such cases as this, care must be exercised that all persons involved are investigated and reported (6a), and that any information received which is unfounded in fact or stems from an erroneous or falsely malicious source (6b–1) is basis for dismissal of the matter.

11. The manner of procuring petitioner's statement of November 3 as a confession of homosexual acts was so like pure blackmail in character, so coercive, so wholly without the benefit of any disinterested counsel, to which petitioner was constitutionally entitled, that the statement as evidence is incompetent,

inadmissible, and either should be expunged from the record or thoroughly supplemented by a statement by petitioner stating in full the coercive measures by which the waiver and the statement were procured.

12. Even if considered admissible, the statement when analyzed and considered in the light of the circumstances when it was made, and in the light of all the other evidence in the case or which should have been if the (SECNAV) instructions had been followed, must be construed not as admission but only as a denial of any act or desire legally construable as homosexual acts.

13. Any holding that petitioner's waiver estops him from raising questions concerning the character and effect of his statement of, or from reopening the proceedings involving his discharge, clearly violates the fundamental legal principle that a minor, with certain exceptions not applicable here, is not bound by commitments during his minority. The underlying legal principle that a minor is not bound by commitments involving important and complex matters of lifelong importancce because he has neither the experience, the wisdom, nor the legal competence to decide such matters refutes any possible estoppel.

14. As the waiver by this appeal is rendered void, as the statement of confession is inadmissible for reasons stated above, and as the total evidence regarding alleged acts utterly fails to establish beyond reasonable doubt that any participation in the alleged acts amounted to any legally construable homosexual act, the total absence of any admissable evidence credible enough to support the decision beyond reasonable doubt renders the decision wholly unsupportable and void.

15. The decision errs in failing to hold that, in the absence of any evidence whatever of any sexual satisfaction, desire, perversion, evil intent, or depravity, or any other evidence credible enough to establish beyond reasonable doubt just what act or acts did in fact occur, the evidence taken as a whole can be held at most to show nothing more than a dimly understood variant of misguided and uncorrected engineroom horseplay, blurred by the near drunken stupor to which he had been brought by his companions, the result of a lonely, immature, and ill-informed minor's desire to win friends on their terms, uncorrected at any time by the advice or guidance of those older and more sophisticated personnel whom he had supposed to be "friends," uncorrected and unguided by any Navy superiors, whose admonition and guidance he could have and should have received, had his engineroom "horseplay" been considered improper.

16. The several decisions erred in not holding that whatever act or acts occurred appeared less for the satisfaction of petitioner than for the satisfaction of his supposed "friends," less to be blamed upon petitioner than upon those older and more sophisticated companions who had brought about his intoxication, and therefore clearly constituting no justification for the more severe penalties applied to petitioner.

17. As the penalties applied in this case are by their nature, procedure, severity and lifelong effect grossly inequitable to petitioner, clearly violate his father's rights as parent of a minor, clearly violate the petitioner's rights both as a minor and as a citizen under the protection of law and the Constitution, and are the result of procedures in clear violation of the Navy's own regulations, equity requires that all actions in the nature of penalties be revoked. Equity requires further that all indications that petitioner was guilty of "homosexual acts" and that his "conduct and character during the period of service * * * is accurately reflected by homosexual acts" be expunged from the record. Equity requires further that every possible effort within the Navy's power be made to minimize, so far as minimizing is possible, and to compensate for, the past and future harm and mental anguish which resulted from the wholly inequitable and improper action of the Navy in this case.

A thorough and objective study of the total situation in this case reveals two outstanding facts.

First, there is nothing in the record which proves the presence of any such conduct or character as might justify penalties of such severe and lifelong nature as were applied in this case. Rather the situation shows an immature minor, hungry to win friends in an unfamiliar and confusing world, drawn by older and more sophisticated supposed "friends" into an incident which, as evidence which is or should have been in the record shows, was wholly alien to his character. His letter of November 9 shows his shocked realization of the nature and implications of the incident, and his resolve to avoid such things in the future.

If a little soap and water will remove the dirt, is it appropriate to attack a child with a hundred-pound fire hose? If a mosquito lands on a child is it the American way to attack the mosquito with a sledgehammer? Where there is every indication that the shock of the hearing itself, with or even without a brief period of probation, would keep the petitioner on the right track, should the Navy choose instead to defame and scar a boy for life, with sledgehammer penalties comparable to those reserved in civilian life for felonies? America is full of men who, once strayed as boys and given probation for another chance, have magnificently succeeded. The courts succeed. Should the Navy do less? Is the Navy so weak, so panicked by the transitory aberrations of its boys, so conscious of their faults and so blind to its own, so calloused by its quest for easy administrative convenience, that only a sledgehammer will do?

Second, the entire proceedings, on the basis of evidence in the record itself, supplemented by other evidence available at that time but never obtained, were so shot through with the subtle but powerful coercion of threats and promises, with total lack of the protection to which his legal and constitutional rights entitle him, that the whole proceeding must be held void. He was overborne and forced by fear of vividly stated public and private shame to sign a waiver and to sign a confession which he himself did not believe, because he was told to. He was deprived of his legal and constitutional rights to consult his father, to have legal counsel, to cross-examine adverse witnesses, and to have witnesses in his own behalf. He was denied the right of impartial and thorough investigation which the Navy's own regulations require. The petitioner never had a chance. The truth never had a chance.

To correct, so far as may still be possible, the catastrophic personal effects of its inequitable and improper action, the Navy should hold such harm and anguish as has already occurred to be more than adequate penalty for whatever dimly sensed acts of unknown responsibility may have occurred in the nearly unconscious condition which resulted from intoxicants supplied to petitioner by more experienced companions. The "undesirable discharge" and all other penalty actions taken should be canceled. The items discussed in paragraph 17, should be expunged. The Navy should restore all military and veterans' rights, and should, at petitioner's option, either (1) grant an "honorable discharge" and pay all amounts due for leave, travel, the amount of pay which would have accrued during his term of enlistment, and any other sums due if the adverse actions had not been taken; or (2) pay all amounts previously withheld, and afford petitioner the opportunity, should he desire, to complete the original term of his enlistment, and have such training as was promised to him at the time of his enlistment.

If the Navy does not at this time voluntarily do everything in its power to rectify the severe, unjust, and lifelong damage done to petitioner, it would appear necessary, in the interest of equity to this petitioner, to seek equitable relief in the courts, or by appropriate legislation. It is petitioner's hope that the obvious equity and justice of this petition will result in the action requested, and make further proceedings unnecessary.

APPENDIX

Paragraph 1: Although a first statement (by L.) is dated October 19 and other statements are dated November 3, no notice reached petitioner's father until December 26; no letter ever answered his repeated requests for information. A personal call at the office of the Chief of Naval Personnel in Washington finally dragged out the requested information, but only after final decision had already been made.

As parent and child have legal obligations for mutual support and assistance throughout their lives, harm to the finances and lifetime peace of mind and earning power of the child is also lifetime harm to the parent.

Paragraph 2: The hearings (summarized in U.S. GPO 1963 document 22-819 and referred to below as "Hrgs") of the Subcommittee on Constitutional Rights of the Judiciary Committee of the U.S. Senate, 88th Congress, 1st session, abound with testimony to the unjustifiable severity of this penalty, and to the denial of constitutional rights in the procedures used. The "tremendous increase in undesirable discharges by administrative proceedings was the result of efforts—to avoid the requirements of the Uniform Code," for protecting the safeguards of the constitutional rights of service personnel. Regardless of the reason for an undesirable discharge, the implications and lifetime results are such that, "You cannot get a job in a bank or trust company," or in many positions for the

Government, or "at any of the places where there is any confidential requirement." "It is a very severe penalty." "It is a stigma. It is a liability, and a heavy one." "Since an undesirable discharge for unfitness creates a lasting stigma for the recipient," it is appropriate to "call attention to the constitutional requirement that standards of guilt and innocence be defined clearly and without 'vagueness'." (See *Lanzetta* v. *NJ*, 306 U.S. 451, also *Harmon* v. *Brucker*, 355 U.S. 579, and other related material as follows:)

Gideon v. *Wainwright*, 372 U.S. 335; *Harvey* v. *Mississippi*, 340 F. 2d 265; *Escobedo* v. *Illinois*, 378 U.S. 478; *In re Stapley*, 246 Fed. Supp. 316; *In re Martinez* (recent case, Dist. Ct., Wash.) Washington Post Editorial, "For Shame," Oct. 10, 1964, p. A14; *Clackum* v. *U.S.* C. CL. 246–56; *Murray* v. *U.S.* C.CL. 237–57; *Ashe* v. *McNamara*; (recent case First Cir.).

Paragraphs 4, 5, 6: See any text on criminal law. While the proceedings here are administrative rather than judicial, the same equitable principles must apply. See Hrgs.

Paragraph 7, 8, 9: The issue of adequacy of evidence to support the *original* decision presumably must be judged only by the evidence in the record at the time of the decision.

However, on the new issues of (1) constitutionality and (2) conformance to the requirements of Navy regulations, new evidence is admissable. The following discussion therefore reviews and analyzes the content and effect of both (*a*) the original evidence, and (*b*) supplemental evidence, which was reasonably procurable on November 3, 1960, but never was made available either to petitioner or to the record.

Supplemental evidence now available includes statements by both petitioner and his father at the March 1965, hearing of the discharge review board; a statement by a professional clinical psychologist (Dr. M.) whose knowledge of petitioner more than spanned his period of service; statements made by petitioner to his father in 1961 immediately following discharge or later but not previously of record; and a statement by K. which accompanies this petition.

Before looking at the substance of the evidence, what is the credibility of each witness and of what he said? The record shows no direct evidence concerning the credibility of any witness. It is therefore necessary to look to indirect evidence, to the nature of the witnesses' own statements and the surrounding circumstances, to judge credibility.

To anyone with deep understanding of human nature, petitioner's letter of November 9 presents a remarkably clear measure of petitioner's credibility. It is obviously the statement of a boy reared in the tradition of telling the truth. It shows clearly the possibly naive belief that if you know in your own heart that you were utterly innocent of any guilt or evil intent, and you explain the whole truth, you may be justly admonished for foolish behavior, for not having the wisdom to avoid the behavior pattern of all around you; but because you certainly aren't "guilty," you've nothing to fear.

Faced with the shock of being told, "I am investigating you for homosexuality," petitioner's letter of November 9 said in effect, "What do you mean homosexuality? Are all these guys in the engineroom homosexuals? If I come into a room where kidding and roughneck horseplay are the way of life for everyone, where no seaman or officer seems to see anything wrong with it or say don't do it, what's so bad about it? Here's what I did—the whole truth—so you can see there's nothing bad or abnormal about it!" And the honesty and truth of that letter, the total absence of any evidence of evil or perverted intent or homosexual tendency is confirmed to a remarkable degree by its consistency with every other statement of petitioner in the case, even those made long afterward when it might be expected that some details might be forgotten.

Petitioner's naivete, his obvious desire to "come clean," his blind belief in the power of truth, the consistency of all of his statements at all times, entitle his statements to maximum belief.

What credibility then shall be given to such parts of any testimony by L., S., and W., as contradicts his? A quick review of their relationship with petitioner sheds light on this.

First, the others were all older in service, and from two months to two and a half years older in age, a big difference to an impressionable boy who, when the first act was charged (April 1961) was still only 17. Second, while petitioner thought that W., S., and L., "and I are good friends," his older "friends" W. and S. made no such statement, but merely said that the reason they were with Whitmore was that he "had a car."

Third, on the night of the later incident, his companions supplied beer to petitioner until he was too drunk to drive, then persuaded him into the back seat, after which S. supplied more beer and continued to supply it to petitioner even after he was too drunk to drive. Does not all this raise a considerable question whether petitioner was merely being "used"?

Fourth, while both W., in the October incident, and S., in his vaguely recalled previous incident said they had "reached a climax," not a word was said about trying to push petitioner away before the climax, and petitioner himself recalls nothing about either one reaching a climax. Does not this raise the same question whether the petitioner, less experienced and sophisticated than his older companions, was merely being "used"? The statements of L., S., and W. that petitioner "started to," "tried to," "attempted to," "approached," etc., coupled with the total absence from the record of anything which indicates that he ever, for his own satisfaction, did more, confirm his statement that often in shipboard horseplay, he would "bluff people down." If without his realizing it, both W. and S. did as they say, carry through to climax, does not this too raise the question whether he was naively being "used"?

Sixth, petitioner told Dr. M. that he didn't think he "was necessarily framed. I think I got a raw deal. Because I do not believe the situation was investigated enough. Mainly as to who asked who to do what." Here again, did petitioner have too much faith in his "friends"?

Evidence shows that the whole October incident came to light when L., S., and W. were overheard talking about it; yet there is no evidence as to what they said. There is some evidence (not of record) that one of the higher officials possibly may have been swayed by malice or at least prejudice, that he "had it in for" petitioner.

There is too the surprising fact that Mr. K., out of service only a few days before and known to be still in the neighborhood at a known address, the one man who better than anyone else had known all of the persons involved for a long period, was never called.

There is the fact that after L.'s statement was taken on October 19, the others "clammed up" and would tell petitioner nothing about what was happening, but had 2 weeks of opportunity to agree on what to tell so that all the blame would fall on petitioner; and since the three were close personal friends, doubtless eager to help each other, the temptation of each of L., S., and W. to make statements self-serving not only for himself but for his friends is self-evident.

Taken as a whole, there is abundant possible basis for holding that petitioner's credibility is greater than that of the witnesses against him.

Turning now to the substance of the two acts charged, what does the evidence show?

It is charged that the first act occurred in April 1961. There is not one word of evidence that any act occurred in April 1961. There is a statement by S. of something which occurred "a number of months ago," and that, "after I reached a climax, I pushed his hand away." Although nothing is directly specified about who asked whom for what, S.'s phrase, "after I reached a climax," carries the inescapable implication that he welcomed any attention given before climax.

Petitioner however recalled no such incident as S. describes. He did, when prompted, think he recalled vaguely a momentary incident, he did not remember when, meaningless both to himself and so far as he knew, to S. His statements to Dr. M. show that he did not then and does not now recall any "homosexual" act.

The nature of the second act is equally vague and doubtful. Does not W.'s admission that he pushed petitioner away after the climax, rather than before, itself raise questions? Was petitioner's behavior, regardless of whose statement is read, anything more than an unsensed extension of the permitted engine-room horseplay? Was he an "evil influence," or was he simply an immature and naive youngster, being used by his more sophisticated companions?

Petitioner's statement as to what occurred is rather careful and detailed, whereas W.'s statement seems to rush hurriedly past any details. Does this perhaps indicate a wish to avoid telling too much? The statements of L., S., and W. agree on one or two details, but are quite inconsistent as to others, such as where (one says Oakland, another San Francisco), who did what (L. says S. "looked in the mirror," S. says he turned around and looked back), etc. Is there a possible implication here that they agreed on some things, but overlooked others?

With such evidence, can any honest person say that no other conclusion is possible save that of the first decision? Is it possible to say that beyond reason-

able doubt, either side of the story is necessarily the correct one? Whatever happened, does the fault lie more with petitioner, or with his older "friends"? Or perhaps with the Navy, with ship's officers who permitted faulty (if it was) engineroom behavior to continue chronically uncorrected?

When asked why he had signed a statement referring to both incidents as "homosexual" acts, petitioner said in effect, "Because H. said they were, and I thought he knew more than I did about such things." How was he to know, without legal counsel, that whether a given act is "homosexual" is not a single question of fact, but a complex conclusion of law? Not one shred of evidence shows the vital element of personal sexual motivation. The false representation which procured such a statement, contrary to petitioner's belief and contrary to law, totally invalidates the statement as evidence, and raises the disturbing question whether Mr. H. should not be discharged from the service for fraud and deceit.

On the vagueness of the original evidence alone, therefore, there is no admissibly definite evidence of the earlier act. Evidence of the second act is so conflicting, so charged with implications of self-serving and doubt, that it is utterly incompetent to prove anything beyond a reasonable doubt. The statement of petitioner is void for fraud in procurement. In such circumstances, how can there possibly be any doubt that the decision, as discussed in paragraph 9, is without basis in fact?

Paragraphs 10 and 11. In addition to reasons discussed above, there are other reasons for holding that the procedure in this case violated Navy regulations. The failure to secure evidence from Mr. K. and to ask petitioner whether he wished to have witnesses called in his behalf as to evidence unfounded in fact, seems conclusive enough by itself. Yet when recently I learned that petitioner had repelled homosexual advances from S, and asked why he hadn't told someone, he replied, "Because no one ever asked me." Is this meeting the Secnav instruction 1900.9 that all persons involved must be investigated and reported?

When asked why he signed the waiver and statement if he did not really believe what the statement said, he said, "Because of what Mr. H. said." Pressed for further explanation, he said in effect, "He told me about this officer that had elected a court-martial, and all the stuff came out in the papers, so the public and his family knew all about everything, and it just ruined his life. If I'd sign the waiver, which I guess I didn't understand, it wouldn't mean anything, because if I'd just take an administrative discharge, and quietly leave, neither my family nor anyone else would need to know. He never told me that if I were *really innocent of anything wrong, as I thought, I could go back to the ship* and serve out my enlistment and do a good job and get an honorable discharge. When I got home and found my father already knew about it, I knew it was just another example of the shoddy way the Navy had treated me, in spite of my trying my best to tell the truth about everything, as my father had told me to do when I enlisted." With both statement and waiver the result of powerful mental coercion on a youngster barely past his 18th birthday, without benefit of parent or counsel, or the other rights guaranteed by the fifth and sixth amendments, the total invalidity of both statement and waiver is apparent. In this connection, see cases of interest cited above.

12. One of the most striking things about petitioner's statement is the sharp contrast between the flat statement about homosexual acts in the first part of the second page, and the "apparent" homosexual activity mentioned near the bottom. When asked about this conflict, petitioner explained that he had not thought there were any "homosexual acts." He honestly had not been able to think of any earlier act; that when he asked permission either to see S.'s statement or to see him in person and ask what he had in mind when he referred to an earlier act of some sort, he was refused permission to do either. Instead, Mr. H. kept asking questions, did you do this, did you do that, until he found himself being practically forced into saying things in Mr. H.'s words, not his own, which he didn't believe, but didn't know what to do about it. So he signed. Taken in the light of these circumstances, the reason for the conflict between Mr. H.'s words above and petitioner's phrase below, becomes suddenly clear. When tested by the words of petitioner's letter and his other statements, it is clear that petitioner's statement was saying. "To you, Mr. H., they may appear to be apparent homosexual acts; but to me they were nothing but plain Navy horseplay."

X
Attorney for Petitioner

Administrative Discharges—A Private Practitioner's Viewpoint

By Robinson O. Everett

The private practitioner's viewpoint is a highly pragmatic one; he is concerned with achieving the most satisfactory solution of the problem with which his client has presented him. Therefore, my talk on the topic assigned me will center on the practical alternatives available to the attorney who has been retained to help stave off an impending administrative discharge or to contest a discharge that the client received previously.

I. THE CLIENT WHO IS STILL IN THE SERVICE

A. Some preliminary considerations

If the client reaches your office while he is still in service and with a discharge in prospect, the first inquiry concerns his wishes about remaining in uniform. He may be interested in continuing his military career; or on the other hand, his concern may be chiefly with the type of discharge that he will probably receive and the effects of that discharge on veterans benefits, employment opportunities, educational prospects, and his general reputation in the community. In the latter case, there may be possibilities for negotiating with military authorities to obtain a discharge—perhaps for the convenience of the Government or under some similar authority—that will not affect his future adversely. In some instances, it will not suffice for your client to receive an honorable discharge; if the discharge documents are to refer to the regulation under which the discharge is being accomplished, you will wish to check that regulation carefully to determine whether that reference might create difficulties for your client in obtaining employment. This might, indeed, occur if the regulation to be cited concerns homosexuals or subversives.

Sometimes your client will be chiefly concerned with obtaining a delay in the discharge proceedings so that he can qualify for retirement benefits; and in more than one case that has reached the courts, obtaining delay for this reason was probably a major goal of the attorney. Of course, the prospects of delaying administrative procedings through temporary restraining orders and injunctions are diminished by reason of the doctrine of exhaustion of remedies. *Beard* v. *Stahr*, 370 U.S. 41.

Your client may be seeking advice as to the acceptance of an administrative discharge or submitting a resignation in lieu of court-martial proceedings. In that case you must evaluate the likelihood that he could be successfully prosecuted under the Uniform Code of Military Justice. Even if he has confessed misconduct, the likelihood of prosecution may be small because of the difficulties that would be encountered in establishing a corpus delicti under military law requirements—which are stricter than those applied in Federal civil courts.

Occasionally the problem may present itself in a different aspect and you may suspect that your client is being considered for an administrative discharge by reason of alleged misconduct which could not be established before a court-martial. See, e.g., *Clackum* v. *U.S.*, 296 F. 2d 226 (Ct. Cl. 1960). Here a demand for trial by court-martial might be a useful tactic. While Congress has not yet enacted Senator Ervin's proposed legislation to provide a statutory right to demand court-martial under these circumstances (S. 2006, 88th Cong., 1st sess., reintroduced in 89th Cong.), the demand for court-martial helps demonstrate the client's belief in his own innocence and may help in negotiating with military authorities for some satisfactory solution.

The client's case is especially strong if he is being processed for administrative separation by reason of alleged misconduct of which he was acquitted by a military or civil tribunal. Incidentally, several cases involving such a situation have been made the basis of complaints to Congressmen or to congressional committees, and in some of them relief has been forthcoming.

B. Hearings before a board of officers

For the most part directives authorizing administrative discharges provide for hearings by boards of officers. The authority of these boards, the manner in which they are appointed, and the procedures under which they operate may differ materially from one service to another, and therefore you will need to consult carefully the governing regulations to determine your client's rights in the board hearing. Moreover you should consult the enabling act, such as

5 U.S.C. 22, under which the discharge regulations were promulgated to determine whether those regulations are authorized. See *Reed* v. *Franke*, 297 F. 2d 17 (fourth circuit 1961); *Davis* v. *Stahr*, 293 F. 2d 860 (D.C. 1961); *Bland* v. *Connally*, 293 F. 2d 852 (D.C. 1961). And the examination of the regulations and enabling acts should take place with full recognition that they may be susceptible to an unexpected interpretation that will help avoid a weighty constitutional problem. Compare *Greene* v. *McElroy*, 360 U.S. 474.

In representation of your client you may find yourself hindered by opportunity to confront and cross-examine adverse witnesses or to obtain the assistance of process to obtain the testimony of favorable witnesses. See Susskind, "Military Administrative Discharge Boards," 44 Michigan State Bar Journal 25 (January 1965). Thus, in disputing allegations of misconduct, you may be subject to limitations that would not exist in a trial by court-martial.

When the board makes its findings, these should be checked closely against the notice received by your client as to the allegations against which he was called upon to defend; a significant variance might reveal absence of the opportunity for a fair hearing that was purportedly being granted by the regulations. Similarly, if the record of the proceedings fails to show that there is evidence to sustain the findings, this insufficiency might be relied upon to demonstrate arbitrary action by the board and prejudice to the respondent. Also, you should determine whether the findings correspond to the basic authority granted by the discharge regulations and by appropriate enabling acts and whether the findings support any recommendations made by the board of officers.

The armed services differ as to the effect of a recommendation made by the board of officers. Apparently the Air Force and Army prohibit, while the Coast Guard, Marine Corps, and Navy permit, the issuance of a discharge less favorable than that recommended by an administrative board. See Dougherty and Lynch, *The Administrative Discharge: Military Justice?* 33 Geo. Wash. L.R. 498, 515 (1964). However, none of the services prohibits the taking of more favorable discharge action than that which has been recommended by a board of officers; and so your efforts should not end with the findings of the board.

A relatively new alternative that was developed by the Navy and is now also utilized by the Air Force permits the suspension of an administrative discharge. If your client can qualify for this relief, then like a serviceman with a suspended punitive discharge he gets a second chance to demonstrate his retainability in the service.

The discharge review boards, established under 10 U.S.C. 1553, have jurisdiction to grant relief only after a discharge has been issued. However, under some circumstances an application for relief may be made to the correction boards, provided by 10 U.S.C. 1552, even during the pendency of administrative discharge proceedings. In *Schwartz* v. *Covington*, 341 F. 2d 537 (9th Cir. 1965) a discharge was enjoined pending the completion of action by the Army Board for the Correction of Military Records.

C. *Judicial relief pending discharge*

If a temporary restraining order or injunction is sought prior to the discharge, the defendant must determine who should be the defendants. In particular, is the Secretary of the military department concerned an indispensable party defendant, or does it suffice under the doctrine of *Williams* v. *Fanning*, 332 U.S. 490 (1947) to proceed against military commanders at a lower echelon? At one time, the problem was quite significant by reason of the inability to serve the Secretary of a Department outside of the District of Columbia where he maintained his official residence. If he were an indispensable party defendant, then the injunction could only be sought in the District of Columbia. Fortunately, a recent change in the Judicial Code now allows suit to be commenced outside of the District of Columbia. 28 U.S.C. 1391.

Thus, if you should choose to seek an injunction that would halt issuance of the administrative discharge, you may either sue in the district court where your client resides or may bring an action in the District of Columbia, where the Secretary of the appropriate military department is located. Obviously your choice of forums will reflect your analysis of the prospects of success in your client's district and circuit, as compared to those prospects in the District of Columbia.

The chief obstacle to judicial relief prior to discharge will result from the doctrine of exhaustion of administrative remedies. In *Beard* v. *Stahr*, 370 U.S. 41, the efforts of an Army officer to stay discharge proceedings ran afoul of this

doctrine; and several later cases have taken a similar approach. See, e.g., *Anderson* v. *McKenzie*, 306 F. 2d 248 (9th Cir. 1962). In *Reed* v. *Franke*, 297 F. 2d 17 (4th Cir. 1961), the court of appeals indicated it might have been willing to give plaintiff relief against a pending discharge if he had presented a substantial claim that the prescribed military discharge procedures violated his constitutional rights; but it did not consider that such a claim had been presented. However, in *Schwartz* v. *Covington*, 341 F. 2d 537 (9th Cir. 1965) an Army enlisted man was able to obtain injunctive relief to restrain his commanding general from issuing him an undesirable discharge. In staying issuance of the discharge until the Army Board for Correction of Military Records could act on Covington's application for relief, the court noted that the plaintiff had satisfied three basic requirements: (1) He had shown a likelihood that he would ultimately prevail; (2) he had demonstrated that there would be irreparable injury if he were discharged, even if later he was reinstated in the Army; and (3) he had shown that, in light of his nonsensitive duties, the Government would not suffer irreparable injury if the stay were granted. Apparently the court of appeals would place considerable emphasis on the stigma that results from an undesirable discharge, even if later revoked; and so the second condition—that of irreparable injury to the plaintiff would seem relatively easy to satisfy. The injury to the Government from delaying the discharge would depend in large part on the type of duties to which the plaintiff would be assigned, while further proceedings took place. In *Schwartz* v. *Covington*, the plaintiff could convincingly demonstrate the likelihood of ultimate victory since the Army was attempting to base his discharge on alleged acts in a prior enlistment.

II. POSTDISCHARGE ADMINISTRATIVE PROCEEDINGS

A. Discharge review boards

Discharge review boards are established under 10 U.S.C. 1553 to review the discharge or dismissal of any former member of an armed force. Relief is available from them only after the discharge has occurred; and it does not include any award of pay. These boards, which are composed of military officers, have no subpena power to compel the attendance of witnesses and their procedure is relatively informal. So far as I am aware, the applicant for relief who so requests will almost automatically be granted a hearing before these boards.

B. Boards for the correction of records

In 10 U.S.C. 1552 provision is made for establishment of boards of civilians to "correct any military record." These boards, composed solely of civilians serving part time, do not grant hearings to an applicant as a matter of right; and according to the statistics presented by the Department of Defense to the Senate Subcommittee on Constitutional Rights in 1961, hearings are frequently denied. The authority of these boards is not limited to discharge matters; and even in a discharge case it can apparently be exercised before the administrative discharge is issued. See *Schwartz* v. *Covington*, supra. The relief granted by these boards—subject to approval by the Secretary of the military department involved—can extend to change of a discharge, complete elimination of the discharge and restoration to duty, restoration of rank, and elimination of derogatory information from an applicant's military records.

Adopting a liberal construction of the power of the correction boards and rejecting a contrary view of the Comptroller General, the Court of Claims ruled recently that the Army Board for the Correction of Military Records was empowered to correct not only statements of fact but also "conclusions" contained in an applicant's military record. The court adopted this construction with full recognition that, in upholding the correction boards' power to change legal conclusions contained in military records, it was sanctioning an additional or alternative forum for the consideration of issues of law.

Furthermore, the Court of Claims has limited the power of the service secretaries to reject the findings and recommendations of such boards. A rejection that is unsupported by the records and evidence may itself be attacked as arbitrary in a subsequent judicial proceeding. See *Betts* v. *U.S.*, 172 F. Supp. 450 (Ct. Cl. 1959); *Hicks* v. *U.S.*, 172 F. Supp. 445 (Ct. Cl. 1959); *Proper* v. *U.S.*, 154 F. Supp. 317 (Ct. Cl. 1957).

Generally speaking a Correction Board will not consider a discharge case until the applicant has also exhausted his remedies before the Discharge Review

Board. (See, e.g., par. 7 of Air Force Regulation 31-3). If, however, the application for relief includes a request for action which is beyond the jurisdiction of the Discharge Review Board—for example, award of backpay—the applicant apparently will not be required to apply to the Correction Board.

In a discharge case you may decide to apply first to the Discharge Review Board and then later to the Correction Board; in this way you are getting two changes to present your client's case. However, I would suspect that if a hearing already has taken place before a Discharge Review Board, a Correction Board would be much less likely to grant a hearing than if no prior hearing had occurred. Thus, you may choose to work your client's application for relief in such a way—by requesting backpay or other monetary relief—that it will fall outside the jurisdiction of a Discharge Review Board. Then it will be possible to go directly to the Correction Board without pausing for proceedings before the Discharge Review Board.

III. POSTDISCHARGE JUDICIAL REMEDIES

A. The Court of Claims

After you have exhausted your client's administrative remedies before the Discharge Review Board and the Correction Board—and have perhaps exhausted your own patience in the process—you may wish to seek judicial relief. Although the leading case—*Harmon* v. *Brucker*, 355 U.S. 579—which allowed judicial review of administrative discharge action, involved a proceeding brought in a Federal district court, the Court of Claims offers an equally attractive route for attack. In this tribunal relief is limited to an award of money damages; and the Court of Claims canot directly order either restoration to duty or a change in the character of a discharge. See Meador, "Judicial Determinations of Military Status," 72 Yale L.J. 1293 (June 1963). However, as a practical matter, a judgment for the plaintiff in the Court of Claims will usually enable him to obtain any further appropriate relief from the Correction Board; and absent such administrative relief, the Court of Claims judgment would presumably give rise to a collateral estoppel in favor of the plaintiff if he then instituted further litigation in a district court.

The plaintiff in the Court of Claims will seek to recover pay and allowances which have been forfeited without statutory authority and in violation of the Government's duties. The action may also be phrased in terms of breach of the enlistment contract. Cf. *McAulay* v. *U.S.*, 305 F. 2d 836 (Ct. Cl. 1962). Thus, in *Murray* v. *U.S.*, 154 Ct. Cl. 185 (1961), I included in the plaintiff's petition allegations that, by its arbitrary and illegal discharge of the plaintiff, a former master sergeant, the Air Force had committed a breach of Murray's enlistment contract, and that the damages should include not only any backpay that had accrued after his discharge but also the commuted value of the retirement benefits of which plaintiff had been deprived by the Government's repudiation of his contract.

Some interesting principles apply to the computation of damages in the Court of Claims. For instance, if it has illegally discharged a serviceman, the Government would apparently not be allowed to defend that, subsequent to his discharge, he had not rendered the military services envisaged under the enlistment contract. Compare *Bell* v. *U.S.*, 366 U.S. 393 (1961). If plaintiff had enlisted under an enlistment for a fixed term of service and the term ended prior to the date of judgment in the Court of Claims, then apparently the recovery of backpay for the illegal discharge will extend only through the term of the original enlistment and not up to the date of judgment. At least, this was the relief granted in *Murray* v. *U.S.*

On the other hand, if the plaintiff had been serving under an enlistment for an indefinite period, then backpay would apparently be recoverable up to the date of judgment in the Court of Claims. An interesting variation of this principle was applied in *Clackum* v. *U.S.*, 296 F. 2d 226 (1960), where the Court of Claims ruled that the plaintiff, a WAF airman, had been discharged in violation of the Air Force's own regulations. The Government argued that, even if the discharge had been ineffective for one purpose, it was effective to terminate entitlement to pay, since Clackum was a reservist who was subject to release from active duty at any time. Relying on the clear principle of *Vitarelli* v. *Seaton*, 359 U.S. 535—which involved the separation of a Government employee who lacked civil service tenure or employment rights—the Court of Claims held that the unde-

sirable discharge illegally issued to Clackum would not be recognized for any purpose.

A plaintiff who has been illegally discharged but thereafter secures employment is properly subject to a set-off for his wages earned in private employment. (I believe this is similar to the rule that governs the recovery of backpay by employees whose loss of employment results from an unfair labor practice, as determined by the NLRB). In *Murray* v. *U.S.*, *supra*, the plaintiff had received considerable VA benefits for physical disability after his unlawful administrative discharge from the Air Force. Here an effort was made to invoke the "collateral source" rule and to argue that no setoff should be allowed since the disability benefits differed from the earning of wages; but the Commissioner did not accept this view and it was not urged before the Court of Claims.

B. Action in a district court

Some of the same general rules that apply to efforts to enjoin issuance of an administrative discharge would govern an effort to obtain a declaratory judgment that the discharge is illegal. For instance, you will still be subject to the requirement of exhaustion of administrative remedies. And you will have the same choice between suing where your client resides or suing in the District of Columbia. In the district court money damages cannot be recovered—at least not in excess of $10,000. However, a favorable judgment in the district court would, in practice, lead to administrative relief as to any money benefits lost as a result of the illegal discharge. Moreover, the district court judgment would seem to give rise to a collateral estoppel in favor of the plaintiff if it became necessary for him to sue in the Court of Claims.

In choosing between the Court of Claims and a Federal district court, you may believe that the Court of Claims is too remote. However, at your request, a Commissioner will probably set a hearing at a place convenient for you and your client. If you are disturbed by printing costs for the petition and other pleadings in the Court of Claims, you should, at least, consider whether your client can qualify under the court's rules to sue in forma pauperis. And, in making your choice of forum, remember that your local district judge may be very unfamiliar with military discharge problems.

IV. GROUNDS FOR RELIEF

Whatever your forum and at whatever stage, on what grounds will you seek relief for your client? You may find that the discharge is being attempted in violation of the military's own directives; and under the familiar guidelines of *Vitarelli* v. *Seaton*, *supra*, and *Service* v. *Dulles*, 354 U.S. 363, such an attempt will not be condoned. Indeed, the discharge will not be upheld even though it might have been properly accomplished under some other regulation or directive. *Clackum* v. *U.S.*, *supra; Vitarelli* v. *Seaton*, *supra*. Thus, in *Roberts* v. *Vance*, 343 F. 2d 236 (D.C. App. 1964), the plaintiff, a controversial Reserve officer serving on active duty, obtained a judgment which set aside an order by the Secretary of the Army releasing him from active duty. According to the Court, the Secretary had not obeyed his own regulations.

Several cases, including *Harmon* v. *Brucker*, *supra*, have involved a discharge improperly based on alleged misconduct prior to the serviceman's entry into the armed services. Moreover, failure to disclose preinduction conduct apparently cannot be used to sustain a discharge. *Davis* v. *Stahr*, 293 F. 2d 860 (D.C. App. 1961). A more difficult problem is present if evidence of preinduction activities is utilized by military authorities to corroborate allegations of misconduct during a current enlistment. See *Schwartz* v. *Covington*, 341 F. 2d 537 (9th Cir. 1965).

If a discharge proceeding has been initiated under one regulation and terminated and then is initiated under some other regulation, there may be a basis for arguing that the second proceeding is a subterfuge—an effort to do indirectly that which could not be done directly. Similarly, you have a strong argument for your client if he is being administratively discharged for alleged misconduct of which he has been acquitted by a court-martial or civil court. A variant of this situation was present in *Jackson v. U.S.*, 297 F. 2d 939 where the plaintiff brought an action for back pay in the Court of Claims. His undesirable discharge had been predicated on an Oklahoma State court conviction of rape, which was subsequently reversed on appeal, and thereafter the charges were dismissed. Jackson claimed that the Air Force's failure to revoke his discharge was illegal. Although the Court of Claims denied him relief, the Solicitor General seems to have taken a different view; and after the plaintiff had petitioned for certiorari, the case was settled. (I have presented a similar

problem to the Army Board for Correction of Military Records in seeking relief for a former Army sergeant, discharged by reason of a conviction which later was set aside in habeas corpus proceedings.)

One of the most helpful cases in attacking your client's discharge may be *Cole* v. *U.S.* (Ct. Cls. No. 112–63), decided June 11, 1965. There, in addition to finding that the Air Force had not complied in the discharge proceeding with its own regulations, the Court of Claims criticized a briefing provided the board of inquiry by a high military commander. According to the court, the briefing "jeopardized plaintiff's rights to that due process protection which the fifth amendment extends to military personnel." This opinion by the court may help eliminate some of the "command influence" on administrative boards, which one of Senator Ervin's bills would prohibit. However, you will be well advised to investigate any possibility that, by means of a briefing or otherwise, command influence was exerted against the board of officers which made findings and recommendations adverse to your client.

If your client has not been honorably discharged, but has been discharged under honorable conditions with a general discharge, you are not precluded from seeking judicial relief. Although in one case the Court of Appeals for the District of Columbia reasoned that there is no connotation of dishonor attached to a general discharge, see *Ives* v. *Franke*, 271 F. 2d 469 (CADC 1959) *cert. denied*, 361 U.S. 065, the prevailing view is clearly to the contrary. See *Murray* v. *U.S.*, *supra; Davis* v. *Stahr*, 293 F. 2d 860 (CADC 1961). Indeed, in the leading case of *Harmon* v. *Brucker*, the Court of Appeals opinion reveals that Harmon had been discharged with a general discharge under honorable conditions. See 243 F. 2d 613.

V. Conclusion

The Congress is considering new legislation to provide further protection to military personnel with respect to administrative discharges. However, even today the diligent attorney will find that he has many weapons at hand to protect his client from unfair treatment.

Columbia Employment Service,
Washington, D.C., January 21, 1966.

Mr. Lawrence Baskir,
Constitutional Rights Subcommittee,
Old Senate Office Building,
Washington, D.C.

Dear Mr. Baskir: Confirming our telecon this afternoon relative to your inquiry concerning the effect of military records and discharges under other than honorable conditions.

In the past 2 years I have had personal experience with relatively few cases of individuals seeking employment after discharge under other than honorable conditions, but I have found in these cases that employers are reluctant to hire such individuals for much the same reasons as they are reluctant to hire persons with criminal records involving confinement, persons released from mental institutions or who have been "discharged for cause" by their last employer. If the employer has a choice between a person with a "bad" discharge and a person with nothing on his record the latter would normally get preference for the job.

Some employers may go behind the discharge certificate and give the employee a chance to explain or perhaps prove that the circumstances were not as serious as might be implied by the type of discharge, but for the most part an employer does not bother to take the time and effort to look any further than the certificate itself. He also does not want to wait for any period of time to resolve such issues when he needs a man for the job immediately and not several weeks or months from the date of the application.

It is more true that if the applicant in any of these categories has had a record of satisfactory performance since his separation from the service he would be favorably considered for jobs not requiring security clearances, great responsibility, or trust. I feel that the reason in some cases is that the employer does not know the fine distinctions regarding administrative separations, and therefor would rather say "No" than take a chance on the applicant.

I might add that some employers look with disfavor on exsoldiers who have reductions in rank on their records even though they have "honorable discharges."

Sincerely yours,

Robert E. Byrne.

CATHOLIC WAR VETERANS,
UNITED STATES OF AMERICA,
Washington, D.C., March 7, 1966.

MR. PAUL WOODARD,
Constitutional Rights Subcommittee,
Old Senate Office Building, Washington, D.C.

DEAR SIR: The writer has been asked to submit a letter to the Senate Constitutional Rights Subcommittee of Military Affairs and is very appreciative of the opportunity.

Having been the Catholic War Veterans counsel before the Discharge Review Boards and the Boards for Changing Military Records for the past 6 years, I have been constantly in close contact, personally and by mail, with the petitioners and many times with their wives, their fathers and mothers.

There is attached to this letter, a group of excerpts written by undesirably discharged servicemen and their wives, taken from our Catholic War Veterans Discharge Review letter files. They reveal a cross section of the miseries brought to them and their families.

Practically every petitioner who seeks our services as counsel, speaks of the hardship brought by the curse of the undesirable, bad conduct, and discharges under other than honorable conditions. The practice of printing "undesirable" on the face of these administrative discharges is a flagrant act of character assassination. It destroys the acceptability of the former serviceman (or woman) who receives such a discharge and renders him undesirable, unfit, unsuitable, unworthy to work and associate with normal men and women. The stigma is designed to last throughout the life of the former serviceman and only the Discharge Review Board or the Secretary of that branch of the service can change it.

Requests for hearings and rehearings are sent to the Review and Record Changing Boards by thousands of middle aged men who have carried the stigma since youth and are still trying to rid themselves of the terrifying instrument that destroys job acceptability. The Administrative Discharge Regulations provide for a review of this undesirable discharge but it means little good, as nearly 90 percent of the cases reviewed by the Discharge Review Boards are not granted.

Thousands upon thousands of America's young men are turned away every year by civilian, government, and State employment offices because industry and government considers these discharged men as undesirable. They must show their discharge certificate that condemns them.

During the fiscal year of 1958, 30,748 individuals received undesirable discharges through administrative process. A former member of the House Military Committee stated on House Report No. 388 to House Report H.R. 88 of March 26, 1959, that more than a quarter of a million individuals have already received undesirable discharges. It appears, then, that today there are over 500,000 undesirable discharges now causing a miserable existence to these men and their families.

Attached is a group of excerpts taken from letters in our Catholic War Veterans discharge review files. The statements that are made by the petitioners I confer with at the hearings, always relate to the hardships resultant of the damming undesirable discharges. The tragic effects of the undesirable discharge, as revealed in the attached group of letters and when multiplied by the hundreds of thousands of similar cases from all of the other veterans organizations, reveals the havoc these mercyless character assassinations bring into American homes.

The natural endowments of all of these former Army, Navy, Marine Corps, and Air Corps men were accepted to the recruiting officers at the time of enlistment. Very frequently, these young men—with no juvenile or adult police records—will commit a minor civilian offense such as joy riding, public drinking, fighting, or other minor disturbances. If the soldier is arrested by the civilian police and convicted for the misdemeanor, he is returned to his post and ordered before an Administrative Discharge Board and awarded an undesirable discharge. His offense did not deserve a trial by court-martial, yet the mandatory issuing of the undesirable discharge for the light civilian conviction, sends the young man back to civil life as an outcast and the condemning castigation on the face of his discharge certificate, renders him undesirable for employment.

This counsel urges the Constitutional Rights Subcommittee on Military Affairs to prevail upon the Congress of the United States to abolish the Administrative Discharge Act and to provide a good conduct certificate to every holder of an undesirable, bad conduct or general discharge under other than honorable condi-

tions, who can obtain from a Federally Constituted Authority, a sworn statement of good conduct for the past 3 years.

A. F. ZERBEE, *Counsel.*

EXCERPTS TAKEN FROM CATHOLIC WAR VETERANS DISCHARGE REVIEW LETTER FILES

1. We are expecting a baby in May and this discharge is a very big thing for him. He wanted to get a city job but because of this it is holding him back. To him right now this means more to him than anything else. If there is anyway you can help us please try and do so because I know if he gets his discharge changed, it will mean more to him now because he is starting a family.

2. I have prepared this with the sole intention of having my discharge papers corrected so I can have a decent job, not only for me but my family.

3. Submits a brief in which he contends that his present discharge is a ban to police employment. Requests a change to honorable discharge. Contends he didn't have counsel until after making a statement.

4. I have written you before about trying to get my discharge reviewed but, however, it did me no good. I was 17 years of age when I entered the service and 19 when I received by bad conduct discharge. I have been going to night school for 3 years but it does me no good for I cannot get a decent job because of my discharge.

5. I am writing to you regarding my appeal to the Navy to have my naval record corrected. I have been on the New York City Civil Service list for patrolman, police department, and have just received notice of proposed disqualification because of this captains mast. I feel that this charge on my record is of great injustice to myself and my family, I am sure that the Navy would not have given me an honorable discharge for honest, and faithful service if this captains mast was of grave nature. I received a card from the Navy saying that my case will be considered but they could not give me a definite date as to when it would be. But now that I received this card from the civil service commission the time is getting very short for me. I would appreciate it very much if you could possibly contact them and ask for a hearing on my case as soon as possible.

6. I understand there are exceptions in some cases and it may sound selfish, but I'm asking that my case be made one of those exceptions, because since my discharge, which has been over 3 years, I have gotten married and have a family and another one due, and I have been unable to find employment of any kind due to my discharge. If my discharge can't be reinstated, and I can't reenlist, could you please give me a letter of recommendation so that I might get a job to support my family.

7. I am willing to serve the rest of my enlistment to receive a discharge that I can at least get a job with. When you make a mistake you are usually given a second chance. If the discharge isn't changed, I'll never receive that chance.

8. I am writing to you in regards to my request to the Air Force discharge review board to have my discharge reviewed, as you probably know from my letters to them and copies of their letters to you. Since my discharge I've married. I find now that I'm sorry for anything I may have said or done during my Air Force enlistment. I have been a foolish kid before and find that I could have had many opportunities for good jobs, many that I've been able to do and had teachings for, and many I could have been taught to do, but was unable to take them due to my discharge.

9. I would like, if it is possible, to have this discharge changed to an honorable discharge. I have over the years lost many a good and decent job because of the discharge. Also my family has suffered because of it. I am married and have one child, and expecting another child the end of November.

10. I was discharged from the Navy as an undesirable on May 7, 1957. The very nature of my discharge has been a mental burden to me and my family for the past 4 years. I deeply regret the fact that I was discharged under such circumstances. It has been a very depressing situation, when asked by a prospective employer, "Have you been in the service?" This question always comes up. "How long were you in?" "Come in and see me tomorrow and bring your discharge with you." I've lost many job offers over my undesirable discharge. This is something you can't explain or discuss with a possible employer.

11. At this time I am married and my wife is employed as secretary to the county judge of Marion County, Fla. I have been working for Sears and Roebuck since the time of my discharge, but have had several opportunities for

much better positions, but was rejected because of my discharge. I am very interested in becoming a State trooper, but have been advised that I must have an honorable discharge to apply for this job.

12. I have since taken psychiatric treatment and the doctor feels that had I been treated at the time, all my trouble could have been avoided. I haven't been involved in any trouble since being discharged, have married and have five children. I would like to clear my record if at all possible not only for my own sake but the sake of my wife and children.

13. I don't have any new evidence concerning my case but I feel if I had an honorable discharge I could secure better employment. Specifically I would like to go into Government service.

14. It is necessary for me to get it changed to an honorable discharge. It prevents me from acquiring better employment such as, civil service employment. I was refused civil service employment because of this discharge. I intend to reenlist and earn my honorable discharge from the Navy if possible.

15. I am having trouble getting a job and I would like to get one so that I could get off welfare.

16. I could not find suitable work on account of this and I started odd jobs and I finally got a steady job but it still doesn't help me face the future with a better out look. I guess it would take a Presidential pardon to get an honorable discharge.

17. I was never given the opportunity to work off the bad conduct discharge as was my coaccused. Moreover, I was unaware until last year that an administrative review was possible. I have no other criminal record but this has hindered me in civilian life. I am married and have three children and desire to correct this if at all possible.

[From the New York World Telegram and Sun, Jan. 17, 1966]

(Submitted by Col. D. George Paston)

CIVIL LIBERTIES UNION FIGHTS PACIFIST'S DISCHARGE STATUS

(By G. Bruce Porter of the World-Telegram Staff)

A young pacifist who was inducted forcibly into the Navy last November 16 after refusing to appear for his physical examination has been released as "unsuitable" under a general discharge classification, it was learned today.

The New York Civil Liberties Union has protested the status of the discharge and is seeking to have it changed to a fully honorable one.

A spokesman for the Navy said the pacifist, 21-year-old Joseph F. Brennan, 247 Elizabeth St., a member of the Catholic Worker movement, was released from the service at the Brooklyn Naval Station on December 17, just a month after he was picked up by city police as an unauthorized absentee and turned over to military authorities.

The spokesman refused to give the reason for the discharge but said it was "the type of discharge given to a man who drops out of boot camp because he can't pass the swimming test." He would not say whether it was granted in Brennan's case because he had refused, as a pacifist, to cooperate.

Brennan enlisted as a Seabee in the Naval Reserve in 1963 but applied for status as a conscientious objector last June. When the application was turned down he refused to attend Reserve meetings, and when called for active duty last November he picketed the 3d naval district headquarters at 90 Church St. and went on an 8-day hunger strike in protest.

He said at the time that if he were forcibly inducted he would refuse to obey orders or cooperate in any way. After his subsequent induction, he was placed in St. Albans Hospital at the naval station where on a doctor's advice he gave up his hunger strike.

A spokesman for the NYCLU said that although Brennan's general discharge was granted "under honorable conditions," it is considered a black mark on his record. He said, for instance, that a general discharge prohibits a man from swearing on employment applications that he was honorably discharged from the service.

The NYCLU said that while Brennan was in the service, the Navy tried to take him before a captain's mast on charges of refusal to obey a lawful order and unauthorized absence. When Brennan refused and asked instead for a full-scale court-martial, the NYCLU said, the charges were dropped.

IV. Extraterritorial Jurisdiction

Memorandum

Jurisdiction over civilians abroad and former service personnel, S. 761 and 762, 89th Congress

(Inclosure 5 to Federal Bar Association Statement)

1. Background

(*a*) Article 2(11) of the Uniform Code of Military Justice purports to make amenable to trial by courts-martial civilian dependents and employees, and other persons serving with the Armed Forces in foreign countries. In a series of opinions involving homicide, larceny, and sodomy cases beginning in 1957 and ending in January 1960, the U.S. Supreme Court held that those provisions of the Uniform Code of Military Justice by court-martial in peacetime are an unconstitutional invasion of the exclusive jurisdiction of the Federal courts over crimes against the United States. (See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *Singleton*, 361 U.S. 239 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *McElroy* v. *Guagliardo* and *Wilson* v. *Bohlender*, 361 U.S. 281 (1960)).

(*b*) Similary article 3(a) of the Uniform Code of Military Justice (10 U.S.C. 803a) purports to authorize trial by courts-martial of former members of the Armed Forces who, while in military status, committed serious crimes for which they cannot be tried by any State or Federal court. In *Toth* v. *Quarles*, 350 U.S. 11 (1955) held that so much of Article 3*a* which purports to extend the jurisdiction of courts-martial to persons who are not members of the military service at the time prosecution is initiated is an unconstitutional invasion of the exclusive jurisdiction of Federal courts over crimes against the United States.

(*c*) As a result of the foregoing Supreme Court decisions a vacuum was created with respect to the jurisdiction of any American forum to try former service personnel, civilian employees, and dependents who commit serious offenses in foreign countries.

(*d*) The objective of S. 761 and S. 762 is to fill the resulting jurisdictional voids.

2. General

(*a*) The committee is in wholehearted agreement that legislation authorizing an American forum to try American nationals for serious offenses committed overseas is essential and that, U.S. District Courts are the appropriate American forum for this purpose. We note with respect to serious felonies committed against law abiding members of American communities abroad that foreign authorities are sometimes reluctant to assume jurisdiction. In some countries foreign criminal law and procedure differs from our own basic concepts of due process so drastically that U.S. authorities would not even consider requesting foreign courts to assume jurisdiction. In many of these countries the United States still enjoys exclusive criminal jurisdiction for its military contingents, and in all countries save Turkey and Saudi-Arabia, the personnel associated with MAAG's and military missions including dependents enjoy some variety of diplomatic immunity from criminal jurisdiction. To us it is inconceivable that substantial groups of Americans who are abroad on behalf of the Government should be immune from all criminal responsibility for such serious crimes as murder, rape, robbery, and assaults. We therefore concur in the objectives of S. 761 and S. 762.

(*b*) We note, however, that there are numerous defects in the text of these bills. These defects will be developed in the following discussions.

3. S. 762—Jurisdiction over accompanying civilians abroad

(*a*) S. 762 would make amenable to trial in the appropriate U.S. District Courts any citizen, national, or other person owing allegiance to the United States who commits certain offenses while serving with, employed by, or accompanying the Armed Forces outside the United States. The offenses enumerated are:

(1) Solicitation of desertion, mutiny, misbehaviour before the enemy, or sedition. (10 U.S.C. 882.)

(2) False official statement. (10 U.S.C. 907.)

(3) Loss, damage, destruction, or wrongful disposition of military property. (10 U.S.C. 908.)
(4) Waste, spoilage, or destruction of non-military property. (10 U.S.C. 909.)
(5) Improperly hazarding a vessel. (10 U.S.C. 910.)
(6) Drunken or reckless driving. (10 U.S.C. 911.)
(7) Misbehaviour of a sentinel. (10 U.S.C. 913.)
(8) Dueling. (10 U.S.C. 914.)
(9) Riot or breach of the peace. (10 U.S.C. 916.)
(10) Crimes and offenses not capital not otherwise denounced by the Uniform Code of Military Justice which are denounced as crimes by enactment of Congress and are triable in the Federal civil courts. (10 U.S.C. 934.)
(11) Principals, accessory after the fact, attempts and conspiracy related to the foregoing offenses. (10 U.S.C. 877–881.)

(*b*) S. 762 would apply the military statute of limitations, and would apply the maximum punishment authorized for the same act or omission if committed at the same time by a member of the Armed Forces. It would further provide that prior trial in a foreign court with respect to the act or omission involved is a bar to trial.

(*c*) Offenses enumerated.—(1) Inasmuch as the Supreme Court decision which gave rise to the jurisdictional void sought to be cured involved civil felonies such as murders, larcenies, and sodomy, it appears strange that S. 762 omits entirely the civil felonies denounced by 10 U.S.C. 918–932 (murder, manslaughter, rape, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, assault, burglary, housebreaking, perjury, and frauds against the Government).

(2) Insofar as the offenses enumerated in S. 762 denounce crimes directly injurious to the operations of the Government they are now applicable to all American nationals without respect to the place the crime is committed. This conclusion is supported by a rule of construction announced by the U.S. Supreme Court in *U.S.* v. *Bowman* 260 U.S. 94 (1922) for determining the intent of Congress whenever a penal statute is silent as to its territorial application:

"Crimes against private individuals or their property like assaults, murder, burglary, larcency, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace or good order of the community, must, of course be committed within the territorial jurisdiction of the Government where it may properly exercise it. If punishment of them is to be extended to include those committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard * * *"

"But the same rule of interpretation should not be applied to criminal statute, which are, as a class, not logically dependent on that locality for the Government's jurisdiction, but are enacted because the right of the Government to defend itself against obstruction or fraud, wherever perpetrated, especially if committed by its own citizens, officers, or agents. * * * In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allow it to be inferred from the offense."

(3) Applying the rule of construction of the *Bowman* case, we note that criminal statutes included within title 18, denouncing offenses directly injurious to the operations of the Government include the following which S. 762 would denounce:

(*a*) 18 U.S.C. 1381, 2387, and 2388 encompass the scope of 10 U.S.C. 882 (solicitation).

(*b*) 18 U.S.C. 1001 and 1018 cover the scope of 10 U.S.C. 907 (false official statements).

(*c*) 18 U.S.C. 1361 and 641 cover the scope of 10 U.S.C. 908 (military property).

(*d*) 18 U.S.C. 111 and 2196, cover the scope of 10 U.S.C. 910 (hazarding vessel).

(4) With respect to the "crimes and offenses not capital" clause of 10 U.S.C. 934 it is to be noted that outside of the United States and the special maritime and territorial jurisdiction of the United States (18 U.S.C. 7), the only offenses which would be made punishable by S. 762 are the same noncapital offenses now deemed to be applicable to U.S. nationals wherever committed. This category of offenses includes various forms of theft of Government property (18 U.S.C. 641, 643, 645 and other sections of title 18, ch. 37); extortion (18 U.S.C. 872, 873, 876, 877); perjury before a U.S. agency (18 U.S.C. 1621 and 1622); various frauds against the Government (18 U.S.C. 287, 652, 1002, 1003, 1023,

1024); bribery and graft (18 U.S.C. 201–202); unauthorized military pass (18 U.S.C. 499, counterfeiting (18 U.S.C. ch. 25); espionage (18 U.S.C. 792ff) and others.

(5) In view of the comprehensive penal sanctions applicable with respect to offenses directly injurious to this operation, no reason is seen for duplicating them in S. 762.

(6) Similarly it is not necessary to reenact 10 U.S.C. 877–881 for the reason that these matters are already provided in Federal Criminal Law and Procedure. See 18 U.S.C. 2 (principals); 18 U.S.C. 3 (accessory after fact); Rule 31*c*, Federal Rules of Criminal Procedure (attempts and lesser included offense); and 18 U.S.C. 371 conspiracy.

(7) The principal jurisdictional void involves felonies against the person or property of individuals—whether they be other members of the overseas military communities or residents of the host State. No Federal statute reaches the American civilian abroad who commits murder, manslaughter, rape, larceny (except of Government property) robbery, forgery, arson, assaults and burglary and perjury where the victim is other than the Government. Inasmuch as these offenses are denounced in 10 U.S.C. 918 to 931, it is indeed surprising that they are omitted from S. 762.

(8) Title 18 includes most of missing offenses but their applicability is limited to the special maritime and territorial jurisdiction of the United States. (18 U.S.C. 7.) Inasmuch as the forum for these offenses are to be U.S. district courts, it appears to be simple and more convenient to apply the offenses applicable to the special martime and territorial jurisdiction to American nationals abroad, rather than to adapt the same offenses from the Uniform Code of Military Justice.

(*d*) *Punishments.*—(1) S. 762 would apply the same maximum punishment to accompanying civilians as is provided for members of the Armed Forces tried by courts-martial.

(2) Except for aiding the enemy, premeditated murder, and murder perpetrated while committing certain felonies, Congress did not prescribe any mandatory quantum of punishment. With respect to a few offenses it authorized the death penalty, but with respect to most it provided merely for such punishment as a court-martial may direct. However, the President is authorized, in 10 U.S.C. 856, to prescribe maximum limits of punishments for offenses. Accordingly the maximum limits of punishments are prescribed from time to time in Executive orders which may be changed at the pleasure of the President.

(3) Presidential determination as to maximum punishments is appropriate with respect to courts-martial established under the congressional power to regulate the Armed Forces. It is doubtful, however, whether the Federal courts will consider it to be appropriate or constitutional for the President to fix the maximum limit on punishments for offenses triable in Federal courts. Inasmuch as Congress fixes the limits of punishments on criminal statutes under title 18, the same procedures should be adopted in S. 762.

(*e*) *Categories of person.*—(1) With respect to categories of persons who will be amenable to American penal sanctions for criminal acts committed abroad, S. 762 tends to fill portions of the jurisdictional void created when 10 U.S.C. 2(11) was held to be unconstitutional. Thus, an American forum can provide penal sanction with respect civilians associated with the Armed Forces in some serious cases when foreign authorities are unwilling or unable to assume jurisdiction.

(2) The committee notes that if the bill under consideration were broadened to include civil felonies committed abroad, and if it were to provide concurrent jurisdiction in the Federal courts with respect to members of the Armed Forces, as well as civilians, the objectives of S. 761 would also be attained with respect to crimes committed abroad by former service personnel prior to their separation from the service. If a serious offense is committed by service personnel within U.S. territorial jurisdiction, it would likewise be an offense against Federal or State law. Thus, it does not appear to be necessary to provide for continuing jurisdiction under the code except for serious offenses committed abroad.

(3) A survey of jurisdictional agreements shows that in several countries the United States still has exclusive criminal jurisdiction over members of the Armed Forces and accompanying civilians. In all countries except Turkey and Saudi Arabia, the personnel of the military assistance advisory groups or missions (including civilian employees and dependents) enjoy immunity from host State criminal jurisdiction as members of the technical and administrative staffs of the U.S. diplomatic mission.

(4) Military members of these groups, of course, remain amenable to the Uniform Code of Military Justice, but civilians with such immunity are not only immune from host State law for such offenses as murder, rape, and robbery, but because of the void of relevant U.S. criminal statutes, they are also beyond the reach of U.S. law. In such cases the alternatives are either that the offender go unpunished or that immunity be waived. Only recently the United States waived diplomatic immunity in the case of an AID employee charged with the murder of another AID official and a Vietnamese national.

(5) The United States is one of the few countries whose official representatives abroad enjoy not only immunity from the law of the receiving State but also from the reaches of the sending State's law with respect to such serious crimes as murder. Most civil-law countries extend their entire penal code to all nationals on the nationality principle of jurisdiction. It is sometimes said that the common law countries are more closely bound by the territorial principle, but as early as 1829 Parliament denounced murder by British subjects anywhere in the world (9 GEO IV c. 31, sec. 7; see *Regina* v. *Azzopardi*, Central Criminal Court 1843; 169 English Reprints 115). See also the present Offenses Against the Person Act, 24 and 15 Vic. C 100 section 9.

(6) Some members of the committee believe that the limitations of S. 762 to persons employed by, serving with, and accompanying the Armed Forces abroad is an unreasonable classification in that it arbitrarily applies criminal sanction to a limited class of U.S. nationals abroad to the exclusion of other groups of persons abroad. They believe that this unreasonable classification deprives the affected civilians of equal protection of the law. Other members believe that the classification can be justified on the basis of the needs of military communities abroad. But all feel that respect for the rule of law suggests that no person be completely immune from criminal responsibility for serious felonies. We, therefore, believe that serious consideration be given to providing appropriate penal sanctions for civil felonies to all American nationals abroad, or at least to those who are employed by any agency of the Government and their dependents.

(*f*) *Practical considerations.*—It must be recognized the S. 762, in any form in which it might be enacted, cannot completely fill the void created by the loss of military jurisdiction over accompanying civilians. The practical difficulties of securing the attendance of the accused under existing extradition treaties, and of obtaining witnesses and admissible evidence from foreign sources are so formidable that it is unlikely that prosecution would be undertaken except in the most serious cases. With respect to offenses provable by American witnesses and evidence available from American sources many of these difficulties may be obviated. Implementation of S. 762 may require extensive renegotiation of extradition treaties, all of which now specify that an extraditable offense must have been committed within the territorial jurisdiction of the requesting State. Assuming that appropriate arrangements can be made to secure foreign cooperations in this respect, U.S. legislation will be required to authorize U.S. authorities abroad, upon probable cause, to arrest, detain, and deliver the accused to the United States for trial in a district court. Such authorization is absent from the present text of S. 762. Moreover, the attendance of foreign witnesses cannot be compelled. A feasible solution to this problem is to authorize the use of depositions by both sides in criminal cases provided the right of confrontation is safeguarded.

4. S. 761. Jurisdiction over former members of the Armed Forces for serious offenses committed while they were subject to the Uniform Code of Military Justice.

As indicated above the principal problem area involves offenses committed by former service personnel outside of the jurisdiction of the United States. Except for purely military offenses their criminal conduct would be an offense under Federal or State law if committed within the United States. Thus, the problem is similar to that with respect to civilians accompanying the Armed Forces abroad. It would appear that the objective of S. 761 could most conveniently be attained by including members of the Armed Forces in the class of persons to whom S. 762 is to apply.

5. Recommendations:

It is recommended that the Federal Bar Association:

(*a*) Endorse the objective of S. 761 and S. 762.

(*b*) Express its doubts as to the necessity of duplicating U.S. criminal statutes which are now applicable to U.S. nationals wherever they may be.

(*c*) Recommend that S. 762 be revised to include civil felonies, preferably by extending application of offenses punishable in the special maritime and territorial jurisdiction of the United States to the appropriate class of persons in a foreign country.

(*d*) Express doubt as to the suitability of using Executive Department limitations on punishments of the measure of maximum punishment authorized in Federal civilian courts.

(*e*) Recommend careful reconsideration as to the class of persons to whom S. 762 shall apply.

(*f*) Recommend that as a minimum S. 762 should apply to members of the Armed Forces as well as accompanying civilians thus attaining the principal objectives of S. 761.

(*g*) Recommend further study of the practical problems incidental to implementing S. 762 including legislation authorizing the detention, custody, extradition and delivery to the United States of civilians for trial by U.S. courts; and the use of depositions where the attendance of witnesses is not compellable.

[From American Bar Association Journal, December 1965]

HISTORY VINDICATES THE SUPREME COURT'S RULINGS ON MILITARY JURISDICTION

(Cries of anguish went up, Mr. Wiener recalls, when the Supreme Court held unconstitutional trials by court-martial of civilian dependents and employees accompanying the Armed Forces overseas. Now Mr. Wiener has unearthed British military records of two centuries ago, unknown to either the Court or counsel in the American cases, that show authoritative English rulings in accordance with the conclusions reached by the Supreme Court)

[By Frederick Bernays Wiener of the District of Columbia bar]

Rarely if ever has a series of cases provided such a combination of both factual and forensic drama as did the decisions of the Supreme Court, within the past decade, that held unconstitutional the trials by court-martial of civilian dependents and employees accompanying the Armed Forces overseas.[1]

On the human side, the dramatic impact came from the killing of their husbands by two emotionally disturbed women,[2] from the killing of his wife by a man doubtless in his cups,[3] from a sordid instance of infanticide,[4] and from a case that came close to calling for a unilateral American judicial determination of the status of occupied Berlin just after the Soviet leaders had begun to threaten the Western Allies' continued stay in that city.[5]

On the legal side, the cases involved a rehearing by the Supreme Court, in itself a most unusual event, plus the withdrawal of two published opinions and different results in those two cases.[6] This was perhaps the first time in the history of the Court that, following publication of an opinion, an altered outcome in the same litigation had come about without any change in the composition of the Court.[7] What happened was that one judge on further reflection

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[1] *Kinsella* v. *Krueger*, 351 U.S. 470 (1956), rehearing granted, 352 U.S. 901 (1956), earlier opinion withdrawn, 354 U.S. 1 (1957); *Reid* v. *Covert*, 351 U.S. 487 (1956), rehearing granted, 352 U.S. 901 (1956), earlier opinion withdrawn, 354 U.S. 1 (1957); *Kinsella* v. *Singleton*, 361 U.S. 234 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *McElroy* v. *Guagliardo* and *Wilson* v. *Bohlender*, 361 U.S. 281 (1960).

[2] *Kinsella* v. *Krueger* and *Reid* v. *Covert*, both *supra* note 1.

[3] *Grisham* v. *Hagan*, *supra*, note 1.

[4] *Kinsella* v. *Singleton*, *supra* note 1.

[5] *Wilson* v. *Bohlender*, *supra* note 1.

[6] *Kinsella* v. *Krueger* and *Reid* v. *Covert*, both *supra* note 1.

[7] In the first income tax case, *Pollock* v. *Farmers' Loan and Trust Company*, 157 U.S. 429, 586 (1895), the question of the constitutional validity of the income tax was reserved, the Court being equally divided, as Mr. Justice H. E. Jackson was ill. In the second, even though Justice Jackson voted to sustain, another judge—his identity never yet established—changed his mind, and the tax was struck down. 158 U.S. 601 (1895).

In *Jones* v. *Opelika*, 316 U.S. 584 (1942), rehearing granted, 318 U.S. 796 (1943), different result, 319 U.S. 103 (1943), there was a change in the composition of the Court.

In *Flora* v. *United States*, 357 U.S. 63 (1958), a rehearing was granted, but in the second opinion the Court adhered to its original views. 362 U.S. 145 (1960).

It is true that in *Kinsella* v. *Krueger* and *Reid* v. *Covert*, Mr. Justice Brennan voted differently on rehearing from his predecessor Mr. Justice Minton on the original hearing. But even if the latter had not retired and had adhered to his vote, the result in both cases would have been different nonetheless. The same comment applies to Mr. Justice Reed's retirement following the grant of but before the argument on the rehearing.

changed his mind.[8] And, before the series of cases in question had run their course, another judge not only changed his mind, but provided the determinative vote in the most closely contested ones, the two that were decided 5 to 4, thus ending the long struggle with a decisive opinion that was diametrically contrary to the ones he originally had written.[9]

If the present paper were essentially a licked lawyer's lament, exemplifying the "practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press"[10], or by writing a law review article endeavor to establish in the court of professional opinion propositions that have been rejected by the highest court of law, it would, however futile or ill-advised, at least carry the blessings of an established tradition.

What follows, however, is from the pen of one who ultimately succeeded in establishing his views.[11] No settled custom hallows such a venture, undoubtedly because it is less frequently undertaken, if indeed ever. After all, the principal intangible reward of the forensic victor is the happy glow of victory, and it is the fact of victory rather than the route by which it was reached that looms important to potential clients among the public and the profession. Hence, subsequent reargument by prevailing counsel is usually restricted to oral dissertations submitted to such of his friends as are either willing to listen or are unable to avoid doing so; this is a form of presentation which can (and generally does) include as integral portions of the syllogism items that occurred to the speaker only after—sometimes long after—his first version had been delivered.

Why then trouble to refight "old, unhappy, far-off things, and battles long ago"?

What follows was compiled not to celebrate forensic victories, not to hail a situation, literally, "Where Freedom slowly broadens down from precedent to precedent", but rather to call the attention of the profession to discoveries in the Public Record Office in London that demonstrate conclusively that the result ultimately reached by the Supreme Court of the United States in 1957 and again more broadly in 1960 reflected precisely what the Judge Advocate General of His Britannic Majesty's Land Forces had authoritatively ruled just two centuries earlier. Needless to say those unpublished rulings were not known to the Court or to counsel on either side in the American cases.

Constitutional Norms Reflect English Law

It is well to recall, by way of preliminary, that American constitutional norms reflect the state of English law when the Constitution was adopted,[12] and that this is particularly true in respect of the double guarantee of jury trial.[13] Trial by jury in the United States means the kind of trial by jury that was current in England in 1789 and 1791.[14] If, therefore, it had been known, at the time that our Supreme Court wrestled with the problem of court-martial jurisdiction over civilian dependents and employees, that such jurisdiction had been rejected in respect of identical classes of persons accompanying the British Army overseas well before the American Revolution, then the Court could have reached the result that it did with much less difficulty. (Counsel would have been spared much difficulty also, though discomfiture on the part of the bar seems somehow to be a matter in which the concern of nonpractitioners has never been particularly deep.)

Now, here are the rulings—and by way of an additional preliminary it must also be noted that under a well-settled series of decisions dating from before

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[8] Mr. Justice Harlan, who set forth his reasons for changing his opinion at 354 U.S. 1, 65 (1957).

[9] *McElroy* v. *Guagliardo* and *Wilson* v. *Bohlender*, both *supra* note 1, *per* Mr. Justice Clark, who had written the first opinions in the *Krueger* and *Covert* cases, then dissented from the grant of rehearing therein (352 U.S. at 902), and thereafter also dissented from the second opinions that changed the result (354 U.S. at 78). The other two cases decided in 1960 went seven to two, while the final vote in *Reid* v. *Covert II* was six to two.

[10] *United States* v. *Morgan*, 313 U.S. 409, 421 (1941).

[11] The author participated as counsel for the realtors in the *Krueger*, *Covert*, *Singleton*, *Grisham*, and *Wilson* cases, all *supra* note 1—a statement which, it is hoped, will be regarded as an admission required by candor rather than as an assertion impelled by immodesty.

[12] *Gompers* v. *United States*, 233 U.S. 604, 610 (1914); *Ex parte Grossman*, 267 U.S. 87, 108–109 (1925).

[13] U.S. CONST. art. III, § 2, cl. 3, and the Sixth Amendment.

[14] *Thompson* v. *Utah*, 170 U.S. 343, 350 (1898); *Patton* v. *United States*, 281 U.S. 276, 289 (1930); and see, for the jury trial provisions of the Seventh Amendment, *Dimick* v. *Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 657 (1935).

1720 not even soldiers could be tried by court-martial in England except for offenses specifically denounced by the Mutiny Act; this meant that military personnel committing ordinary common-law felonies were triable only in the civil courts.[15]

It was only in places where there was "no form of our civil judicature in force" that soldiers were triable by court-martial for civilian crimes. The Articles of War specifically named Gibraltar and Minora as such places.[16] yet, interestingly enough, it was precisely at those places where civilians were held not subject to military law.

In 1734, in a ruling that has been in print since 1869, Attorney General Sir John Willes held that the only persons who could be tried by court-martial for common law felonies committed at Gibraltar were officers and soldiers subject to the Mutiny Act.[17] Lord Mansfield in 1774 spoke of having been counsel for a carpenter in the train of artillery at Gibraltar who had recovered damages from the Governor there for confirming the sentence of a court-martial pursuant to which the plaintiff was flogged, on the footing that the carpenter was not subject to military law.[18] The record of the case, now located, shows that the Governor defaulted on the merits and left to the jury only the question of damages; this was in 1738.[19] And in 1755 Charles Gould, Deputy Judge Advocate General, held that a civilian employee at Gibraltar, the clerk of the works under the Board of Ordnance, was not subject to trial by court-martial for assaulting an officer who had mistakenly arrested him.[20]

On Christmas Day, 1764, two soldiers and a woman, the wife of one of them, murdered a shopkeeper on the island of Minorca, then British soil.[21] All three were tried jointly by court-martial, all three were convicted and sentenced to be hanged. The soldiers were executed; the Governor pardoned the woman.[22] When the proceedings reached England, Gould ruled that the court-martial had exceeded its jurisdiction and that the Governor's pardon was accordingly ineffectual.[23] She required a royal pardon, which was duly obtained and transmitted to Minorca, "thinking it necessary upon every account to provide that the woman should not by any possibility be again called to answer for the same fact." [24]

Again, in 1770 Gould (by this time Judge Advocate General de jure he having been such de facto as deputy for more than 20 years) advised a new deputy judge advocate at Minorca that a soldier's wife could not be tried by court martial.[25] And in 1777, when still a third deputy judge advocate asked whether the civilian employees of the Board of Ordnance there could be disciplined by court-martial, Gould replied that they were not subject either to the Mutiny Act or to the Articles of War, but that if it was desired to make them so, they should be enlisted.[26]

Interestingly enough, the Supreme Court of the United States made the same response in 1960 when the Government urged upon it the necessity of subjecting civilian employees overseas to military law. If that is indeed necessary, said the Court, they should be given military status and put in uniform.[27]

Again, on the West Indian island of Martinique, which was taken from the French in 1762,[28] a British sailor, a boatswain in the Royal Navy, killed a British soldier. He was tried by an Army court-martial, convicted, and sentenced to death.[29] Gould ruled in 1763 that a person in the Navy was not

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[15] 1 CLODE, THE MILITARY FORCES OF THE CROWN 519 (1869).

[16] See Article II of Section XX of the Articles of War of 1765, reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS *1469 (2d ed. 1896). This provision first appeared as Article of War 46 of 1718. See also Prichard, *The Army Act and Murder Abroad* [1954] CAMB. L. J. 232, 238.

[17] 1 CLODE, *op. cit. supra* note 15, at 532–533.

[18] *Mostyn* v. *Fabrigas*, 1 *Cowp.* 161, 175–176: s.c. *sub nom. Fabrigas* v. *Mostyn*, 20 How. St. Tr. 81, 232.

[19] *Conning* v. *Sabine*, Public Record Office (hereinafter P.R.O.), KB 122/165 (Rot. 482) a case located by Dr. Sylvia L. England.

[20] P.R.O., WO 81/7/11 *et seq.*

[21] Minorca was British from 1713 until it was recaptured in 1756, then British again from 1763 through 1783.

[22] P.R.O., WO 71/75/1.

[23] P.R.O., WO 81/11/66 and 67.

[24] A copy of the warrant for preparing the pardon is in P.R.O., WO 72/6.

[25] Gould to Captain Schomberg, September 22, 1770 (P.R.O., WO 72/6).

[26] Gould to Joseph Collins, Esq., September 23, 1777 (P.R.O., WO 81/13/157).

[27] *McElroy* v. *Guagliardo*, *supra*, note 1, 361 U.S. at 286–287.

[28] It will be recalled that at the close of the French and Indian War (known as the Seven Years' War in Europe) one of the issues much discussed in England was whether it was preferable to retain Martinique and Guadaloupe, relinquishing Canada; or *vice versa*.

[29] P., WO 71/49/120.

subject to the Articles of War and that the sailor must be returned to England to be tried in a civil court there.[30]

In none of the foregoing rulings did the Judge Advocate General's Office make reference to the so-called camp follower Article of War, the one providing that "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no Inlisted Soldiers, are to be subject to orders according to the Rules and Discipline of War." This article, which first appeared in 1746 or 1747,[31] was not based on any corresponding expansion of the Mutiny Act, and consequently it was afterward—rather long afterward—pointed out that those therein enumerated "are subject to military orders, not by the letter of the Mutiny Act, but by the usage and customs of war."[32] Otherwise stated, the British camp follower Article of War was simply irrelevant to British military jurisdiction in time of peace.

The United States took over the camp follower Article of War verbatim by legislative enactment, and it remained on the American statute book from 1775 until 1917, the effective date of the 1916 Articles of War.[33] But Winthrop and the earlier Judge Advocates General always insisted that it had no application except "in the field," which is to say, in a place where and at a time when military operations were in progress.[34] Yet, curiously enough, when Article of War 2(d) of 1916 extended military jurisdiction over camp followers to overseas areas in time of peace,[35] no one so much as mentioned those earlier rulings, nor was any reference whatever made to Winthrop's italicized conclusion that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace*".[36] Thus the Supreme Court in 1960 vindicated Winthrop quite as much as the earlier English rulings vindicated the Supreme Court.

Moreover, in one important respect, the English rulings in the 1760's circumscribed the military jurisdiction in time of war far more narrowly than any American court or lawyer would limit that jurisdiction today.

Quebec, as is well known, was captured by the British in 1759, while all the rest of Canada was surrendered by the French in 1760; but title did not pass until the Peace of Paris that was signed in 1763. During this interval, and indeed until the expiration of the 18-month period allowed individual French subjects for departure, Canada was under a military government, and all criminal offenses were tried by court-martial.[37] This was what today would be everywhere recognized as a military government jurisdiction,[38] and in fact far more inhabitants than camp-followers were so tried.

But, when an inhabitant sentenced by court-martial to hang for murder asserted and established that his daughter rather than he was actually the guilty party, and she then admitted the crime, she was tried by court-martial, sentenced to be hanged in chains, and duly executed, while the man was pardoned.[39] When

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[30] P.R.O., WO 81/10/169 (Gould to Secretary at War Welbore Ellis, June 2, 1763); and see WO 81/10/198, 199, 219, 222. The sailor was eventually pardoned by the King (P.R.O., WO 71/49/144–146), probably without a further civil trial in England. See 1 CALENDAR OF HOME OFFICE PAPERS, 1760–1765, 306 (1878).

[31] It is in neither set of Articles of War for 1745, those for 1746 have not reappeared, and in the combined Articles of War for 1747 it appeared as Article 23 of Section XIV.

[32] SAMUEL, AN HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY 691 (1816). The first statutory authority for trials by court martial to any "Person serving with or belonging to His Majesty's Armies in the Field" dates from 1813 (53 Geo. 3, c. 99, § 1), and that was sharply limited as to locale and types of offenses.

[33] Article XXXII of 1775; Section XIII, Article 23, of 1776; Article 60 of 1806; Article 63 of 1874. For the text see, respectively, WINTHROP, *op. cit. supra* note 16, at *1482, *1497, *1516, and *1531.

[34] WINTHROP, *op. cit. supra* note 16, at *131–*138: DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 150–152 (1912).

[35] Article of War 2(d) of 1916 was reenacted in 1920 and in 1948; it appeared as 10 U.S.C. § 1473 from the 1926 through the 1946 editions. It was replaced in 1950, effective May 31, 1951, by Article 2(11) of the Uniform Code of Military Justice, originally 50 U.S.C. § 552(11), and now still preserved, despite its complete unconstitutionality, as 10 U.S.C. § 802(11).

[36] WINTHROP, *op. cit. supra* note 16, at *146. The statement in the text is based on careful and detailed study of the legislative history of the 1916 Articles of War.

[37] *E.g.*, ALDEN, GENERAL GAGE IN AMERICA 55, 57 (1948); BURT, THE OLD PROVINCE OF QUEBEC, (Chapter III, "The Canadians under Military Rule" (1933); LONG, LORD JEFFERY AMHERST: A SOLDIER OF THE KING, Chapter XI, "An Empire for the Crown" (1933).

[38] 3 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES §§ 688–702A (2d ed. 1945); 2 OPPENHEIM, INTERNATIONAL LAW 432–456 (Lauterpacht's 7th ed. 1952).

[39] P.R.O. WO 71/49/147 (first trial); *id.* at 210–212 (post-trial declarations); *id.* at 213–214 (second trial); Riddel, *The First British Courts in Canada*, 33 YALE L. J. 571, 578–579 (1923–1924).

the record of the case reached England, in the summer of 1763, Gould insisted that the court-martial had no jurisdiction and forwarded for the innocent man an effective royal pardon.[40]

Gould's ruling would be rejected universally today, but in the 1760's the law of belligerent occupation had not yet developed; the concept of a court-martial exercising a military government jurisdiction was not formulated until the 19th century.[41] What Gould overlooked, by contemporary standards was that the system of trials by court-martial for civil offenses in Canada had been specifically approved by the King.[42] But even there his personal culpability is not great, for his original reaction—that the military trials were not warranted in law—obtained the concurrence of the Secretary of State, Lord Egremont. The noble lord, however, who was within a month of his own death, did not realize that he had himself, less than two years earlier, conveyed the King's approval of those precise arrangements.[43]

The correspondence that Gould had with the military commanders in Canada accordingly makes spicy reading; they threw at him both the King's approval and the earlier records of trial logged in the Judge Advocate General's Office. General Gage's comment—till the Receipt of your letter, I must remind you, I had not the smallest Doubt of those court-martial proceedings being consistent with Law"—recalls that of Mr. Justice Holmes a century and a half later; "I also think that the statute is constitutional, and but for the decision of my brethren I should have felt pretty clear about it."[44] In the end Gould climbed down as graciously as he could.

Later, when the British Army during the American Revolution regularly tried by court-martial for common-law felonies the inhabitants of the American cities successively occupied, Gould's complaints were less voluble, though he still considered such trials not warranted by law.[45] But the British commanders continued to try these persons to the end, and in this respect the later precedents from our own Civil War would justify the jurisdiction that they exercised, a jurisdiction likewise reflecting military government, and hence based on the law of war.[46]

The broader jurisdiction over civilians in an area under military occupation was sustained by our Supreme Court in 1952 in *Madsen* v. *Kinsella*, 343 U.S. 341, a decision that reflected the development of international law since the time when Canada and later the rebellious American cities had been militarily occupied by the British. But the limitations that the Supreme Court placed on the trial of civilians in time of peace in 1957 and in 1960, limitations that involved the scope of trial by jury, faithfully reflected the limitations similarly placed on the extent of British military jurisdiction over civilian dependents and employees in time of peace as those had been laid down in Whitehall and at the Horse Guards two centuries earlier, well before the Thirteen Colonies even thought of going their separate way.[47]

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[40] Letters to and from Gould in P.R.O., WO 72/5 and 72/6; WO 81/10/201, 204; WO 81/11/12, 14; Gould to General Thomas Gage, February 11, 1764, manuscript in the W. L. Clements Library, University of Michigan. For the pardon, see P.R.O., WO 81/10/223, and WO 71/49/214.

[41] 2 OPPENHEIM, *op. cit. supra* note 38, at 432–433; *cf.* 14 HOLDSWORTH, HISTORY OF ENGLISH LAW 38–39 (1964).

[42] Here the relevant documents are General Amherst to Mr. Secretary W. Pitt, October 4, 1760. (P.R.O. CO 5/59, Pt. I, f. 125, and inclosures 30–33 thereto at *id.*, Pt. II, ff. 30 *et seq.*), and the Earl of Egremont (Pitt's successor) to Amherst, December 12, 1761 (British Museum, Add. MS. 21697, f. 9). The account in KENNEDY, THE CONSTITUTION OF CANADA 26–27 (2d ed. 1938) is inaccurate because of failure to reflect the cited documents. The military government arrangements in all three military districts, Quebec, Montreal and Trois Rivèrs, were designedly similar and rested on identical authority.

[43] Gould's letter to Governor Murray of Quebec, in which he says that the Earl of Egremont "saw the Matter in the same light", was dated August 11, 1763, just ten days before the latter's death. 21 DICTIONARY OF NATIONAL BIOGRAPHY 1155–1158 (1921–1922 reprint). *s. v.* Sir Charles Wyndham.

[44] *Adair* v. *United States*, 208 U.S. 161, 190 (1908).

[45] Gould to General S. William Howe, June 20, 1777 (P.R.O., WO 72/8).

[46] See *e.g.*, *The Grapeshot*, 9 Wall. 129 (1870); *Pennywit* v. *Eaton*, 15 Wall. 382 (1873); *Burke* v. *Miltenberger*, 19 Wall. 519 (1874); *United States* v. *Reiter*, Fed. Case No. 16146 (U.S. Prov. Ct. for La.); and see *Miller* v. *United States*, 11 Wall. 268 (1871); *New Orleans* v. *New York Mail Steamship Company*, 20 Wall. 387 (1874); *United States* v. *Dickelman*, 92 U.S. 520 (1876); *Coleman* v. *Tennessee*, 97 U.S. 509 (1879); *Dow* v. *Johnson*, 100 U.S. 158 (1880).

[47] The distinction between the scope of military jurisdiction over dependents in time of peace and in time of war is dramatically illustrated by Mrs. Madsen's subsequent fate. Her detention, as indicated in the text, was based on military government, a branch of the law of war. Thereafter following the release of Mesdames Covert and Smith for want of military jurisdiction in time of peace (354 U.S. 1), Mrs. Madsen sought but failed to obtain release on habeas corpus. *Madsen* v. *Overholser*, 251 F. 2d 387 (D.C. Cir 1958), certiorari denied, 356 U.S. 920 (1958).

Of the Supreme Court's decisions that limited court-martial jurisdiction over civilians in time of peace much has been said in criticism in apparently learned articles in the law reviews and in professional dissertations. According to many disgruntled judge advocates grimly grumbling in their beer, who relied on the contrary assertions as to the scope of British military jurisdiction that the law officers of the United States had made in the briefs, those decisions constitute "bad law". But since to exhume those assertions and criticisms now, in the face of the actual British rulings outlined above, would be unmitigated, sadism, on a par with pulling wings off defenseless flies, they will be left not only unquoted, but uncited as well.

The subsequent discoveries summarized above should not—and do not—occasion either triumphant gloating or trampling on the prostrate forms of former adversaries already vanquished. Rather, they point a lesson to all: the need to rest historical assertions on actual documentary proof. This is a discipline that should be respected equally by lawyers and historians. The lawyers apply it elsewhere, in enforcing the best evidence rule; the better historians consistently preach the need for dirtying one's own hands with the documents.

Failure to apply these elementary safeguards involves, certainly in respect of topics treated only sketchily if at all in reliable secondary sources, a substantial risk of committing fundamental error.[48]

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., January 3, 1965.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: This letter responds to yours of November 22 concerning military justice. As I wrote you a little earlier, I find myself pretty constricted late in January by the inevitable pressures of semester-end formalities. Perhaps you will accept this letter, and the reprint from St. John's University Law Review for May 1961, as a substitute for a personal appearance in Washington.

I am particularly interested by your S. 762 concerning trial of civilian persons accompanying the Armed Forces, who commit crimes on our bases abroad. As you point out in the memorandum accompanying S. 762, and reprinted in the Congressional Record of January 26, 1965, the Supreme Court has held such persons untriable by military courts. Yet to return them for trial in a U.S. district court in the United State means expense and delay, and worse yet, takes busy officers and other military personnel, and civilian witnesses, away from their duties overseas to come back to the United States to testify.

Would it be impossible to send a district judge overseas to try such people? Surely a large American installation such as we have in England or Germany, or perhaps elsewhere, would furnish enough civilian jurymen to make up a grand and petit jury. Many times the accused might waive the one or the other. In a little paper entitled "The Constitution, the Civilian, and Military Justice" 35 St. John's Law Review 215 (1961) I discussed this problem. Perhaps your subcommittee may wish to glance at it, and hence I enclose a reprint.

Respectfully yours,

ARTHUR E. SUTHERLAND, *Bussey Professor of Law.*

[From St. John's Law Review]

THE CONSTITUTION, THE CIVILIAN, AND MILITARY JUSTICE

(By Arthur E. Sutherland, Jr.[1])

Fundamentals of constitutional law remain the same from generation to generation; its manifestations continually change with the changing circumstances of man's life. The boundary between justice for the soldier and justice for the

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[48] All of the foregoing materials will be treated in detail, and many of the more significant documents printed in full, in a book that is now approaching completion, to be entitled *Civilians Under Military Justice.*

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[1] Professor of Law, Harvard Law School.

civilian offers one example. We have come far since the day of small professional armies which gave rise to our concepts of military justice; since the day when the soldier lived apart from the rest of society; since, within a generally civilian people, he dwelt in a small isolated group subject to his own laws and customs, apart from his fellowman. Like all the rest of us, the man-at-arms has been much affected by those technological and organizational changes which, in war, turn the efforts of a whole society toward victory in the field, and which, even in what we call peace, require that we maintain millions of men, basically civilians, enrolled for a time in the armed forces. We station garrisons abroad at scores of points, and send whole families along. And the technological developments which have made war more and more a branch of mechanical engineering, which have made victory dependent on the skilled manipulation and maintenance of innumerable intricate machines, not only make necessary profound changes in the training of military men, but, even more striking, call into association with men-at-arms increasing numbers of civilian scientists, technologists, and specialists of all sorts who keep the machines of war in operation.

This change toward partly civilian military forces makes more difficult and delicate the establishment of a balance between the individual's claim to all the careful procedures of the judicial process and, on the other hand, the necessity for unquestioning discipline which is the essence of military survival. Military law, like the law generally, tends to lag behind social and technological development. This paper treats, in a general way, of the adaptation of constitutional law to this new order, where in substance, if not in theory, the status of soldier merges more and more with that of civilian.

None of these matters is entirely new. Renaissance artillery men were often civilian technicians, respected by the soldiery for knowledge of difficult mysteries. The memoirs of Baroness von Riedesel demonstrate that those who today share the comparatively pleasant life of civilian dependents in one of our far-called military installations, had predecessors who faced sterner tests as they moved down the Lakes with Burgoyne's column. The War of Independence had its sutlers, waggoners, and laudresses. Civilian "packers" were famous 90 years ago, with our armies on the plains, for hardihood in Indian warfare, for mastery of pack-animals, and for resistance to certain sober aspects of military regimentation. The civilian paymaster-clerk was for many generations a necessary functionary with the forces afloat. But in our day, the discipline of civilians who follow the flag takes on a new quality because of their sheer numbers. One remembers, between 1941 and 1945, the Red Cross people overseas, the UNRRA functionaries, the merchant mariners, the political advisers who accompanied major commanders with their civilian specialists and secretaries, demonstrating that under modern conditions Clausewitz's dichotomy between war and diplomacy had become less clear. Within the past few months, the expenditures of military dependents abroad have been thought to imperil our international balance of payments. In modern war then, in the preparation for war, and in the long liquidation of past wars, civilians who follow the flag abroad pose new burdens and risks. Methods of organization and discipline once important only to a small and self-conscious military fraternity, now in varying degrees, depending on time, geography, and international temperature, affect a whole society abroad and at home.

A more familiar allied constitutional question concerns the civil liberty of the man-at-arms in his nonmilitary affairs. Locke wrote in the eleventh chapter of his Second Treatise of Government:

"[T]o let us see that even absolute power, where it is necessary, is not arbitrary by being absolute, but is still limited by that reason, and confined to those ends which required it in some cases to be absolute, we need look no farther than the common practice of martial discipline; for the preservation of the Army, and in it of the whole commonwealth, requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them; but yet we see that neither the sergeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach where he is almost sure to perish, can command that soldier to give him one penny of his money; nor the general, that can condemn him to death for deserting his post or for not obeying the most desperate orders, can yet, with all his absolute power of life and death, dispose of one farthing of that soldier's estate or seize one jot of his goods, whom yet he can command any thing, and hang for the least disobedience."

The draftsmen of our Bill of Rights were men of long memories; in 1789, when they formulated our fifth amendment, the Petition of Right of 1628, with its protest against extension of military procedures to civilians, was closer to them in time than we now are to their day. Yet they were satisfied to treat the separation of military from civil justice in only a few words. Perhaps the line between "cases arising in the land or naval forces" and other cases seemed clearer then than it now does.

At the outset, as in most constitutional controversies, one has here to begin making distinctions on which constitutional rights may depend. Despite the concept of "cold war" which blurs the difference between war and peace, there is still a difference between a national situated as the United States was in 1943, and a nation in our present state. There is a difference between "forces in the field" and forces in garrison at home; Fort Dix is not Heartbreak Ridge. There is a difference between matters overseas and matters at home; our airmen at a base in the peaceful English countryside are scarcely "in the field" in any conventional sense, yet their status is surely different from that of a like group of young men in Bedford, Mass. There is still a difference between the Navy and the other armed forces; men sailing on or under the sea may be isolated for long periods; they are in a situation quite different from men in the ground forces stationed overseas but localized in a highly developed modern camp with abundant transportation and communication. There may well be a significant difference between the families of military men who accompany husbands and fathers on long tours of duty abroad, and, on the other hand, men who, though still called civilians, have engaged by contract to accompany armed forces to far places in the world and to support their military readiness by the exercise of scientific, technological, or administrative skills.

These and like considerations come to the mind of the reflective lawyer who reads *McElroy* v. *United States ex rel. Guagliardo*,[1] decided by the Supreme Court of the United States on the 18th day of January 1960. Guagliardo was a civilian technician, an electrical lineman under contract with the Air Force. He had not gone through the ritual of enlistment. His duties took him to Nouasseur Air Depot in Morocco, where he stole supplies. He was tried by court-martial under article 2(11) of the Uniform Code of Military Justice, was convicted, and was sentenced to the disciplinary barracks at New Cumberland, Pa. He was released on habeas corpus by the court of appeals; the Supreme Court of the United States affirmed on the ground that he was not subject to a military trial. The American constitutionalist faced with *Guagliardo* and its companion cases[2] asks how they came to be so decided, and what is to be done hereafter with civilians accompanying the armed forces overseas. Lessons may be learned from an attempt to answer both questions.

A facile answer to the first of these questions can account for the Supreme Court's treatment of Guagliardo, the civilian employee, by explaining that it is merely a legal extrapolation of the similar decisions 3 years earlier in the cases of wives of servicemen charged with capital offenses.[3] But this explanation may be a bit too easy. Four of the nine Justices dissented in *Guagliardo*. Mr. Justice Clark, who there wrote the prevailing opinion, had voted to uphold Mrs. Covert's military conviction. The prevailing and dissenting opinions of troubled, conscientious judges in Guagliardo's case demonstrate the difficulty of arriving at the conclusion the Supreme Court reached. I suggest that underlying *Guagliardo* and its companion cases, as well as the *Covert* and *Smith* cases of 1957, was one of those major premises which, as Holmes once wrote,[4] practical men generally prefer to leave inarticulate—that the military will not surely do reasonable justice, and that military jurisdiction must be restrained, even at serious cost in efficiency and money. The responsibility for this underlying premise is not limited to men in uniform. Great civilian leaders of the Nation shared in the mistakes which produced that inarticulate premise. In justice to my onetime companions in the

[1] 361 U.S. 281 (1960).

[2] See *Kinsella* v. *United States* ex rel. *Singleton*, 361 U.S. 234 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); and *Wilson* v. *Bohlender*, reported with the *Guagliardo* case.

[3] In June 1957, the Supreme Court held invalid the military conviction of Mrs. Clarice Covert and Mrs. Dorothy Smith, on charges of murder of their husbands, servicemen stationed abroad. See *Reid* v. *Covert*, 354 U.S. 1 (1957). The case was tried together with *Kinsella* v. *Krueger*.

[4] See Holmes, The Theory of Legal Interpretation, 12 Harvard Law Review 417, 420 (1899); Holmes, Collected Legal Papers, 203, 209 (1920).

services, I hasten to say that I do not here state that this premise is correct. I say that it exists. For it we must share the blame, and because of it, take the consequences.

One reads today the account of affairs in Hawaii which gave rise to *Duncan* v. *Kahanamoku*[5] with a sense of regret, with a feeling that this should not have happened. There was no adequate reason, military or other, for the unseemly wrangle which continued as late as 1944 between military and civil administration in the Islands. Although today's critic must remember the stunning, tragic surprise of Pearl Harbor and the natural reaction of military commanders seeking to avoid a repetition, still wisdom is a necessity for senior men-at-arms who are governing a civil population. When military men forget this in a democracy, trouble follows.

The Japanese relocations on the west coast are not now pleasant to remember. One finds himself defensive in explaining them. With all the sympathy in the world for the practical difficulties of counterintelligence that has to be conducted by young men of good intention but no very deep experience, one wishes that the problems which gave rise to the relocations might have been settled some other way. One of the senior officers in charge of a large part of this operation officially reported as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken";[6] he did not, by this extraordinary statement, strengthen civilian confidence in the wisdom and responsibility of the military.

The reports of General Yamashita's trial did little to add to the trust of thoughtful people in military justice.[7] Accounts of the investigatory procedures in the *Malmedy* cases[8] had a similar effect. The difficulty is that people tend to believe the worst, and to characterize any régime by occasional deplorable incidents, not by generally commendable character. The thousands of court-martial cases in which military judges were restrained and conscientious, the distinguished record of able defense by military counsel, the scrupulous administrative review of cases in military channels, the poise and wisdom of the judgments of the United States Court of Military Appeals—none of these has sufficed to wipe out the memory of some conspicuous mistakes. And because these were the mistakes not of a few people, but mistakes unchallenged at the time by a great many of us, we must now share some of the responsibility for the inarticulate major premise of *Guagliardo*.

The first lesson, therefore, is that where a whole nation is to be recurrently in arms, the training and the practice of senior military men must be thoughtful and restrained and just. We can learn to reconcile this with taut and efficient discipline; we must do so, for failure either of discipline or of justice brings intolerable consequences in its train.

What can now be done with military justice for the civilian? This question can be answered in at least three ways, any of which brings difficulties. We can turn civilians, or some of them, into military men, or something sufficiently resembling military men, so that a trial like Guagliardo's becomes constitutional. Or we can accept the constitutional necessity for proceeding on criminal charges against civilians serving with the Armed Forces with all the formalities of article III of the Constitution and the Bill of Rights. Or we can leave civilian justice to the courts of the Nation where the civilian is station. Or we can sometmes follow one course, sometimes another. The first of these possibilities, turning civilians into military men, is suggested in the opinion of the court in *Guagliardo*. The court tells us that we might possibly proceed as the Navy did with its civilian paymaster's clerk.[9] The court stressed the fact that the paymaster's clerk had a position important in the machinery of the Navy, that his appointment was made only on approval of the ship's commander, that he had permanent tenure "until

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[5] 327 U.S. 304 (1946). See Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 Harvard Law Review 833 (1946).

[6] See this statement quoted in Mr. Justice Murphy's dissenting opinion in *Korematsu* v. *United States*, 323 U.S. 214, 241 n.15 (1944).

[7] See *In re Yamashita*, 327 U.S. 1 (1946). One of the army officers assigned as counsel for General Yamashita wrote an account of his experiences; see Reel, the Case of General Yamashita (1949).

[8] See *Everett* v. *Truman*, 344 U.S. 824 (1948), and the proceedings described in Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587, 597 (1949).

[9] See *McElroy* v. *United States*, ex rel. *Guagliardo*, 361 U.S. 281, 284–286 (1960), citing Ex parte Reed, 100 U.S. 13 (1879).

discharged," and that he was required to agree in writing "to submit to the laws and requirements for the Government and discipline of the Navy." All of these criterial could be made to apply to most civilian employees of the Armed Forces. They would not be so employed by the Government for service abroad unless their service was important and unless some senior official approved their appointment. Tenure permanent until terminated does not seem a difficult condition to achieve. And voluntary acceptance of court-martial jurisdiction, as the *Guagliardo* opinion suggests, might eliminate some difficulties. But doubt lingers. Does a civilian, dressed in a uniform and relabeled a soldier, so simply lose the procedural guarantees which freed Guagliardo? And will well-paid and perhaps somewhat undisciplined civilian technicians "enlist" in sufficient numbers? And what of dependents

Perhaps the second possibility is easier. Why not take a civilian article III court overseas to the accused? The sixth amendment guarantee of a jury "of the State and district where the crime shall have been committed" seems not to apply to crimes committed abroad. We are accustomed to trying our national in the United States on charges of commission of civilian crimes in foreign countries. This was the situation in *Best* v. *United States*,[10] where the defendant was convicted in a district court of the United States in the District of Massachusetts on a charge of treason committed in Viena, Austria, and in *Kawakita* v. *United States*.[11] where the treason occurred in Japan. There appears to be no constitutional obstacle preventing an article III trial abroad. There is no provision in the fifth amendment guarantee of indictment by grand jury comparable to the provision in the sixth amendment concerning "the State and district wherein the crime shall have been committed." Under the conditions which obtain in a large American installation abroad, it would prehaps be possible to assemble a grand and petit jury from the military and civilian personnel available, and to commission a certain number of U.S. district judges, or to assign such judges from those already commissioned, to hold court on circuit in other countries. To be sure, jury service would require the time of some of our civilian and service personnel stationed abroad. The Supreme Court has held that civilian government employment is no disqualification for such service,[12] and no reason appears why military employment should disqualify either. Service wives might perhaps occupy some of the posts on grand and petit juries. There would be some delay involved. One would not expect to find a U.S. district judge immediately available at each of the several scores of foreign stations where our civilians may get into trouble. In posts where personnel are comparatively few, time might be required to assemble a grand and petit jury. Professional counsel, to which the civilian defendant is constitutionally entitled under the sixth amendment, might present a difficulty. But members of the bar in uniform are nowadays available at a great many foreign posts, and these, it would seem, should fill the constitutional requirement for defense counsel in those instances where the accused could not afford or would not choose to obtain privately employed counsel for his defense.

A great many defendants might well waive a grand and petit jury once charges were brought, particularly when it became apparent that a speedy and fair trial could be had before a civilian judge. Experience in those jurisdictions where defendants on criminal charges may waive juries demonstrates that a great many do so in order to expedite disposal of their cases, or because they prefer the judgment of a trained and wise professional. And indeed, provision of civilian trials of the sort here suggested might be welcome to the military as relieving them of court-martial duties which take them away from the primary function of the man-at-arms.

If article III trials for civilians abroad are constitutionally possible, they would be much preferable to a system of bringing back to the United States for trial civilians who offend abroad. The inconvenience and delays occasioned by the transportation of witnesses back to the United States from Korea, Turkey, Germany, or England while their military functions go unperformed, or are performed by substitute personnel, would be avoided if the offenses could be prosecuted where they occur. Some revision of the status of forces treaties would

[10] 184 F. 2d 131 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951).
[11] 343 U.S. 717 (1952).
[12] *Frazier* v. *United States*, 335 U.S. 497 (1948).

be necessary, and this might prove an obstacle embarrassing if not insuperable.[13] Still, this escape from the *Guagliardo* dilemma seems well worth study.

The third possibility remains—trial in the courts of the country where the offense occurs. This practice was constitutionally upheld in *Wilson* v. *Girard*.[14] It may in some instances be unwelcome to the personnel involved, though certainly the *Girard* record indicates a trial of scrupulous fairness.

For *Guagliardo*, as for most important human problems, no perfect solution free of any disadvantage seems possible. But the art of constitutional government is a practical one to be applied in a less than perfect world. If men were angels, we should need no trials among our forces abroad. But, in this somewhat unlikely state of affairs, we should need no forces either.

STATUS OF FORCES AGREEMENTS: THE AMERICAN EXPERIENCE

(Edward D. Re*)

INTRODUCTION

Of the many legal problems that followed the close of World War II, few indeed have been so thoroughly examined, if not vehemently debated, as those stemming from the stationing of American servicemen on friendly foreign soil. Perhaps no treaty has been so severely criticized as the NATO Status of Forces Agreement. It has been stated that "this unprecedented Agreement reffects a callous disregard of the rights of American Armed Forces personnel," and that it amounts to "penalizing the American soldier in an effort to please our NATO allies."[1] The legal criticism fundamentally stemmed from the belief that "the rule of international law as laid down by Chief Justice John Marshall [in the *Schooner Exchange* case] * * * is that troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country, but are subject only to their own country's laws and regulations for the government of the armed services * * *."[2]

The voices that objected to the approval of the NATO Status of Forces Agreement were not silenced by its ratification by the Senate by a vote of 72 to 12.[3] Many patriotic Americans and organizations continued to clamor for the abrogation of status of forces arrangements patterned on the NATO Status of Forces Agreement.[4] Since the objections were founded upon the conviction that such agreements were "violative of the rights of American nationals,"[5] even the procedural safeguards, expressly set forth in the NATO Status of Forces Agreement itself, did not satisfy the critics.[6] Regardless of its provisions, it was felt by those who opposed the Agreement that America had suffered rather than gained, since, in the absence of the Agreement, American servicemen would have been immune from the jurisdiction of the courts of the foreign country. It was not maintained that international law could not be changed by mutual agreement, but rather, that the agreement in question deprived the American serviceman of an immunity that he would have otherwise enjoyed.

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[13] The possibility that civilian courts of the United States may administer criminal justice over U.S. nationals in certain British territories appears in an agreement of Aug. 1, 1950, concerning leased naval and air bases. See [1950] "U.S. Treaties and Other International agreements," 585. For the peculiarities of civilian jurisdiction in the Ryukyu Islands, see Schuck, "Trial of Civilian Personnel by Foreign Courts," Proceedings of American Bar Association, Section of International and Comparative Law 62 (1958). The difficulties in the way of renegotiating status of forces agreements so as to permit our civilian offenders to be tried abroad by our civilian courts, when their offenses are also crimes under the law of the country where committed, are discussed in the report of the committee on status of forces agreements, proceedings of American Bar Association, Section of International and Comparative Law 120 (1959). For generous help in consideration of the problem of holding civilian trials abroad and for the references here made I am much indebted to my colleague, Prof. Richard R. Baxter. He is not chargeable with any of my mistakes. This paper would be much better if I could have written it with his great background in military life and in the practical application of international law.

[14] 354 U.S. 524 (1957).

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[1] 99 Congressional Record 4818, 4819 (daily edition May 7, 1953) (remarks of Senator Bricker).

[2] *Ibid.*

[3] 99 Congressional Record 9088 (daily edition July 15, 1953).

[4] See "Hearings on H.R. 8704 before House Committee on Armed Services," 85th Cong., 1st Sess. 3572 (1957).

[5] 99 Congressional Record 9032 (daily edition July 14, 1953) (remarks of Senator McCarren).

[6] See 99 Congressional Record 9032 (daily edition July 14, 1953).

It has been shown that under the principles of international law, as gleaned from judicial precedents, the writings of publicists and state practice, no such immunity exists.[7] As indicated by the following quotation, it is futile to rely upon the case of *The Schooner Exchange* v. *McFaddon* in support of the principle of immunity or waiver of territorial jurisdiction.

"The jurisdiction of the Nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself * * *. All exceptions, therefore, to the full and complete power of a Nation, within its own territories, must be traced up to the consent of the Nation itself. They can flow from no other legitimate source." [8]

Clearly, therefore, the general rule is one of territorial supremacy, and all exceptions thereto "must be traced to the consent" of the territorial sovereign.

The practical observation has been made that, by virtue of the ratification of the NATO Status of Forces Agreement, these interesting legal questions are now merely of academic interest.[9] It is perfectly true that from a practical standpoint the actual operation of these jurisdictional arrangements within the foreign country is what really matters. Nevertheless, it ought to be pointed out that since the existing legal precedents did not deal with a more or less permanent stationing of troops in time of peace, they could not possibly have authoritatively disposed of the international legal questions involved. Also one ought to mention that it was unfortunate to speak of the NATO Status of Forces Agreement. The word "Agreement" tended to give the impression that an executive agreement or other informal arrangement was involved rather than a solemn treaty duly ratified by the Senate. This added to the misunderstanding of servicemen, their parents and relatives, who were fearful of trials before foreign criminal courts.

PROCEDURAL AND OTHER SAFEGUARDS

It will be remembered that paragraph 9 of article VII of the NATO Status of Forces Agreement contains specific procedural safeguards that must be accorded an offender to be tried by the foreign court. In addition to these enumerated safeguards, prior to the ratification of the treaty, the Senate adopted a Statement or reservation which imposed certain duties upon American Commanding Officers when a member of their command was to be tried by a foreign tribunal.[10] From all this there emerged the "Trial Observer," whose function is to report any violation of the guaranties contained in the relevant international agreements or any instances of unfairness in the trial before the foreign court.[11] Also, in order to assure competent legal representation, Congress passed a law authorizing the Secretaries of the military departments to incur expenses incident to the representation of their personnel before foreign judicial or administrative tribunals.[12] In addition to these measures designed to guarantee a fair trial, in the event of a conviction and incarceration in a foreign jail, a Department of Defense directive provides for periodic visits by a representative of the armed forces.[13]

The foregoing safeguards, both legal and moral, refute the charge that these agreements reflect a "callous disregard of the rights of American Armed Forces personnel." In the words of Professor Baxter, "the United States does all that it can to protect the American serviceman who is tried in a foreign court." [14]

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[7] See authorities cited in Re, "The NATO Status of Forces Agreement and International Law," 50 Northwestern University Law Review 349 (1955).

[8] *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cra.) 116, 136 (1812). See also *Cozart* v. *Wilson*, 236 F. 2d 732 (D.C. Cir. 1956).

[9] See Schuck, "Concurrent Jurisdiction Under the NATO Status of Forces Agreement," 57 Columbia Law Review 355 (1957).

[10] For a discussion of the procedural safeguards in paragraph 9 of article VII and the Senate statement, see Re, "The NATO Status of Forces Agreement and International Law," 50 Northwestern University Law Review 349, 358–62 (1955).

[11] For a brief description of the duties of the Trial Observer, see Brown, "Function of the Trial Observer Under the NATO Status of Forces and Other International Agreements," 1957 Judge Advocate General's Journal 9.

[12] 70 Stat. 630 (1956), signed by the President and effective on July 24, 1956. The law was designed to protect American personnel against possible disadvantages which might have arisen as a result of the unfamiliarity with local laws, customs and language.

[13] See Departments of Defense Directive No. 5525.1, Nov. 3, 1955.

[14] Baxter, "Criminal Jurisdiction in the NATO Status of Forces Agreement," A.B.A. Section on International and Comparative Law 61, 65 (1957).

THE OPERATION OF THE AGREEMENT

Have these jurisdictional arrangements been implemented in the spirit of cooperation that was envisaged by their draftsmen and proponents?

A sufficient length of time has elasped to permit a fair and objective evaluation of their actual operation. Have they operated satisfactorily? The question is designed to ascertain whether American servicemen tried by foreign courts have been treated with justice and fairness.

If this question were to be summarily answered, it would be perfectly accurate to state that both the annual reports of the Department of Defense to the United States Senate [15] and private investigations in the field [16] reveal that the criminal jurisdictional arrangements concerning American servicemen abroad have operated satisfactorily, and that they have not adversely affected either the morale or the discipline of the American forces. It follows clearly that they have not had a detrimental effect on the accomplishment of the important United States military mission in the various countries.

Many of the original fears about the NATO Status of Forces Agreement and similar treaties were founded on the belief that American servicemen would not receive what the American considers "due process of law," and that certain countries imposed cruel and unusual punishments. The significant inquiry, therefore, deals with the results of those trials involving American personnel. In this important respect, the following statement from House Report No. 2213, May 25, 1956, Union Calendar No. 825 of the Committee on Foreign Affairs, relative to the Mutual Security Act of 1956, is reassuring and bears repetition:

"The hearings did not bring a light to a single instance where it is claimed that an American serviceman believed to be innocent has been imprisoned by a foreign court, or an American sentenced for an act which in the United States would not be considered a crime. Neither has any case of mutilation, flogging or any other cruel, unusual, or excessive punishment been cited."

In 1956 Father Snee and Professor Pye, of the Georgetown Law Center, made a field study of the actual operation of Article VII of the NATO Status of Forces Agreement in France, Italy, Turkey, and the United Kingdom. This study reached the following conclusions:

"From our study of the case material and our discussions with the men working in the field, we believe that the trials of American military personnel in the four countries visited are conducted fairly and impartially. The few cases in which we disagreed with the result reached were, in our opinion, marginal cases. In no case studied did we feel that the fundamental rights of any serviceman were violated, or that procedures were followed or results were reached which were such as to shock the conscience or offend against a concept of ordered liberty." [17]

A study of the testimony, reports and other materials submitted to Congress reveals unmistakably that these treaties have worked well in practice.[18] These documents will also reveal that the Department of Defense has adhered strictly to the policy of protecting "to the maximum extent possible the rights of United States personnel who may be subject to criminal trial by foreign courts. * * *" [19]

The reports of the Department of Defense on the operation of the criminal jurisdictional arrangements throughout the world, submitted annually to a subcommittee of the Committee on Armed Services of the Senate, summarize the American experience and set forth the relevant statistical data. In the most recent hearing before the subcommittee, the Assistant General Counsel of the Department of Defense stated that "our experience under these agreements continues to be generally satisfactory." [20] Predicated upon the testimony, statements,

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[15] For the latest see "Hearing before a Senate Subcommittee of the Committee on Armed Services," 86th Cong., 2d Sess. 1 (1960). See also Report of the Committee on Armed Services, Senate Subcommittee on the Operation of Article VII of the NATO Status of Forces Agreement 2 (1960).

[16] See, *e.g.*, Snee & Pye, Status of Forces Agreement and Criminal Jurisdiction (1957).

[17] Snee & Pye, Status of Forces Agreement and Criminal Jurisdiction 124 (1957).

[18] See, for example, Statement of Monroe Leigh, Assistant General Counsel, Department of Defense, in Operation of article VII, NATO Status of Forces Treaty, "Hearing before a Senate Subcommittee of the Committee on Armed Services," 84th Cong., 2d Sess. 2–5 (1956).

[19] See Department of Defense Directive No. 5525.1, Nov. 3, 1955.

[20] Hearing Before a Senate Subcommittee of the Committee on Armed Services, 86th Cong., 2d Sess. 1 (1960) to review, for the period December 1, 1958, through Nov. 30, 1959, the operation of article VII of the agreement between the parties to the North Atlantic Treaty, together with the other criminal jurisdictional arrangements throughout the world.

and statistical exhibits submitted, the Committee on Armed Services of the Senate, on June 29, 1960, published its most recent report. This report, made by its subcommittee on the operation of article VII of the NATO Status of Forces Agreement, declared its view of the operation of these agreements as follows:

"It is the view of the subcommittee that generally the criminal jurisdictional arrangements regarding United States troops abroad have operated satisfactorily and have not adversely affected during the reporting period the morale and discipline of our forces, nor have they had a detrimental effect on the accomplishment of our military missions in the various countries." [21]

It is interesting to note that the report states at the outset that the subcommittee did not consider the constitutionality of the treaty. Moreover, the subcommittee made no attempt to determine whether it is wise or unwise, as a matter of national policy, for the United States to enter into reciprocal arrangements which recognize the exercise of criminal jurisdiction of foreign countries where United States troops are stationed. The report adds that any "re-examination of the broad policy questions would properly come before the Senate Foreign Relations Committee." [22]

STATISTICAL DATA OF OFFENSES

The report contains the statistics regarding offenses subject to foreign jurisdiction and their disposition, for the year ending November 30, 1959, on both a NATO and a world-wide basis. World-wide, there were 12,909 cases subject to foreign jurisdiction, of which 7,745 were in NATO countries. In 62.43 percent of the world-wide total, jurisdiction of the receiving state was waived, as compared with waivers in 58.37 percent of the NATO cases. However, the NATO figure was higher by 1.6 percent than in the preceding year, although the overall percentage of waivers had decreased slightly. It is interesting to note that jurisdiction of Japanese courts was waived in 96.31 percent of the 3,580 cases involved.

In interpreting the statistical data submitted, it is significant to note the high degree to which the traffic cases constitute the offenses subject to foreign jurisdiction. Of the 12,909 offenses, worldwide, 9,335 were traffic violations. In the NATO countries, of the 7,745 offenses, 5,914 were traffic violations. World-wide, of the 4,070 trials of Americans, 2,720 were for traffic violations.

Of the 4,070 cases tried in foreign courts throughout the world, 214 resulted in acquittal, 3,608 in fine and reprimand only, 148 in suspended sentences of confinement, and 100 (or 2.45 percent) in confinement. Of the 2,740 cases tried in foreign NATO tribunals, 114 resulted in acquittal, 2,485 in fine or reprimand only, 90 in suspended sentences of confinement, and 51 (or 1.86 percent) in confinement. Since the various effective dates of the NATO Status of Forces Agreement (through Nov. 30, 1959), of 39,827 cases subject to jurisdiction in foreign NATO courts, 15,107 were tried—a waiver rate of just over 62 percent. There was actual confinement of 389 persons, or 2.57 percent of those tried. On a world-wide basis for a comparable period of time, of a total of 72,598 cases, 69.19 percent were waived. Sentences of confinement, not suspended, resulted in 2.79 percent of the cases tried.

Later statistics are now being prepared by the Department of Defense, but will not be released prior to their submission to the Senate Subcommittee. It is anticipated that figures for the year ending November 30, 1960 will be available in a report to be issued in June of 1961. It is anticipated that the most noticeable difference in the statistics of the new reporting period, as compared with previous years, will be in the low number of United States personnel confined in foreign penal institutions pursuant to sentences in foreign courts. The latest published figures show a total of 73 Americans confined on November 30, 1959. As of February 28, 1961, the total had been reduced to 49, distributed as follows: 2 in Bermuda, 1 in Canada, 10 in France, 1 in Italy, 26 in Japan, 1 in New Zealand, and 8 in the United Kingdom.

It is expected that the new figures will show no significant change in the waiver rate, although there has been an increase in foreign trials of United States dependents and civilian employees, as a result of the much publicized decisions of our Supreme Court which held unconstitutional the trial of such persons by courts-martial.

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[21] Report of the Committee on Armed Services, Senate Subcommittee on the Operation of Article VII of the NATO Status of Forces Agreement 2 (1960).

[22] *Ibid.*

PERTINENT DECISIONS OF THE SUPREME COURT

(1) *Court-Martial Jurisdiction Over Dependents and Civilian Employees.* In 1956, in the cases of *Reid* v. *Covert*[23] and *Kinsella* v. *Krueger*,[24] the Supreme Court upheld the constitutionality of the court-martial convictions of Mrs. Clarice Covert, for the murder in England of her husband, an Air Force sergeant, and Mrs. Dorothy Krueger Smith, for the murder in Japan of her husband, an Army colonel. Both defendants were dependents who had accompanied their husbands, Armed Forces personnel, abroad. After a rehearing, in a historic decision rendered on June 10, 1957,[25] the Court reversed itself and ordered Mrs. Covert and Mrs. Smith released from custody. The Court held that article 2(11) of the Uniform Code of Military Justice, providing for the trial by court-martial of persons accompanying the Armed Forces of the United States in foreign countries, cannot, in capital cases, be constitutionally applied to the trial of civilian dependents accompanying members of the Armed Forces overseas in time of peace. In acting against its citizens abroad, said the Court, the United States can act only within the limitations imposed by the Constitution, including article III, paragraph 2, and the fifth and sixth amendments; and no agreement with a foreign nation can confer on Congress, or any other branch of the government, power which is free of the restraints of the Constitution. Under the Constitution, courts of law alone are given power to try civilians for offenses against the United States.

The effect of these decisions was broadened on January 18, 1960, by other decisions of the Supreme Court. *Grisham* v. *Hagan*[26] involved a civilian employee of our Armed Forces in France, convicted by court-martial of murder. The court held that civilian employees could no more be tried by court-martial for capital offenses than could dependents, and, therefore, on the authority of *Reid* v. *Covert*, reversed a lower court decision which had denied a writ of habeas corpus.

In *Kinsella* v. *United States ex. rel. Singleton*,[27] the Court held that no distinction could be drawn in these cases between capital and noncapital offenses. An Army private named Dial, and his wife, had been convicted by court-martial in Germany for involuntary manslaughter in the death of one of their children. The court-martial conviction of Mrs. Dial, a dependent accompanying a member of the Armed Forces abroad, for this noncapital offense, was held to be unconstitutional.

Finally, in *McElroy* v. *United States ex. rel. Guagliardo*[28] and *Wilson* v. *Bohlender*, the Court considered the cases of two civilian employees convicted by courts-martial of noncapital offenses—one in Morocco for larceny, and the other in Berlin for sodomy. As had been true of capital offenses, the Court held that no distinction could be drawn between dependents and civilian employees convicted by courts-martial of noncapital offenses. All are unconstitutional.

It will be noted that all of these cases questioned the constitutionality of provisions of the Uniform Code of Military Justice, rather than the jurisdictional arrangement involved. As to the Uniform Code of Military Justice, the law is now clear. A provision which would give to the United States, as sending state, either exclusive or primary jurisdiction over an offense committed abroad by a dependent or civilian employee, does not authorize trial by courts-martial in view of the constitutional limitations upon the use of courts-martial. Nor can waiver of its primary jurisdiction over an offense by a receiving state, under the terms of a Status of Forces Agreement, permit an otherwise unconstitutional trial by court-martial. As a result, a receiving state having primary jurisdiction in such a case will not be inclined to waive it; nor will our government be either inclined or justified in requesting a waiver. Rather, a waiver is to be expected where the primary jurisdiction is ours.

The Supreme Court decisions holding that civilian employees and dependents are not subject to trial by court-martial in times of peace have raised complex problems for the executive branch. Since the decisions are based on constitutional

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[23] 351 U.S. 487 (1956).
[24] 351 U.S. 470 (1956).
[25] Reid v. Covert, 354 U.S. 1 (1957).
[26] 361 U.S. 278 (1960).
[27] 361 U.S. 234 (1960).
[28] 361 U.S. 281 (1960). (This case was heard together with *Wilson* v. *Bohlender*.)

grounds, it is beyond the power of Congress to cure the situation by legislation insofar as trial by court-martial is concerned. All of the alternatives to the trial of such personnel by court-martial involve the most complex substantive and procedural problems, ranging from a constitutional amendment to overseas trials before special American tribunals. Apart from administrative sanctions for relatively minor offenses, no practical alternative has been found other than trial by the foreign courts. Commenting on this "only practical alternative," Snee and Pye assert that the Supreme Court "for all practical purposes denied to the overseas dependents the possibility of trial by any American court, even a court-martial." [29]

It may be added that this is what might have been expected in the absence of a Status of Forces Agreement. The fact that the particular agreement cannot, by virtue of our own Constitution, transfer jurisdiction to an American court-martial, is certainly no ground for adverse criticism of the Agreement.

(2) Constitutionality of the status of forces agreement—the Girard case

The constitutionality of a provision of a Status of Forces Agreement was called directly into question in a case which drew even wider public notice than those which have been mentioned—the case of *Wilson* v. *Girard*.[30] Girard was an Army sergeant stationed in Japan. He was confined by U.S. military authorities for the purpose of being delivered to the Japanese authorities for trial for the killing of a Japanese while, according to U.S. authorities, on official duty. The Japanese contended that the act was not done on official duty, and that the primary jurisdiction rested with them, as receiving State, rather than with us. A joint committee was unable to agree on this question, and referred the matter to higher authority, whereupon the United States waived whatever jurisdiction it might have had over the offense.

Girard petitioned for a writ of habeas corpus in the U.S. District Court for the District of Columbia, contending that the Japanese had no jurisdiction over the offense, and that his detention, for purpose of delivery to the Japanese for trial, was illegal. On June 18, 1957, the district court found the act to have been performed on official duty, giving primary jurisdiction to the United States, which waived it. The question was then posed whether Girard had a constitutional right to trial by an appropriate American tribunal, which right would have been violated were he to be delivered for trial to the Japanese. The district court answered the question in the affirmative and held that to deliver Girard for trial to the Japanese would violate his constitutional rights. The court consequently enjoined the military authorities from deilvering Girard to the Japanese. The petition for a writ of habeas corpus, however, was denied, inasmuch as Girard was still a member of the Armed Forces and was subject to trial by court-martial for the same offense.[31]

On July 11, 1957, the Supreme Court reversed the judgment granting the injunction and affirmed the denial of the writ of habeas corpus. After going into the history of the Status of Forces Agreement with Japan, the Court found that the United States and Japan had signed a security treaty on September 8, 1951, which was ratified by the Senate on March 20, 1952, and proclaimed by the President to be effective April 28, 1952. Article III of this treaty authorized the making of administartive agreements concerning U.S. Armed Forces in Japan. On February 28, 1952, the two nations signed such an administrative agreement on jurisdiction over offenses committed in Japan, with a provision permitting waiver by the state having primary jurisdiction. This agreement was to become effective on the same day as the treaty, and was considered by the U.S. Senate before it gave its consent to the treaty by its ratification. The agreement also provided that upon the coming into effect of the NATO Status of Forces Agreement, which had been signed on June 19, 1951, the United States and Japan would conclude a similar agreement on criminal jurisdiction. The NATO Agreement became effective August 23, 1953; and on September 29, 1953 the United States and Japan signed a protocol agreement embodying the NATO provisions, effective October 29, 1953. The Supreme Court held that, in approving the security treaty, the Senate authorized the making of the administrative agreement and the protocol.

Citing the *The Schooner Exchange* case for the proposition that "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender of its jurisdiction," the Court held that Japan's cession to the United States of juris-

[29] Snee & Pye, Status of Forces Agreement and Criminal Jurisdiction 44 (1957).
[30] 354 U.S. 524 (1957).
[31] *Girard* v. *Wilson*, 152 F. Supp. 21 (D.D.C. 1957).

diction to try American military personnel for offenses against the laws of both countries was conditioned by the covenant that the state with primary jurisdiction would give sympathetic consideration to the request of the other state for waiver. Addressing itself squarely to the issue whether the carrying out of this provision, authorized by the treaty, for waiver of the qualified jurisdiction granted by Japan, was prohibited by the Constitution or legislation subsequent to the treaty, the Court held that there was no constitutional or statutory barrier to the provision. In the absence of encroachment upon constitutional righs, said the Court, "the wisdom of the arrangement is exclusively for the determination of the legislative and executive branches." The Court thus upheld the constitutionality of a waiver of primary jurisdiction by the United States under the agreement, and, by implication, sustained the constitutionality of the Status of Forces Agreement.

SOME DIFFICULTIES AND SPECIAL PROBLEMS

Notwithstanding the rare exceptional case that is newsworthy because it is essentially an oddity, any impartial examination of the literature and documents will demonstrate that these agreements have worked well. In this connection, one may repeat with complete accuracy the statement made by Senator Wiley, who, referring to the bilateral arrangements subsequent to World War II and before NATO, said that "our experience with these countries with respect to this problem has been good." [32] This, of course, does not mean that special problems have not arisen.

In this latter category may be placed our experience in Turkey. Because of the substantial difference between the official rate and the free rate of exchange for Turkish lire, certain "black market" activities had led to arrests and trials of American servicemen by the Turkish courts. While the agreement has worked well in Turkey and excellent community relations exist between American personnel and the Turkish people, the length of Turkish trial proceedings has caused disturbing problems. To the American it is difficult indeed to understand that under standard Turkish criminal procedure, trials are carried on in numerous intermittent hearings—that may possibly continue for a year. Although this practice is not peculiar to Turkish law, little comfort is derived by the serviceman who, as a result, is retained in Turkey after his normal rotation date. Although the results have been just, repeated efforts have nevertheless been made through the State Department to accelerate such trials when American servicemen are involved. Also, although discussions during this past year indicate that a solution may be at hand, another disturbing factor has been the reluctance of the Turkish Government to waive its primary jurisdiction over offenses committed by American servicemen.

Another problem relates to the practice of permitting the prosecution to take an appeal after an acquittal by the trial court. Although this procedure is not unusual, and exists in Japan, France, and Turkey, it is repugnant to the American legal mind. For example, although the Japanese Constitution expressly prohibits double jeopardy, under their system of law a person is not twice put in jeopardy until all of the appellate proceedings have been concluded. It can only be said in this connection that, in those countries where this procedure exists, the Amercan authorities are doing everything possible to minimize its adverse effects.

Special reference must be made to the situation in Iran. The United States has no jurisdictional arrangement in Iran, and of the eight cases that arose in the year ending November 30, 1959, no waivers of jurisdiction were granted by the Iranian authorities. The American commanders in Iran report that the lack of a jurisdictional agreement with Iran has had an adverse effect upon the morale of their commands. At this juncture, it is well to mention that although there is now a status-of-forces agreement with the Federal Republic of Germany,[33] prior thereto, the uncertainty as to the authority to exercise jurisdiction over civilians produced disturbing results upon both morale and discipline. This uncertainty has now been settled by the Supreme Court of the United States by its holdings that civilians cannot be tried by courts-martial.

A deficiency of the NATO Status of Forces Agreement, also present in the Japanese Administrative Agreement, which gave rise to the dispute in the *Girard* case, is the absence of a clause which provides who shall determine whether a particular offense arose out of the performance of official duty. The "supple-

[32] 99 Cong. Rec. 9030 (daily ed. July 14, 1953).
[33] See A.B.A. Section on International and Comparative Law, Report of the Committee on Status of Forces Agreements 99, 132 (1960).

mentary agreement" signed on August 3, 1959, with the Federal Republic of Germany provides that this determination shall be made in accordance with the law of the sending state. It also provides that the German court or authority "shall make its decision in conformity with" the certificate of the military authorities.

In effect, therefore, the German authorities, in the first instance, accept the military certificate as conclusive. It is conclusive only in the first instance because it is also provided that in exceptional cases the certificate may be made, at the request of the German court or authority, the subject of review through the medium of discussions between the U.S. Embassy and the Federal Republic of Germany. In conclusion, it may be added that this "supplementary agreement" is more favorable to the United States than the NATO Status of Forces Agreement.

One additional matter ought to be mentioned, even though it does not deal with the operation of any jurisdictional arrangement. The Department of Defense has reported that the statutory authority to pay counsel fees, court costs, bail, and other expenses incident to the representation before foreign courts, has been of great assistance in assuring servicemen competent representation and the protection of their legal rights. In view of the Supreme Court decisions previously discussed herein, civilians, not being subject to military law, are no longer entitled to the benefits of that law.

CONCLUSION

From the foregoing, certain conclusions stand out in bold relief. Even the most stern critics would have to admit that none of the outrageous situations originally conjured up have actually occurred. Naturally, many difficult and some unanticipated questions were presented.[34] All the reports and statements of responsible authorities, however, reveal beyond any doubt that the agreements have worked "very satisfactorily," [35] that prisonsers have been treated fairly, and that there has been "no evidence of abuse or mistreatment." [36] Indeed, the recent reports indicate that whereas the existence of an agreement does not adversely affect morale or the accomplishment of the mission, the absence of an agreement does have an adverse effect upon morale and the accomplishment of the mission.

Those who envisaged nothing but difficulties and injustices will find the following words of the Assistant General Counsel of the Department of Defense, recently told to a subcommittee of the Committee on Armed Services of the Senate, most reassuring: "I believe it evident that, with hundreds of thousands of U.S. servicemen, civilian employees, and dependents abroad, we are bound to experience difficult and continuing problems. * * * However, it can be said in all fairness that our operations under the NATO Status of Forces Treaty and similar agreements, continue to be workable and satisfactory." [37]

If additional reassurance is required, one ought to note the statement of Senator Ervin that "as a general rule, the punishment meted out to American military and naval personnel by the foreign courts has been substantially less than the punishment which would probably be meted out in similar cases in American courts." [38]

The legal and practical conclusion has been made that these agreements "contain express provisions, which go beyond the minimum requirements of international law, to assure fair trials." [39] When to this is added the statement of the President of the United States that "the maintenance of U.S. military strength in Europe is essential to the security of the Atlantic community and the free world as a whole," [40] both the benefit and importance of the NATO Status of Forces Agreement become too obvious to question.

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[34] A good example is the *Whitley* case dealing with the effect of waiver or nonaction. *Aitchison* v. *Whitley*, 43 Revue Critique de Droit International Prive 602 (1954). Schuck, "Concurrent Jurisdiction Under the NATO Status of Forces Agreement," 57 Columbia Law Review 355 (1957).

[35] See hearings before a Senate subcommittee of the Committee on Armed Services, 84th Cong., 1st sess. 6 (1955).

[36] See Report of the Senate Committee on Armed Services, 84th Cong., 2d sess.—(July 12, 1956).

[37] Hearing before a Senate subcommittee of the Committee on Armed Services, 86th Cong., 2d sess. 11 (1960).

[38] Ibid.

[39] Committee on International Law of the Association of the Bar of the City of New York, Report on Status of Forces Agreements 21–22 (1958).

[40] President John F. Kennedy, in message to the NATO Council in Paris, Feb. 16, 1961.

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THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
November 3, 1965.

To: Senate Constitutional Rights Subcommittee.
From: American Law Division.
Subject: Bibliography on Courts-Martial.
(Attention of Mr. Paul Woodard).

There is herewith submitted, as per your request, a bibliography of law review articles and treatises on military courts-martial with particular reference to those dealing with the constitutional rights available to an accused in such proceedings.

ROBERT M. UJEVICH,
Legislative Attorney.

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MILITARY JUSTICE

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS.

S. Congress. Senate. OF THE

COMMITTEE ON THE JUDICIARY.

AND A

SPECIAL SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, and S. 2907

BILLS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE ARMED SERVICES

JANUARY 18, 19, 25, AND 26; MARCH 1, 2, AND 3, 1966

PART 3
(APPENDIX B)

Printed for the use of the Committees on the Judiciary and Armed Services

U.S. GOVERNMENT PRINTING OFFICE

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MILITARY JUSTICE

APPENDIX B

Questionnaires to the Defense Department

I. Subcommittee Questionnaire to Department of Defense on Bills To Improve the Administration of Justice in the Armed Services

[Letter transmitting February 24, 1966, questionnaire to DOD]

February 24, 1966.

Hon. Thomas D. Morris,
Assistant Secretary of Defense (Manpower)
Department of Defense, The Pentagon, Washington, D.C.

Dear Secretary Morris: On behalf of the members of the Constitutional Rights Subcommittee and the Special Subcommittee of the Armed Services Committee, I should like to express my appreciation for the valuable testimony which you submitted during the current hearings on the 18 bills concerning military justice. The problem of reconciling the special needs of an efficient, disciplined, and effective military establishment with the historic demands of American tradition for due process and fair play in adjudication of criminal punishment is extremely delicate. Your contribution will play a great part in the effort of Congress to strike a meaningful balance between these imperatives.

Pursuant to the request made at the close of your appearance before the subcommittees, I am submitting herewith a series of interrogatories in connection with your testimony. The answers should complement your testimony and will be made part of the record of the hearings. The references in parentheses are to the pages in the hearing transcript where the subject was discussed. Where your answers pertain to formal policy statements or regulations, please include a copy or give the reference. Where figures or statistics are requested, please supply them for each of the past 5 years, or such shorter periods for which information is reasonably available, and please give separate figures for each of the factors referred to. If the policy has changed in recent years, please so indicate, and where relevant, please answer the question with reference to the earlier policy.

In addition to the material asked for above, we should also like to receive supplemental responses to the questionnaire and aide memoire which were submitted to your Department by the Constitutional Rights Subcommittee before the 1962 hearings on the constitutional rights of military personnel. Please supply statistics to date, and indicate any changes in policy, regulations, trends, etc., that have occurred in the intervening years.

Once again, let me express my appreciation to you and the other members of your Department for the invaluable assistance which you have rendered.

With all kind wishes, I am,

Sincerely yours,

Sam J. Ervin, Jr., *Chairman.*

I. NAVY JAG CORPS (S. 746)

1. In his statment, Secretary Morris stated that the Department of Defense has supported the concept of a Judge Advocate General Corps in the Navy (transcript, p. 31). However, it was requested that this committee defer pending action on proposed revision of officer personnel laws (transcript, p. 30).

(*a*) Is this still the position of the DOD?

(*b*) Admiral Hearn, what is your personal opinion as to the need for a Judge Advocate General's Corps in the Navy?

(*c*) Is it your position that independent consideration of only that part of the Bolte proposal, specifically subsections 43–45 which deal with creation of the corps, also should be deferred until the entire package is acted upon?

2. What is the history of the Bolte package; how did it originate, when was it first introduced into Congress, and what legislative action has been taken to date?

(*a*) In respect to the history of the Bolte proposals, what part has the Navy JAG proposal played? Was it included in the original package? If not, when was it added?

(*b*) What is the present status of the Bolte package in DOD?

(*c*) What is its present status in Congress? Are hearings scheduled or anticipated in this session?

(*d*) Is it contemplated in the DOD that the Bolte package might be divided for easier consideration by the Congress?

(*e*) If such were proposed, would this be opposed by DOD?

(*f*) If broken down, would the Navy JAG Corps remain a part of the package, or would it be dropped?

(*g*) Would the Navy support a separate corps proposal if subsections 43–45 were dropped from the Bolte package?

(*h*) Would Navy support a separate corps bill such as S. 746 if subsections 43–45 remained a part of the omnibus Bolte bill? If they were removed from the package bill?

3. What comments are there to the corps proposal as presently set forth in S. 746 and what technical changes are recommended?

(*a*) Would the Navy and DOD recommend passage of S. 746 if it were changed to incorporate the corps provisions presently comprising subsections 43–45 of the Bolte package?

(*b*) Which of the two proposals, S. 746 or subsections 43–45, is preferred, and for what reasons?

II. FIELD JUDICIARY (S. 745)

1. In addition to the necessity for maintaining the flexibility permitted by the administrative authorization of a field judiciary, what other reasons exist for not legislatively establishing this program (transcript, p. 113)?

(*a*) Except for the unforeseen circumstances produced by wartime, what other situations can be foreseen in which the legislative creation of a field judiciary would prove too inflexible?

(*b*) Would including an exception for "time of war" or "national emergency" provide the desired flexibility?

(*c*) Assuming that the legislative creation of a field judiciary is considered necessary, what changes or additional provisions would you suggest to overcome the problems or objections set forth above?

(*d*) Is the field judiciary system used at all in the Vietnam operation, or has it been used at any time under wartime conditions? What problems have been raised in these circumstances, and how have they been overcome?

(Question to Air Force only:)

2. What is the present situation in the Air Force with respect to the assignment of law officers (transcript, p. 115)?

(*a*) Are there such JAG personnel permanently stationed in every command where special courts-martial are conducted? Is it the present practice in the Air Force to have all trials requiring a law officer in one or a few geographical areas?

(*b*) Why would the establishment of a field judiciary require the Air Force to "spot people around in various parts of the world" and why would the program require "about four times as many people"? Please specify how the enactment of S. 745 would impose a greater manpower burden on the Air Force.

III. SUMMARY COURTS-MARTIAL (S. 759)

1. What has been the number of summary courts-martial in recent years since the 1963 amendment to article 15 (transcript, p. 215)?

(*a*) Have certain commands eliminated the summary court-martial (transcript p. 66)?

(*b*) Does the frequency of summary courts-martial vary significantly in different commands? What is the high, low, mean, and median number of summary courts-martial in various commands?

(*c*) To what is the variation in number of summary courts-martial attributed?

2. Of the number of summary courts-martial in recent years, how many represent trials resulting from refusal to accept article 15 punishment?

(*a*) Are there statistics on the number of article 15 imposed or offered? In how many cases did the refusal to accept article 15 punishment not result in summary courts-martial?

3. How many special courts-martial have there been in recent years?

(*a*) Of this number, how many resulted from refusal to accept summary court-martial?

(*b*) Of the number given in (*a*), in how many special courts-martial did the accused request legally qualified counsel and how often was this request granted?

4. What procedural protections for the accused are present in a special court-martial that are not present in summary court-martial (transcript, p. 70)?

(*a*) From the standpoint of insuring impartiality of adjudicatory procedures, including review, what advantages are there for the accused in a special court-martial that are not present in a summary court-martial?

(*b*) What is the difference in review procedures after a summary court-martial conviction, and those available after special court-martial? Is there any difference when that special court-martial trial resulted from a refusal to accept a summary court-martial?

5. Considering the number of instances in which a summary court-martial is elected by a member in lieu of the offer of article 15 punishment, and considering also the frequency in which special courts-martial are held because of a refusal to accept a summary trial, what is the estimate of times in which a special court-martial would be elected in lieu of an article 15, if the summary court-martial were abolished?

6. What opportunities exist for the accused in a summary court-martial to review the record and note his objections or comments (transcript, p. 63)?

(*a*) What objection is there to allowing the accused to note his concurrence, or explain his nonconcurrence, on the record sheet of a summary trial?

7. Are defendants permitted by official Defense Department or Service policy or regulation to have counsel assist them in summary courts (transcript pp. 70 and 81)?

(*a*) May they have special assistance from nonlegal personnel of their own choosing, whether in service or not?

(*b*) If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

(*c*) Are servicemen regularly informed prior to trial of their right to have counsel in summary courts?

(*d*) In how many cases have counsel appeared to assist the accused in summary courts-martial, and how often they have been legally-trained or qualified?

(*e*) What is the comparison of acquittal rates when counsel is present in summary courts and when they are not?

8. What official guidelines are issued to commanders to assist them in the decision as to whether a minor offense warrants an offer of an article 15 or a summary court-martial? Is the decision whether to offer an article 15 or a summary court-martial essentially a matter of the officer's good judgment?

(*a*) Is it true that the practical effect of the officer's initial decision to offer an article 15 or a summary court-martial is to determine whether the serviceman has an election to trial by special court-martial?

9. In view of the fact that the special court-martial contains certain procedural protections not afforded to summary courts-martial, why should not a man be permitted to elect a special court-martial, whether or not he has been offered and has refused an article 15, if he believes he has a better chance thereby of establishing his innocence, and is willing to risk the possible harsher punishment of a special court-martial?

(*a*) Aside from the additional manpower requirements of a special court-martial, and that it is possible to impose harsher punishment, what factors militate against offering a special court-martial to any serviceman who requests it?

(*b*) What is your estimate of the influence that the creation of a single law officer special court-martial would have on the manpower demands involved in

giving an election of a special court-martial to every serviceman who requests one?

(*c*) Would the objections to abolishing summary courts-martial because of the manpower requirements be met by permitting only trial by a single law officer special court-martial when an article 15 is refused?

IV. CHANGES IN SPECIAL COURTS-MARTIAL (S. 752)

1. In how many special courts-martial have there been legally qualified counsel present for the accused?

(*a*) How often has legal counsel been requested, and how often has it not been made available?

(*b*) What is the comparative acquittal, appeal, and successful appeal rates for special courts-martial in which legal counsel has and has not been made available?

(*c*) How often has there been legally qualified counsel on the defense side but not the other?

(*d*) Are any trends evident, and are any conclusions suggested by this experience?

2. In how many cases has there been a lawyer present on the special court-martial (transcript, p. 137)?

(*a*) In how many cases has the lawyer been a member, but not the president?

(*b*) In how many cases has there been legal counsel for the defense but no lawyer present on the court?

(*c*) How often has a lawyer been assigned to the court because of the presence of legally qualified defense counsel?

(*d*) In how many cases has a lawyer been challenged from a special court-martial and how does this compare with challenges of nonlegally trained personnel?

(*e*) What is the comparative rate of successful appeal, on any grounds, to COMA when the president is legally qualified and when he is not?

(*f*) Similarly, what is the comparison of results when these two classes of cases are reviewed under articles 65–67?

(*g*) Are the above answers (*e*) and (*f*) affected where the defense counsel is legally qualified?

3. When issues such as the admissibility of evidence, voluntariness of confessions, sufficiency of proof, form of instructions, etc., are raised by legal counsel, what guidance is available to the nonlegally trained court president and members in deciding them? Many they seek the advice of JAG personnel (transcript, p. 136)?

4. Assuming that the law is changed to require the appointment of a law officer before a special court-martial can adjudge a BCD, to what degree is there a danger that the mere appointment of a law officer will suggest that a BCD is considered appropriate by the convening authority?

(*a*) Would the mandatory assignment of a law officer in every case in which the possible penalty is a BCD completely eliminate the problem or at least mitigate it sufficiently? What objections, if any, would there be to such a provision?

(*b*) What other suggestions can be made for avoiding this danger?

V. ADMINISTRATIVE DISCHARGES

1. What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for the specific charges upon which the action was based; for instance, homosexuality, conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

(*a*) Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

(*b*) If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

2. What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

(*a*) Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules

not going to the merits, because the sentence did not include a discharge, or because of some other reason.

3. What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

(*a*) Please classify these cases separately according to the various reasons for deciding on a second proceeding and the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

4. What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc.?

5. Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (transcript, pp. 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

(*a*) In how many cases were administrative discharge proceedings instituted in these circumstances?

(*b*) Of these, in how many cases did the member request a court-martial?

(*c*) What were the final dispositions of these cases?

(*d*) In how many cases was pre-service homosexuality a factor in these instances? Associating with known homosexuals?

(*e*) Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

(*f*) Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer?

6. Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the UCMJ, except in cases of homosexuality (transcript, p. 184)? Is this policy expressed in formal regulations or directives?

7. Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless court-martialed and what were the dispositions (transcript p. 179)?

(*a*) When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed?

(*b*) When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if guilt had been established in a military tribunal, or is it based merely on the fact of civil conviction?

8. Are there procedures in the UCMJ for court-martial and discharge of members who are habitual offenders?

(*a*) What is the policy of utilizing the authority set forth in section 127c (B) of the Manual? Is this authority utilized to its maximum?

(*b*) Please set forth the number of courts-martial based on section 127c (B), and compare this to the number of administrative separations of various types given for similar reasons.

9. What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (transcript, p. 180)?

(*a*) How many administrative discharge cases have there been for each type of case given above?

10. Assuming that it is considered advisable to enact S. 758 to give an election of a court-martial in some instances to members accused of offenses under the UCMJ when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (transcript, pp. 184–194)?

11. Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum

elements of due process, what is the order of preference of the following alternatives or groups of alternatives from the standpoint of the service?

(*a*) Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the subcommittees.

(*b*) Give an unqualified election of a court-martial to the member.

(*c*) Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.

(*d*) Grant post-discharge review of legal issues of COMA.

(*e*) Some other legislative change (please specify) desired by the service.

VI. REVIEW OF ADMINISTRATIVE DISCHARGES BY COMA (S. 753)

1. Does the number of cases referred to in General Hodson's statement (transcript, p. 54) represent the number of discharge cases reviewed by discharge review boards? How was this figure computed?

(*a*) What is the number of administrative discharges reviewed by DRB for prior years?

(*b*) How many administrative discharge cases are there annually for unfitness, unsuitability, or misconduct in each service?

(*c*) What is the breakdown of these cases in terms of type of discharge, and of these, which are the result of board hearings?

(*d*) Of the number of discharge cases reaching DRB and BCMR, what is the breakdown in terms of type of discharge?

(*e*) For each of these types of discharge, in how many cases have the DRB and the BCMR changed the character of discharge, and to what have they been changed?

2. Of the cases reaching review, how many of them involve determination of legal questions, and what are the usual kinds of legal questions raised?

(*a*) Does this answer include as a "legal" question, issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulation"?

(*b*) What types of legal issues (if different from above) would be likely to reach COMA if S. 753 were law?

3. What factors would operate to dissuade a former serviceman from taking an appeal of an administrative discharge to COMA?

4. On the basis of the total of administrative discharge cases, those reaching review boards, and the answers given above, what is the estimate of the cases of previous years which would have been appealed to COMA if S. 753 had been effective?

5. In view of the testimony that the number of legal issues in administrative discharges in few (transcript, p. 53), what burdens upon COMA would arise from granting this review authority (transcript, p. 211)?

6. Are cases brought before the DRB and BCMR now reviewed by the respective JAG offices? Do JAG personnel as a matter of practice review some or all discharge cases? What standards determine the cases reviewed by the Judge Advocate?

7. What additional burden is involved on JAG personnel in reviewing cases which would be susceptible of review by COMA under S. 753 (transcript, pp. 53 and 54)?

VII. EXTRATERRITORIAL CRIMINAL JURISDICTION (S. 761 AND S. 762)

1. What are the various proposals now being considered for remedying the jurisdictional gap over employees, dependents, and ex-servicemen (transcript, pp. 26, 31, and 141)?

(*a*) Please indicate the present status of each of the proposals considered.

(*b*) What problems are raised by each of these suggestions, and what means might be used to overcome these various objections?

(*c*) Please indicate the relative desirability of each of these suggestions.

2. What suggestions are being considered by the Departments of State and Justice, and in what stage of consideration are each of these proposals?

(*a*) In what office of these departments are these proposals being considered (transcript, pp. 141 and 148)?

3 With respect to the treatment of offenses committed overseas by employees and dependents, are there any formal guides issued to commanders which describe or recommend the type of administrative punishment appropriate for var-

ious kinds of offenses? Is there any attempt at standardizing the punishment given in various commands for similar offenses (transcript, p. 145)?

4. What kinds of privileges are subject to revocation as sanctions (see column 2 under Sanctions Imposed by U.S. Authorities, chart A) (transcript, p. 142)?

5. What other administrative action (except return to the United States) is possible as a sanction (see column 4 under Sanctions Imposed by U.S. Authorities) (transcript, p. 142)?

6. What is your evaluation of the suggestion that 18 U.S.C. section 7 (maritime jurisdiction) be expanded to cover all crimes committed by U.S. citizens elsewhere than on U.S. soil? By Department employees and dependents only?

(*a*) What practical problems would be encountered by such a provision, and are they different from those now encountered by the section as currently enforced?

(*b*) How are the problems under this section met at present?

(*c*) What possible devices could be employed to eliminate or alleviate these practical problems if section 7 were so amended?

(*d*) If it is your judgment that any provision for extra-territorial jurisdiction would not be practical for ordinary offenses, would you nonetheless see value in creating such jurisdiction for the extremely serious offense?

(*e*) What additional means are necessary to assist military authorities in coping with disciplinary problems of oversea dependents, such as juvenile delinquency, minor nontraffic offenses, and in maintaining law and order in the community?

7. What is the number of cases in recent years of crimes committed by servicemen which were discovered subsequent to their release from service? Please classify them as to type of offense, and indicate what, if any, judicial or other action was taken against these ex-servicemen.

VIII. COMMAND INFLUENCE (S. 749)

1. Assuming that "command influence" may be present when members of a court, or a counsel, imagine that a certain result is desired by higher authority, even though this authority has in no way expressed or indicated his judgment of the case, could any form of legislation counteract this type of "command influence"?

2. What would be your opinion of a proposed amendment to the UCMJ which would specify that the exercise of command influence is a court-martial offense?

(*a*) Because of the circumstances necessarily attendant to a case under such a proposed article, how likely would prosecution be?

(*b*) Would this proposal nonetheless have value as an expression of the seriousness with which such activity is viewed, thereby greatly assisting the services in their efforts to educate officers to their responsibilities in this area (transcript, p. 131), and to the need for careful judgment in these situations? If so, would this justify, in your judgment, such an amendment?

3. The subcommittee has received information to the effect that, subsequent to *U.S.* v. *Kitchens*, allegations of command influence were made in the case of *U.S.* v. *Perry and Sparks* in which review was requested by the Court of Military Appeals. The command influence had allegedly been exercised over the two defense counsel who originally defended the accused in their trial at Fort Bragg and over the defense counsel who defended the accused at their retrial at Fort Jackson. What investigation was made of the allegations in that case, what conclusions were reached, and what, if any, disciplinary action was taken?

4. The subcommittee has been informed that there are currently pending two cases in the Court of Military Appeals which involve allegations of an improper lecture to members of the court-martial in connection with trials at Fort Devens, Mass. One of the cases is *U.S.* v. *Albert* (18,960). What were the contentions made by the accused in those cases? In how many cases which reached the boards of review have there been contentions of command influence in recent years?

IX. MISCELLANEOUS

1. In the Navy and the Army, it is current practice not to have senior board members rate the performance of junior members. The reasons given during the hearings (transcript, pp. 101–109) may be summarized as follows:

(*a*) In establishing an independent judicial organization it was considered desirable to make the system free from improper influences in form as well as substance.

(*b*) Since the members of the boards are personally known to some extent by the nonboard rating officer, the board member is not prejudiced by being evaluated by persons ignorant of his performance.

(*c*) The opinions and knowledge of other board members may be solicited by the rating officer; as a consequence there is insulation from conscious or unconscious prejudice on the part of senior board members, without the danger of a member being rated by persons ignorant of the true nature of his performance.

General Manss, what personal comments do you have on each of these observations? If you consider these observations are valid, what additional reasons, in your opinion, outweigh them so as to warrant continuation of the Air Force's present policy?

2. In view of the fact that during war or national emergency the supply of legally trained officers is likely to increase as the number of men in uniform increases (transcript, p. 110), to what extent is it necessary to have "time of war" exceptions for those proposals (such as S. 750, S. 752, S. 754, and S. 758) which require expanded use of legally trained personnel? Why is this exception required for section 35, UCMJ and S. 745?

3. To what extent is the file on cases presented to BCMR or DRB sent to the JAG office for its opinion (transcript, p. 91)?

(*a*) How often is this done, and in what kind of cases?

(*b*) In what percentage of cases is the opinion of the JAG followed by the respective boards? How often is more extensive corrective action taken than that recommended or suggested by JAG?

4. Is it currently the practice of the service, by regulation or otherwise, to inform the parents or guardians of members under 21 years, or those whose parents' permission was necessary for enlistment, of the fact that steps to court-martial or administratively process these members are being instituted?

(*a*) What provisions are made to afford disinterested counsel and advice to immature servicemen, or others not capable of making effective decisions, as to the factors to be weighed in making various elections or choosing between different courses of action in these cases?

5. In view of the DOD position in opposition to the bills affecting administrative discharge procedures, what would be the position of the services on the legislative enactment of the provisions of DOD Discharge Directive 1332.14?

6. Are there any provisions for review of an administrative discharge in an adversary proceeding prior to the execution of the discharge?

(*a*) What is your feeling with respect to the legislative establishment of an adversary review prior to discharge upon the grounds of failure of due process in the board proceeding?

7. What articles of the code apply to cases of homosexuality presently handled administratively?

(*a*) Of the cases handled administratively, what kinds of homosexual activity could not have been prosecuted as violations of article 125 or 134 of the manual?

(*b*) What is your position on the suggestion that the code be amended to contain an article expressly making these kinds of homosexuality a court-martial offense?

[DOD answers]

ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., May 5, 1966.

Hon. SAM J. ERVIN, Jr.
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of February 24, 1966, for answers to a series of interrogatories relevant to my earlier testimony before your Subcommittee. Your letter also requested that you be provided with supplemental responses to the Questionnaire and Aide Memoire which were submitted to the Military Departments by the Constitutional Rights Subcommittee in 1962.

Enclosed with this letter is the material you requested. Where particular interrogatories pertained to practices or views of the Military Departments rather than of the Department of Defense or requested data kept separately by

the Military Departments, I have so indicated in the attachments. Specifically, the answers to questions I.1.b.; I.3.g. and h.; II.1. and 2.; III.1. through 9.; IV.1. through 3.; V.1 through 11.; VI.1. through 7.; VIII.1. through 4.; and IX.1. through 7. are in the responses of the Military Departments. The supplemental responses to the 1962 Questionnaire and Aide Memoire are, of course, also contained in the individual submissions of the Military Departments.

May I again express my appreciation to you for the opportunity to appear before the Subcommittee on Constitutional Rights and the Special Subcommittee of the Armed Services Committee to express the views of the Department of Defense on these important matters.

Sincerely,

THOMAS D. MORRIS.

I. NAVY JAG CORPS (S. 746)

Question 1: In his statement, Secretary Morris stated that the Department of Defense has supported the concept of a Judge Advocate General Corps in the Navy (Transcript page 31). However, it was requested that this committee defer pending action on proposed revision of officer personnel laws (Transcript page 30).

Question a: Is this still the position of the DoD?

Answer: The Department of Defense adheres to its position favoring the creation of a Judge Advocate General's Corps in the Navy. This position is based on the Navy's preference for this organizational form and on the personnel management aspects of the proposal.

Question b: Admiral Hearn, what is your personal opinion as to the need for a Judge Advocate General's Corps in the Navy?

Answer: See Admiral Hearn's response.

Question c: Is it your position that independent consideration of only that part of the Bolte proposals, specifically subsections 43–45 which deal with creation of the Corps, also be deferred until the entire package is acted upon:

Answer: Since the presentation of our position with respect to S. 746, the conclusion has been reached that enactment of the Bolte legislation should not be pressed at this session. Consequently, our position with respect to separate consideration of a Navy JAG Corps bill now is favorable.

Question 2: What is the history of the Bolte package; how did it originate, when was it first introduced into Congress, and what legislative action has been taken to date?

Answer: The so-called "Bolte" package derives from a study made from August 1960 to April 1961, at the direction of the Secretary of Defense, with the concurrence of the Bureau of the Budget and the Armed Services Committees. The recommendations of the Committee, as modified after extensive Secretarial and Bureau of the Budget review, were transmitted to Congress as a legislative proposal in March 1963. No bill was introduced. Substantially the same proposal was resubmitted in March 1965. No legislative action has taken place.

Question a: In respect to the history of the Bolt proposals, what part has the Navy JAG proposal played? Was it included in the original package? If not, when was it added?

Answer: The Navy JAG Corps proposal was incorporated in the Bolte package shortly before Bolte was first submitted to Congress in early 1963. The JAG Corps proposal had previously been a separate item in the Department of Defense legislative programs for the 86th and 87th Congresses. It was introduced as H.R. 12347 in the 86th Congress and as H.R. 6889 in the 87th Congress. It was made a part of the Bolte package that was submitted to the 88th Congress as a means of integrating legislative effort.

Question b: What is the present status of the Bolte package in DoD?

Answer: Recently, as noted above, it has been determined that the Bolte package should be deferred at this session.

Question c: What is its present status in Congress? Are hearings scheduled or anticipated in this session?

Answer: In consonance with the conclusion stated in 1.c. and 2.b., no hearings are contemplated at this session.

Question d: Is it contemplated in the DoD that the Bolte package might be divided for easier consideration by the Congress?

Answer: The Department of Defense will conduct a new evaluation of the package. This evaluation will determine the content of any proposal to be submitted to the 90th Congress.

Question e: If such were proposed, would this be opposed by DoD?

Answer: In view of the foregoing responses, this question now has no applicability.

Question f: If broken down, would the Navy JAG Corps remain a part of the package, or would it be dropped?

Answer: This question now has been overtaken by events.

Question g: Would the Navy support a separate Corps proposal if subsections 43–45 were dropped from the Bolte package?

Answer: See Admiral Hearn's response.

Question h: Would Navy support a separate Corps bill such as S. 746 if subsections 43–45 remained a part of the omnibus Bolte bill? If they were removed from the package bill?

Answer: See Admiral Hearn's response.

Question 3. What comments are there to the Corps proposal as presently set forth in S. 746 and what technical changes are recommended?

Answer: The provisions of S. 746 are in the main very similar to H.R. 6889 of the 87th Congress which was a Navy-sponsored bill. Certain changes in S. 746 are desirable to provide eligibility for the Marine Corps lawyers to be detailed as Deputy Judge Advocate General and the Assistant Judge Advocate General.

Question a: Would the Navy and DoD recommend passage of S. 746 if it were changed to incorporate the Corps provisions presently comprising subsections 43–45 of the Bolte package?

Answer: The new evaluation of Bolte is not expected to affect the validity of the JAG Corps provisions in the package. The answer, therefore, is affirmative.

Question b: Which of the two proposals, S. 746 or subsections 43–45, is preferred, and for what reasons?

Answer: The position of the Department has been to oppose S. 746 since JAG Corps provisions were included in Bolte. No position has been developed on the detailed provisions of S. 746 as contrasted with those of Bolte. It is apparent from a comparison of S. 746 and the JAG Corps provisions of Bolte that S. 746 is more favorable to the Navy legal group than Bolte.

II. Field Judiciary (S. 745)

Question 1: In addition to the necessity for maintaining the flexibility permitted by the administrative authorization of a field judiciary, what other persons exist for not legislatively establishing this program (Transcript page 113)?

a. Except for the unforseen circumstances produced by wartime, what other situations can be foreseen in which the legislative creation of a field judiciary would prove too inflexible?

b. Would including an exception for "time of war" or "national emergency" provide the desired flexibility?

c. Assuming that the legislative creation of a field judiciary is considered necessary, what changes or additional provisions would you suggest to overcome the problems or objectives set forth above?

d. Is the field judiciary system used at all in the Viet-Nam operation, or has it been used at any time under wartime conditions? What problems have been raised in these circumstances, and how have they been overcome?

Responses to this interrogatory are being submitted individually by the Military Departments.

Question 2: What is the present situation in the Air Force with respect to the assignment of law officers (Transcript page 115)?

a. Are there such JAG personnel permanently stationed in every command where special courts-martial are conducted? Is it the present practice in the Air Force to have all trials requiring a law officer in one or a few geographical areas?

b. Why would the establishment of a field judiciary require the Air Force to "spot people around in various parts of the world" and why would the program require "about four times as many people"? Please specify how

the enactment of S. 745 would impose a greater manpower burden on the Air Force.

For Air Force answer only.

III. SUMMARY COURTS-MARTIAL (S. 759)

Question 1: What has been the number of summary courts-martial in recent years since the 1963 amendment to Article 15 (Transcript page 215)?

a. Have certain commands eliminated the summary court-martial (Transcript page 66)?

b. Does the frequency of summary courts-martial vary significantly in different commands? What is the high, low, mean, and median number of summary courts-martial in various commands?

c. To what is the variation in number of summary courts-martial attributed?

Question 2: Of the number of summary courts-martial in recent years, how many represent trials resulting from refusal to accept Article 15 punishment?

a. Are there statistics on the number of Article 15 imposed or offered? In how many cases did the refusal to accept Article 15 punishment *not* result in summary courts-martial?

Question 3: How many special courts-martial have there been in recent years?

a. Of this number, how many resulted from refusal to accept summary court-martial?

b. Of the number given in (a), in how many special courts-martial did the accused request legally-qualified counsel and how often was this request granted?

Question 4: What procedural protections for the accused are present in a special court-martial that are not present in summary court-martial (Transcript page 70)?

a. From the standpoint of ensuring impartiality of adjudicatory procedures, including review, what advantages are there for the accused in a special court-martial that are not present in a summary court-martial?

b. What is the difference in review procedures after a summary court-martial conviction, and those available after special court-martial? Is there any difference when that special court-martial trial resulted from a refusal to accept a summary court-martial?

Question 5: Considering the number of instances in which a summary court-martial is elected by a member in lieu of the offer of Article 15 punishment, and considering also the frequency in which special courts-martial are held because of a refusal to accept a summary trial, what is the estimate of times in which a special court-martial would be elected in lieu of an Article 15, if the summary court-martial were abolished?

Question 6: What opportunities exist for the accused in a summary court-martial to review the record and note his objections or comments (Transcript page 63)?

a. What objection is there to allowing the accused to note his concurrence, or explain his non-concurrence, on the record sheet of a summary trial?

Question 7: Are defendants permitted by official Defense Department or service policy or regulation to have counsel assist them in summary courts (Transcript pages 70 and 81)?

a. May they have special assistance from non-legal personnel of their own choosing, whether in service or not?

b. If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

c. Are servicemen regularly informed prior to trial of their right to have counsel in summary courts?

d. In how many cases have counsel appeared to assist the accused in summary courts-martial, and how often have they been legally-trained or qualified?

e. What is the comparison of acquittal rates when counsel is present in summary courts and when they are not?

Question 8: What official guidelines are issued to commanders to assist them in the decision as to whether a minor offense warrants an offer of an Article 15 or a summary court-martial? Is the decision whether to offer an Article 15 or a summary court-martial essentially a matter of the officer's good judgment?

a. Is it true that the practical effect of the officer's initial decision to offer an Article 15 or a summary court-martial is to determine whether the serviceman has an election to trial by special court-martial?

Question 9: In view of the fact that the special court-martial contains certain procedural protections not afforded to summary courts-martial, why should not a man be permitted to elect a special court-martial, whether or not he has been offered and has refused an Article 15, if he believes he has a better chance thereby of establishing his innocence, and is willing to risk the possible harsher punishment of a special court-martial?

a. Aside from the additional manpower requirements of a special court-martial, and that it is possible to impose harsher punishment, what factors militate against offering a special court-martial to any serviceman who requests it?

b. What is your estimate of the influence that the creation of a single law officer special court-martial would have on the manpower demands invloved in giving an election of a special court-martial to every serviceman who requests one?

c. Would the objections to abolishing summary courts-martial because of the manpower requirements be met by permitting only trial by a single law officer special court-martial when an Article 15 is refused?

Answers to the above interrogatories are contained in the responses of the Military Departments.

IV. Changes In Special Courts-Martial (S. 752)

Question 1: In how many special courts-martial has there been legally-qualified counsel present for the accused?

a. How often has legal counsel been requested, and how often has it not been made available?

b. What is the comparative acquittal, appeal, and successful appeal rates for special courts-martial in which legal counsel has and has not been made available?

c. How often has there been legally-qualified counsel on the defense side but not the other?

d. Are any trends evident, and are any conclusions suggested by this experience?

Question 2: In how many cases has there been a lawyer present on the special court-martial (Transcript page 137)?

a. In how many cases has the lawyer been a member, but not the President?

b. In how many cases has there been legal counsel for the defense but no lawyer present on the court?

c. How often has a lawyer been assigned to the court because of the presence of legally-qualified defense counsel?

d. In how many cases has a lawyer been challenged from a special court-martial and how does this compare with challenges of non-legally trained personnel?

e. What is the comparative rate of successful appeal, on any grounds, to COMA when the President is legally-qualified and when he is not?

f. Similarly, what is the comparison of results when these two classes of cases are reviewed under Articles 65–67?

g. Are the above answers (e) and (f) affected where the defense counsel is legally qualifed?

Question 3: When issues such as the admissibility of evidence, voluntariness of confessions, sufficiency of proof, form of instructions, etc., are raised by legal counsel, what guidance is available to the non-legally trained Court President and members in deciding them? May they seek the advice of JAG personnel (Transcript page 136)?

Question 4: Assuming that the law is changed to require the appointment of a law officer before a special court-martial can adjudge a BCD, to what degree is there a danger that the mere appointment of a law officer will suggest that a BCD is considered appropriate by the Convening Authority?

a. Would the mandatory assignment of a law officer in every case in which the possible penalty is a BCD completely eliminate the problem or at least mitigate it sufficiently? What objections, if any, would there be to such a provision?

b. What suggestions can be made for avoiding this danger?

Answers to the above interrogatories are contained in the responses of the Military Departments.

V. Administrative Discharges

Question 1: What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for the specific charges upon which the action was based; for instance, homosexuality, conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

a. Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

b. If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

Question 2: What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

a. Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules not going to the merits, because the sentence did not include a discharge, or because of some other reason.

Question 3: What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

a. Please classify these cases separately according to the various reasons for deciding on a second proceeding and the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

Question 4: What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc.?

Question 5: Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (Transcript pages 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

a. In how many cases were administrative discharge proceedings instituted in these circumstances?

b. Of these, in how many cases did the member request a court-martial?

c. What were the final dispositions of these cases?

d. In how many cases was pre-service homosexuality a factor in these instances? Associating with known homosexuals?

e. Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

f. Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer?

Question 6: Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the UCMJ, except in cases of homosexuality (Transcript page 184)? Is this policy expressed in formal regulations or directives?

Question 7: Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless court-martialed and what were the dispositions (Transcript page 179)?

a. When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed?

b. When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if the guilt had been established in a military tribunal, or is it based merely on the fact of civil conviction?

Question 8: Are there procedures in the UCMJ for court-martial and discharge of members who are habitual offenders?

a. What is the policy of utilizing the authority set forth in section 127c (B), of the Manual? Is this authority utilized to its maximum?

b. Please set forth the number of courts-martial based on section 127c (B), and compare this to the number of administrative separations of various types given for similar reasons.

Question 9: What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (Transcript page 180)?

a. How many administrative discharge cases have there been for each type of case given above?

Question 10: Assuming that it is considered advisable to enact S. 758 to give an election of a court-martial in some instances to members accused of offenses under the UCMJ when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (Transcript pages 184–194)?

Question 11: Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum elements of due process, what is the order of preference of the following alternatives or groups of alternatives from the standpoint of the service:

a. Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the Subcommittees.

b. Give an unqualified election of a court-martial to the member.

c. Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.

d. Grant post-discharge review of legal issues to COMA.

e. Some other legislative change (please specify) desired by the service.

Answers to the above interrogatories are contained in the responses of the Military Departments.

VI. Review of Administrative Discharges by Coma (S. 753)

Question 1: Does the number of cases referred to in General Hodson's statement (Transcript page 54) represent the number of discharge cases reviewed by Discharge Review Boards? How was this figure computed?

a. What is the number of administrative discharges reviewed by DRB for prior years?

b. How many administrative discharge cases are there annually for unfitness, unsuitability, or misconduct in each service?

c. What is the breakdown of these cases in terms of type of discharge, and of these, which are the result of board hearings?

d. Of the number of discharge cases reaching DRB and BCMR, what is the breakdown in terms of type of discharge?

e. For each of these types of discharge, in how many cases have the DRB and the BCMR changed the character of discharge, and to what have they been changed?

Question 2: Of the cases reaching review, how many of them involve determination of legal questions, and what are the usual kinds of legal questions raised?

a. Does this answer include as a "legal" question, issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulation"?

b. What types of legal issues (if different from above) would be likely to reach COMA if S. 753 were law?

Question 3: What factors would operate to dissuade a former serviceman from taking an appeal of an administrative discharge to COMA?

Question 4: On the basis of the total of administrative discharge cases, those reaching review boards, and the answers given above, what is the estimate of the cases of previous years which would have been appealed to COMA if S. 753 had been effective?

Question 5: In view of the testimony that the number of legal issues in administrative discharges is few (Transcript page 53), what burdens upon COMA would arise from granting this review authority (Transcript page 211)?

Question 6: Are cases brought before the DRB and BCMR now reviewed by the respective JAG offices? Do JAG personnel as a matter of practice review some or all discharge cases? What standards determine the cases reviewed by the Judge Advocate?

Question 7: What additional burden is involved on JAG personnel in reviewing cases which would be susceptible of review by COMA under S. 753 (Transcript pages 53 and 54)?

Answers to the above interrogatories are contained in the responses of the Military Departments.

VII. EXTRATERRITORIAL CRIMINAL JURISDICTION (S. 761 AND S. 762)

Question 1: What are the various proposals now being considered for remedying the jurisdictional gap over employees, dependents, an ex-servicemen (Transcript pages 26, 31, and 141)?

a. Please indicate the present status of each of the proposals considered.

Answer: During the 89th Congress the Department of Defense considered the following proposals for remedying the jurisdictional gap involving employees, dependents and ex-servicemen:

(1) A draft bill to amend title 10, U.S. Code, section 817(a), to authorize court-martial for petty offenses of persons serving with, employed by, or accompanying the armed forces outside the United States;

(2) A draft bill to amend title 18, U.S. Code, by adding a new section 16 which would—with respect to any member of the U.S. armed forces, or any person serving with, employed by, or accompanying the armed forces who is a national or citizen of the United States—extend to all locations overseas those federal penal statutes which now apply to acts committed within the special maritime and territorial jurisdiction of the United States, and by adding a new section 17 which would preserve the present extent of the jurisdiction of courts-martial, military commissions, provost courts, or other military tribunals with respect to such offenses;

(3) A draft bill to amend title 10, U.S. Code, by adding a new chapter 48 which would provide for the apprehension, restraint, removal, and delivery of persons serving with, employed by, or accompanying the U.S. armed forces overseas.

a. The Department of Justice has taken exception for varying reasons to each of these proposals. In view of the nature of the objections raised by the Department of Justice, no further action has been taken by the Department of Defense.

Question b: What problems are raised by each of these suggestions, and what means might be used to overcome these various objections?

Answer: With respect to the draft bill which would amend title 10, U.S. Code, to reassert court-martial jurisdiction over civilians for petty offenses, the Department of Justice questions whether such a bill would be constitutionally sound in the light of *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), which prescribes as the test of constitutional validity the status of the offender rather than the nature of the offense. The Department of Justice also questions whether, even assuming that the punishment for a petty offense is trivial and that the offense is the kind that can be tried without a jury under *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937), trial by court-martial would be constitutionally permissible since courts-martial are part of the Executive Branch. Finally, the Department of Justice notes that the draft seems to raise questions of vagueness and accordingly may be defective on due process grounds.

The Department of Justice finds no legal objection to the draft bill to amend title 18, U.S. Code. However, that Department questions whether the need for the bill is of sufficient importance to justify the administrative and financial burdens which would result from its enactment. The burdens which the Department of Justice has in mind relate to the costs incurred in sending investigators overseas and in bringing witnesses to the United States for trial. In addition there are the legal problems of compelling the return to the United States of the accused and of the fairness of trials in which the attendance of witnesses for the accused cannot be compelled.

It is the view of the Department of Justice that the third bill, relating to apprehension, restraint, removal and delivery, would be permissible under *Kinsella* v. *Singleton, supra.* But, the Department points out that the powers provided for in the draft bill must be exercised in a manner which satisfies minimum safeguards of due process and therefore questions the adequacy of the draft in this respect because the draft provides no guidelines as to who would have authority to hold hearings and prescribes no guidelines for the conduct of such hearings. Inasmuch as this draft bill would complement the second draft bill relating to the expansion of the maritime and territorial jurisdiction, the Department of Justice also questions whether the need for this draft is of sufficient importance to justify the resulting administrative and financial burdens.

Question c: Please indicate the relative desirability of each of these suggestions?

Answer: Most of the offenses committed overseas by civilians are of the petty offense category, and it is the petty offense which is most likely not to be prosecuted by foreign nations. Accordingly, from the point of view of discipline and morale, the draft bill dealing with petty offenses is the one that is most needed. As noted above, however, a bill to deal with such offenses presents the most problems from the constitutional viewpoint. Generally, serious offenses are adequately handled by foreign courts. Nevertheless, it would be desirable for the United States to be in a position to exercise jurisdiction over such offenses, should circumstances warrant that exercise of jurisdiction. The third bill is a necessary complement to the second bill. Of course, a constitutional amendment would be the most effective means of dealing with this problem but such an amendment is not politically feasible.

Question 2: What suggestions are being considered by the Departments of State and Justice, and in what stage of consideration are each of these proposals?

a. In what office of these departments are these proposals being considered (Transcript pages 141 and 148)?

Answer: In view of the position taken by the Department of Justice with respect to the proposals made by the Department of Defense, no proposals are now being considered by the Departments of Justice and State.

Question 3: With respect to the treatment of offenses committed overseas by employees and dependents, are there any formal guides issued to commanders which describe or recommend the type of administrative punishment appropriate for various kinds of offenses? Is there any attempt at standardizing the punishment given in various commands for similar offenses (Transcript page 145)?

Answer: The Department of the Army has published in Appendix B to Civilian Personnel Regulation C 2, a copy of which is attached, tables prescribing certain administrative penalties for relatively minor offenses committed by civilian employees. There is no similar formal guide prescribing administrative sanctions which may be imposed on dependents. In some overseas areas, local regulations authorize denial or suspension of certain privileges of the types enumerated in the answer to question 4 below which are normally available to both employees and dependents.

The Department of the Navy has no guide of general application prescribing the types of administrative penalties that may be imposed on employees and dependents abroad for the offenses here considered.

The Department of the Air Force has adopted a policy providing for the dismissal of civilian employees when they become culpably involved with law enforcement authorities of a foreign government on the ground that such involvement reflects adversely upon the United States and prejudices the successful fulfillment of Air Force's mission overseas. Further, it has published a guide applicable worldwide to all cases involving misconduct of a relatively minor nature by civilian employees. This guide appears as attachment 1 to Air Force Regulation 40–751, a copy of which is attached hereto. (As printed, paragraph 1a of AFR 40–751 appears to limit its applicability to the 50 states; it is, however, used as a guide worldwide. The Department of the Air Force is preparing a change to make this point clear and will provide the Subcommitteee with a copy of the change as soon as it is published.) No comparable guide has been promulgated for disciplining dependents.

Question 4: What kinds of privileges are subject to revocation as sanctions (see column 2 under Sanctions Imposed by U.S. Authorities, Chart A) (Transcript page 142)?

Answer: The following privileges normally enjoyed by civilian employees and dependents of all three military departments overseas are subject to suspension or revocation as disciplinary measures:

(a) commissary privileges;
(b) post exchange privileges;
(c) purchases of gasoline, oil, and other automotive supplies at exchanges;
(d) registration and use of privately owned vehicles;
(e) Government-issued drivers' licenses;
(f) purchase of liquor from class VI;
(g) club and recreation facilities privileges;
(h) housing support for Government-owned or controlled housing.

Question 5: What other administrative action (except return to the U.S.) is possible as a sanction (see column 4 under Sanctions Imposed by U.S. Authorities) (Transcript page 142)?

Answer: The following additional administrative sanctions (as well as return to the United States) are employed:

(a) admonition;
(b) reprimand;
(c) demerits for traffic violations under driver safety point system;
(d) suspension from employment;
(e) dismissal from employment;
(f) revocation of Department of Defense sponsorship of the holder's passport, requiring application by the disciplined individual to the local government for a visa which may or may not be issued.

Question 6: What is your evaluation of the suggestion that 18 USC, section 7 (maritime jurisdiction) be expanded to cover all crimes committed by U.S. citizens elsewhere than on U.S. soil? By Department employees and dependents only?

Answer: As stated in the answer to question 1, one of the proposals considered by the Department of Defense would provide for the expansion of the maritime and territorial jurisdiction to offenses committed overseas by persons serving with, employed by, or accompanying the U.S. armed forces. The draft bill did not cover offenses committed by other U.S. citizens overseas for the reason that the Department of Defense lacks information as to whether there is any need for the expansion of that jurisdiction to non-DoD personnel. The Department would have no objection to a broadening of its draft bill to cover such persons but defers to the views of the other Government agencies concerned as to whether any such broadening is warranted.

Question a: What practical problems would be encountered by such a provision, and are they different from those now encountered by the section as currently enforced?

Answer: The practical problems which would result from such a bill are noted in the answer to question 1.b. (paragraph 2). These practical problems differ in magnitude and scope from those now encountered under 18 U.S.C. 7 because offenses covered by that section are committed in places under the jurisdiction of the United States.

Question b: How are the problems under this section met at present?

Answer: Inasmuch as the practical problems now encountered in the administration of 18 U.S.C. 7 fall outside the purview of the Department of Defense, it is suggested that this question be addressed to the Department of Justice.

Question c: What possible devices could be employed to eliminate or alleviate these practical problems if section 7 were so amended?

Answer: See the answer to question 6.b.

Question d: If it is your judgment that any provision for extra-territorial jurisdiction would not be practical for ordinary offenses, would you nonetheless see value in creating such jurisdiction for the extremely serious offenses?

Answer: It is the position of the Department of Defense that creating such jurisdiction for the extremely serious offenses would be useful.

Question e: What additional means are necessary to assist military authorities in coping with disciplinary problems of overseas dependents, such as juvenile delinquency, minor non-traffic offenses, and in maintaining law and order in the community?

Answer: See the answer to question 1.b. (paragraph 1).

Question 7: What is the number of cases in recent years of crimes committed by servicemen which were discovered subsequent to their release from service? Please classify them as to type of offense, and indicate what, if any, judicial or other action was taken against these ex-servicemen.

Answer: Information concerning offenses committed by service personnel which were discovered subsequent to their separation has not been collected or maintained by the military departments. It is probable that a majority of the cases in this category are those involving suspected fraudulent claims in connection with travel vouchers submitted by military personnel for travel by themselves and dependents. Finance records are reviewed periodically to determine where overpayments have been made and cases of suspected fraud discovered during these periodic reviews are referred to the Department of Justice or military commanders, as appropriate. In this connection records maintained by the Army Finance Center at Fort Benjamin Harrison, Indiana, show that in fiscal year 1965 a majority of the 125 Army cases of suspected fraud involved persons no longer in the service. Cases involving separated individuals were referred to the Federal Bureau of Investigation for appropriate disposition and no information is available in the Department of Defense as to action taken by the F.B.I. It is generally the policy of all three military departments to refer to the Department of Justice other apparent violations of title 18 of the U.S. Code. Because disciplinary action may no longer be taken by the military in these cases, the Department of Defense is not able to furnish more specific information.

Appendix B. Tables Pertaining to Penalties for Various Offenses

Table I. Penalties for Delinquency or Misconduct

This table of penalties for delinquency or misconduct will be used as a general guide in imposing disciplinary action to assure like penalties for like offenses throughout the Department of the Army. The list of offenses and suggested penalties set forth below may not successfully meet the demands of all situations and therefore is to be considered as suggestive only. Final decision as to the action to be taken will rest with the responsible administrative officials. When imposing progressive penalties for a second or third offense, consideration should be given to whether a reasonable period has elapsed since the prior offense. In addition, reference is made to penalties stated in tables II, III, and IV.

Offense	Penalties		
	1st offense	2d offense	3d offense
1. Insubordination (refusal to obey orders, impertinence, like offense).	Official written reprimand, or 1-day suspension.	2- to 5-day suspension	6- to 10-day suspension, or removal.
2. Fighting or creating a disturbance among fellow employees, resulting in an adverse effect on morale, production, or maintenance of proper discipline.	1- to 3-day suspension	4- to 6-day suspension	7- to 10-day suspension, or removal.
3. Sleeping on duty (where safety of personnel or property is not endnagered thereby).	Official written reprimand, or 1- to 3-day suspension.	do	Do.
4. Sleeping on duty (where safety of personnel or proprety is endangered thereby).	5- to 10-day suspension, or removal	Removal	
5. (*a*) Drinking intoxicants while on duty.	1- to 10-day suspension	do	
(*b*) Drinking intoxicants on duty where safety of personnel or property is endangered thereby.	5- to 10-day suspension or removal	do	
6. Reporting for duty intoxicated to a degree which would interfere with proper performance of duty, be a menance to safety, or be prejudicial to the maintenance of discipline.	1- to 5-day suspension	5- to 10-day suspension	Removal.
7. Absence without leave (any absence from duty which has not been authorized pursuant to CPR L1 and for which pay must be denied).	Official written reprimand, or suspension of 1 to 3 days.	4- to 6-day suspension	7- to 10-day suspension, or removal.
8. Debt complaints (neglecting or avoiding payment thereof without sufficient excuse or reason).	See par. 2–2*a*		
9. False statements, misrepresentation, or fraud in application blank or other official records submitted to the Department of the Army. Apparent oversights and errors, where satisfactorily explained, may be excused where not otherwise disqualifying.	5- to 10-day suspension, or removal		
10. Loafing (willful idleness or deliberate failure to work on assigned duties).	Warning or official written reprimand.	Official written reprimand or 1- to 3-day suspension.	6- to 10-day suspension, or removal.
11. Theft. (Penalty imposed will be determined primarily by value of articles stolen, whether property was recovered, and employee's explanation.)	1- to 10-day suspension, or removal	Removal	
12. Gambling on duty	Official writen reprimand, or 1- to 5-day suspension.	5- to 10-day suspension	Removal.
13. Notorious misconduct off duty. (With regard to off-duty conduct, all employees have an obligation to so conduct themselves that no disgrace or disrepute will be visited on the Department of the Army.)	1- to 10-day suspension, if offense is minor. Removal for major offenses.	Removal	

See footnote at end of table, p. 884.

Offense	Penalties		
	1st offense	2d offense	3d offense
14. Deliberate or willful failure to observe any written regulation or order prescribed by competent authority.			
(a) Violation of administrative regulations where safety of persons or property is endangered thereby.	6- to 10-day suspension, or removal	Removal	
(b) Violation of administrative regulations where safety of persons or property is not endangered thereby.	1- to 5-day suspension	6- to 10-day suspension, or removal	Removal.
(c) Refusal to testify in a properly authorized inquiry or investigation conducted by representatives of the Department of the Army except where such refusal is based upon the grounds of self-incrimination.	do	do	Do.
(d) Violation of official security regulations involving material classified secret or above.[1]	6- to 10-day suspension, or removal	Removal	
(e) Violation of official security regulations involving material classified confidential or below.	1- to 5-day suspension	6- to 10-day suspension, or removal	Do.
15. Careless or negligent failure to observe any written regulation or order prescribed by competent authority.			
(a) Violation of administrative regulations where safety of persons or property is endangered thereby.	do	do	Do.
(b) Violation of administrative regulations where safety of persons or property is not endangered thereby.	Official written reprimand	1- to 5-day suspension	6- to 10-day suspension, or removal.
(c) Violation of official security regulations involving material classified secret or above.	1- to 5-day suspension, or removal	6- to 10-day suspension, or removal	Removal.
(d) Violation of official security regulations involving material classified confidential or below.	Official written reprimand	1- to 5-day suspension	6- to 10-day suspension or removal.
16. Immoral or indecent conduct	3- to 5-day suspension, or removal		
17. Knowingly making false or malicious statements against other employees, supervisors, or officials with the intent to harm or destroy the reputation, authority, or official standing of those concerned.	Official written reprimand or removal.	Removal	

[1] Removal actions which are prompted by deliberate or willful failure to observe official security regulations involving materials classified secret or above, and suspension actions incidental therto, will be processed in accordance with SR 620-220-1. Disciplinary suspensions are not authorized under SR 620-220-1, and must be accomplished as prescribed in CPR S1.3.

TABLE II.—*Penalties applying to motor vehicle operators*

1. The acts or circumstances listed in paragraphs 3 and 4 below may require either suspension or revocation of any vehicle operator's permit which may have been issued in accordance with AR 600–55. Suspension or revocation of such permit is not in itself an adverse personnel action and is not subject to the provisions of CPR S1.

2. The suspension or revocation of a vehicle operator's permit does, however, require action either to remove driving duties from the employee's position or to remove the employee temporarily or permanently from the position which requires performance of driving duties. Any adverse personnel action which is required to accomplish this is subject to the applicable provisions in CPR S1. Such personnel actions will not be based on the suspension or revocation of the permit but will be based on the reasons that led to the suspension or revocation.

3. In accordance with Section 930.118 of the Civil Service Regulations the following grounds constitute sufficient cause for suspension or revocation of an operator's permit and for any necessary adverse personnel action.

a. The employee is convicted of operating under the influence of narcotics.

b. The employee is convicted of leaving the scene of an accident without making himself known.

c. A Federal medical officer finds the employee fails to meet the required physical standards.

d. The employee's State operator's license is revoked.

e. The employee's State operator's license is suspended. The employee may be permitted to retain his Standard Form 46 (United States Government Motor Vehicle Operator's Identification Card) or DD Form 313 (United States Government Operator's Permit) for a period not to exceed 45 days from the date of suspension of the State license and operate a vehicle on Government business on Federal property at the discretion of the commanding officer. If, however, it is apparent from the nature of the suspension of the State license that it will not be or is not likely to be restored within 45 days, he employee should be barred immediately from the operation of a motor vehicle.

4. The following circumstances may also be used as reasons for suspension or revocation of an operator's permit and as a basis for adverse personnel action.

a. Involvement in a motor vehicle accident while driving a Government vehicle and after investigation found to be at fault.

b. Conviction of traffic (other than parking) violations with the motor vehicle assigned.

c. Improper operation of the motor vehicle assigned.

d. Noncompliance with Department of the Army administrative orders relating to motor vehicle operation.

e. Failure on physical examination to meet required physical standards but defects are considered by Federal medical officer to be of a temporary nature.

f. Conviction of operating Government motor vehicle under the influence of intoxicating liquor.

5. Restoration of a suspended operator's permit should be effected only after demonstration by road test, current physical examination, or such other procedure as may be considered necessary by the appointing officer, that driving competence has been reestablished.

TABLE III.—*Penalties applying to civilian marine personnel (excluding harbor craft employees)*

In addition to tables I and IV there are certain offenses for which, under express provisions of law or regulation, civilian marine employees may be punished by removal or even by fine or imprisonment.

Offense	Penalties			Remarks
	1st offense	2d offense	3d offense	
Desertion	Removal (mandatory)			Employee forfeits all pay and allowances due from the voyage.
Missing sailing of the ship	Reprimand to removal	10-day suspension to removal	30-day suspension to removal	
Willful disobedience to a lawful command at sea.	do	do	do	The offender may be confined until such disobedience shall cease. Pay does not accrue during period of confinement.
Assaulting any master, mate, pilot, engineer or other officer.	do	Removal		Upon conviction, offender may be imprisoned not more than 2 years (46 U.S.C. 701).
Willfully damaging the ship or her equipment, or willfully embezzling or damaging any of her stores or cargo.	Loss of pay equal to the loss sustained and reprimand to removal.	Loss of pay equal to the loss sustained and 30-day suspension to removal.	Loss of pay equal to the loss sustained and removal.	See 62 Stat. 764.
Smuggling	Removal (mandatory)			For any act of smuggling for which the offender is convicted and whereby loss or damage is occasioned to the master or the Army such a sum as sufficient to reimburse the master or the Army may be retained from the offender's wages in satisfaction or on account of such liability.
Introducing, selling, possessing, or using intoxicants aboard ship.	5-day suspension to removal	10-day suspension to removal	30-day suspension to removal	

TABLE IV.—*Miscellaneous offenses prohibited in law or civil service regulation*

NOTE.—In addition to those mentioned earlier, there are certain offenses for which, under express provisions of law or regulation, employees may be punished by removal or even by fine or imprisonment. In some cases, the penalty is authorized, in other cases it is prescribed. It is impossible to spell out all these offenses, but a considerable number are listed in this table. Before taking disciplinary or removal action, the actual text of the law or regulation should always be consulted.

Nature of offense	Law or regulation	Maximum penalty
Bribes: Asking, accepting, or receiving bribe of any kind with the intent of having one's decisions on any official matter influenced thereby.	18 U.S.C. 201	Fine of 3 times the value of the bribe, 15 years' imprisonment, or both; removal; permanent disqualification from holding any Federal office.
Claims against United States: Aiding and assisting in prosecution of claim against the United States, or receiving any gratuity or any share of or interest in claim from any claimant otherwise than in discharge of proper official duties.	18 U.S.C. 205	$10,000 fine, 2 years' imprisonment, or both.
Compensation—Receiving salary from source other than the U.S. Government: Receiving any salary in connection with services as a government official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality. (There are some statutory exemptions from this prohibition in the case of certain employees.)	18 U.S.C. 209	$5,000 fine, 1 year imprisonment, or both.
Compensation to Members of Congress, officials, and others in matters affecting the Government: Except as otherwise provided by law, officers and agents of the United States are forbidden the following act: Directly or indirectly receiving or agreeing to receive any compensation for services rendered in connection with any Government contract, claim, or other matter in which the United States is interested.	18 U.S.C. 203	$10,000 fine, 2 years' imprisonment, or both; permanent disqualification from holding any Federal office.
Contracting beyond specific appropriation: The following act when performed by an officer of the United States: Knowingly contracting for erection, repair, furnishing of public building, or for any public improvement, to pay larger amount than specific sum appropriated for such purpose.	18 U.S.C. 435	$1,000 fine, 1 year imprisonment, or both.
Disqualifications of former officers and Employees in matters connected with former duties: It shall be unlawful for whoever, having been an officer or employee of the U.S. Government to act as agent or attorney for prosecuting any claim against the United States involving a matter in which he participated personally and substantially while so employed.	18 U.S.C. 207	$10,000 fine, 2 years' imprisonment, or both.
Drunkenness. Habitually using intoxicants to excess.	Sec. 8, Civil Service Act; 5 U.S.C. 640.	Removal.
Examination.—Fraud. Intentionally making a false statement or practicing any deception or fraud in examination or appointment.	Civil Service Regulation 731.201(c).	Do.
Examination—Improper activity with respect to ratings: Willfully, corruptly, and falsely marking, grading, estimating or reporting upon the examination or proper standing of any person examined under the Civil Service Act, or aiding in so doing.	Sec. 5, Civil Service Act; 5 U.S.C. 637.	$1,000 fine, 1 year imprisonment, or both.
Willfully and corruptly making any false representations concerning the examination or proper standing of any person examined under the Civil Service Act, or concerning the person examined.		
Examination—Improperly furnishing information: Willfully and corruptly furnishing to any person any special or secret information for the purpose of either improving or injuring the prospects or chances for appointment, employment, or promotion, of any person examined or to be examined under the Civil Service Act.	----do----	Do.

TABLE IV.—*Miscellaneous offenses prohibited in law or civil service regulation*—Continued

Nature of offense	Law or regulation	Maximum penalty
Examination—Inducing withdrawals: Influencing another person to withdraw from competition for any position in the competitive service for the purpose of either improving or injuring the prospects of any applicant for appointment.	Civil Service Rule 4.3.	Such disciplinary action as the Civil Service Commission may direct.
Examination—Obstructing right of: Willfully and corruptly, alone or in cooperation with others, defeating, deceiving, or obstructing any person in respect of his right of examination according to the civil service rules and regulations.	Sec. 5, Civil Service Act; 5 U.S.C. 637.	$1,000 fine, 1 year imprisonment, or both.
Extortion: Under color of office, or pretended office, attempting any act which if performed would be extortion, or act of extortion.	18 U.S.C. 872	$5,000 fine, 3 years' imprisonment, or both. (If the amount extorted or demanded does not exceed $100: $500 fine, 1 year imprisonment, or both.)
Failing to dispose properly of moneys accruing from lapsed salaries or unused appropriations for salaries: Failing to cover into the Treasury any moneys accruing from lapsed salaries or unused appropriations for salaries.	5 U.S.C. 50	Removal (mandatory); $1,000 fine or 1 year imprisonment.
Failing to make deposit when required: Failing to deposit with the Treasurer or some public depositary money in possession or under control when required to do so by the Secretary of the Treasury or the head of any other proper department; or by the General Accounting Office.	18 U.S.C. 649	Fine equal to sum embezzled, 10 years' imprisonment, or both. (For embezzlement of amount not exceeding $100: $1,000 fine, 1 year imprisonment, or both.)
Failing to make returns or reports: Neglecting or refusing to make any return or report which any officer is required to make at stated times by any act of Congress or regulation of the Treasury Department, other than his accounts, within the time prescribed by such act or regulation.	18 U.S.C. 2075	$1,000 fine.
Failing to render accounts: Failing to render accounts as provided by law for public money received other than salary, pay, or emolument.	18 U.S.C. 643	Fine equal to sum embezzled, 10 years' imprisonment, or both. (For embezzlement of amount not exceeding $100: $1,000 fine, 1 year imprisonment, or both.)
False certificates: Giving certificate or other writing, containing any statement which is known to be false.	18 U.S.C. 1018	$500 fine, 1 year imprisonment, or both.
False claims: Entering into any agreement, combination, or conspiracy to defraud the Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.	18 U.S.C. 286	$10,000 fine, 10 years' imprisonment, or both.
Presenting for payment or approval by any person or officer in civil, military, or naval service of the United States or any department thereof, any claim upon or against the United States knowing such claim to be false, fictitious, or fraudulent.	18 U.S.C. 287, 1001	$10,000 fine, 5 years' imprisonment, or both.
Knowingly and willfully falsifying or concealing or covering a material fact by any trick, scheme, or device.		
Making false or fraudulent statements or representations.		
Making or using any false writing or document, knowing same to contain any false, fraudulent or fictitious statement or entry.		
False entries or reports: Following acts when performed by any person holding office or employment under the United States, and charged with the duty of keeping accounts or records of any kind: With intent to deceive, mislead, injure, or defraud, making in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties.	18 U.S.C. 2073	$5,000 fine, 10 years' imprisonment, or both.
Following acts when performed by any person holding office or employment under the United States, and charged with the duty of receiving, holding, or paying over moneys, to, for, or on behalf of the United States, or of receiving, or holding in trust for any person any moneys or securities: Making false report of any moneys or securities or aiding or abetting any such person in so doing, with intent to deceive or defraud the United States or any person.		

TABLE IV.—*Miscellaneous offenses prohibited in law or civil service regulation*—Continued

Nature of offense	Law or regulation	Maximum penalty
Gifts to official superiors: Soliciting contributions from other Government officers or employees for a gift or present to those in a superior official position. Accepting gifts or presents offered or presented as a contribution from persons in Government employ receiving a lower salary. Making donation as a gift or present to official superior.	Sec. 1784, Revised Statutes; 5 U.S.C. 113.	Removal.
Government documents or records: Concealing, removing, mutilating, obliterating, or destroying records or documents. Attempting to conceal, remove, mutilate, obliterate, or destroy records or documents; taking or carrying away records or documents, with intent to conceal, remove, mutilate, obliterate, or destroy them.	18 U.S.C. 2071	$2,000 fine, 3 year's imprisonment, or both. If the guilty person was in charge of the records or documents, and actually concealed, removed, mutilated, falsified, obliterated, or destroyed them: $2,000 fine, 3 years' imprisonment, or both, plus removal and disqualification for Federal office.
Taking and carrying away, without authority, from place where filed or kept, any document or file, intended to be used or presented to procure payment of money from or by the United States; presenting, using, or attempting to use any such document or paper, in order to procure the payment of any money from or by the United States.	18 U.S.C. 285	$5,000 fine, 5 years' impriosnment, or both.
Government transportation requests: Falsely making, counterfeiting, forging, in whole or in part, any form of transportation request. Knowingly altering any such request. Knowingly passing, publishing, selling, or attempting to pass, publish, or sell any such false, forged, counterfeited, or altered form of request.	18 U.S.C. 508	$5,000 fine, 10 years' imprisonment; or both.
Government vehicles and aircraft: Using, or authorizing the use of, Government owned or leased motor vehicles or aircraft for other than official purposes.	5 U.S.C. 78(c)	Suspension for not less than 1 month, suspension for a longer period, or removal if circumstances warrant.
Impersonating Federal officer or employee: Falsely assuming or pretending to be officer or employee acting under the authority of the United States, or in such pretended character demands or obtains any money, paper, document, or thing of value.	18 U.S.C. 912	$1,000 fine, 3 years' imprisonment, or both.
Influencing Members of Congress: Using, directly or indirectly, funds appropriated by Congress to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress.[1]	18 U.S.C. 1913	Removal (mandatory) after notice and hearing; $500 fine, 1 year imprisonment, or both.
Influencing parties or witnesses or obstructing proceedings: Endeavoring corruptly, or by threats or force, or by any threatening letter or communication, to influence, intimidate or impede any witness in any proceeding pending before any department, or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House or of any joint committee of the Congress of the United States. Endeavoring corruptly, or by threats or force, or by any threatening letter or communication, to influence, obstruct or impede the due and proper administration of the law under which such proceedings is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress of the United States.	18 U.S.C. 1905	$5,000 fine, 5 years' imprisonment, or both.

[1] This restriction does not operate to prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

TABLE IV.—*Miscellaneous offenses prohibited in law or civil service regulation*—Continued

Nature of offense	Law or regulation	Maximum penalty
Injuring any party or witness in person or property on account of attending such proceeding, inquiry, or investigation, or of testifying to any matter pending therein.		
Interested persons acting as Government agent: Participating personally and substantially as a Government official or employee in transacting official business with any person or organization with whom he has a financial interest.	18 U.S.C. 208	$10,000 fine, 2 years' imprisonment, or both.
Making official contract with Member of Congress: The following act when performed by an officer of the United States: Making or entering into any contract or agreement on behalf of the United States, directly or indirectly, with any Member of or delegate to Congress or a Resident Commissioner, after his election, or before or after qualifying for office.	18 U.S.C. 432	$3,000 fine.
Malfeasance, nonfeasance in personnel administration: Violation of any law, rule, or regulation administered by the Civil Service Commission, or failure to adhere to established policies, regulations, standards, and instructions relating to personnel management subject to the jurisdiction of the Commission.	Civil Service Rule 5.4	Such disciplinary or corrective action as the Commission deems appropriate.
Misconduct generally: Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.	Civil Service Regulation 731.201(b).	Removal.
Official envelopes: Using official envelope, label, or endorsement authorized by law to avoid payment of postage or registry fee on private letter, package, or other matter in the mail.	18 U.S.C. 1719	$300 fine.
Refusing to testify before Civil Service Commission: Refusing to give the Civil Service Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the Civil Service Act, rules, and regulations, or to subscribe such testimony and make oath or affirmation thereto before an officer authorized by law to administer oaths.	Civil Service Rule 5.3	Removal.
Requiring receipts for larger sums than paid: The following acts when performed by persons charged with payment of any appropriation made by Congress: Paying to any clerk or other employee of the United States a sum less than provided by law, and requiring such employee to give voucher for a greater amount than paid.	18 U.S.C. 652	Fine of double amount withheld, 2 years' imprisonment, or both. (If the amount embezzled is $100 or less: $1,000 fine, 1 year imprisonment, or both.)
Strikes: Participating in any strike against the Government of the United States, or asserting the right to strike against the Government; or holding membership in an organization of Government employees that asserts the right to strike against the Government of the United States, knowing that such organization asserts such right.	5 U.S.C. 118p and 118r.	$1,000 fine, 1 year and a day imprisonment, or both.
Unauthorized personnel: Employing personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.	31 U.S.C. 665(b)	Removal; $5,000 fine, 2 years' imprisonment, or both.
Using public money unlawfully: Following acts when performed by any disbursing officer or person acting as such: Converting to own use, or loaning or depositing in any manner except as authorized by law, any public money entrusted to him; withdrawing such money from the Treasury or any authorized depositary for any purpose not prescribed by law.	18 U.S.C. 653	Fine of amount embezzled, 10 years' imprisonment, or both. (If the sum embezzled is $100 or less: $1,000 fine, 1 year imprisonment, or both.)
The following acts when performed by person charged with safekeeping of public moneys: Loaning, using, converting, or depositing public moneys entrusted to him, except as specially allowed by law.	18 U.S.C. 648	Fine equal to amount embezzled, 10 years' imprisonment, or both. (If the amount embezzled does not exceed $100, fine of $1,000; 1 year imprisonment; or both.)
Voluntary service: Accepting voluntary service for the Government except in cases of emergency involving the safety of human life or the protection of property.	31 U.S.C. 665(b)	Removal; $5,000 fine, 2 years' imprisonment, or both.

AFR 40–751

AIR FORCE REGULATION
No. 40–751

DEPARTMENT OF THE AIR FORCE
Washington, *27, January 1966*

Civilian Personnel

MAINTAINING DISCIPLINE

This regulation contains information needed by commanders, staff and central civilian personnel offices, operating officials, and supervisors. It explains Air Force policy on maintaining discipline and prescribes procedures to be followed when disciplinary action must be taken.

1. WHEN THIS REGULATION APPLIES

a. The procedure in this regulation for taking disciplinary actions apply to US citizens and also to non-US citizens employees in the 50 States, who are paid from appropriated funds, with the following exceptions:

(1) Actions taken under AFR 40–12.

(2) Actions directed by the Civil Service Commission.

(3) Actions taken against employees serving probationary or trial periods (see AFR 40–452); employees serving their first year of employment who are not required to complete a probationary or trial period; or employees serving under a temporary time limited appointment. These employees have been given neither procedural protections nor grievance and appeal entitlements in the case of adverse actions. When serious disciplinary action is appropriate for them, their services may be terminated after proper notice if warranted. However, this exclusion, does not preclude giving oral admonishments or reprimands where such actions would serve to correct an employee's conduct or unsatisfactory performance.

b. Disciplinary actions against non-US citizen employees (not covered in a, above) are established by the servicing major air command.

2. AIR FORCE POLICY

Primary emphasis is placed on preventing situations requiring disciplinary actions through effective employee-management relations. When a supervisor determines that disciplinary action is appropriate, he informs the employee concerned of the reasons which justify the action against him. The supervisor must keep in mind that the objective of disciplinary action is to correct and rehabilitate, not to punish and penalize. Any disciplinary action taken must be based on good cause, be consistent with laws and regulations governing such actions, and be fair and equitable.

3. PRINCIPLES OF DISCIPLINE

a. Discipline involves relationships among supervisors, individual employees, and groups of employees; and relationships of each individual employee to his associates as well as to his supervisor and to the organization. It encompasses all aspects of supervision which correct, mold, strengthen, or guide employees toward greater productivity and satisfactory adjustment to working relationships. An atmosphere of discipline is achieved through instruction, good example,

and practice which influence employees to abide by rules, regulations, and procedures, and aid them in controlling their emotions and developing correct habits of conduct. Discipline is an indicator of the quality of supervision exercised.

b. Good discipline is the essence of effective teamwork. It has as its objective self-discipline, or that control which is self-motivated. Supervisors stimulate self-discipline by (1) giving employees a chance to express themselves on matters affecting them; (2) considering their views; and (3) recognizing individual dignity and the need for a sense of security. Self-discipline is further enhanced by recognizing employees' contributions; and giving them a sense of accomplishment, pride in the organization and the Air Force, and confidence in the personal integrity, consideration, and understanding of supervisors. It is fostered and sustained by firm and decisive leadership and consistently fair and equal treatment of all employees.

4. DELEGATION OF AUTHORITY TO DISCIPLINE, SUSPEND, AND DISCHARGE CIVILIAN EMPLOYEES

a. Commanders of activities to which central civilian personnel offices (CPOs) are assigned are delegated authority in AFRs 40–102 and 105 to discipline, suspend, and discharge civilian employees. (This authority may not be redelegated, but an authorized commander may designate others to act for him.) These commanders are empowered and obligated to act when it has been determined that disciplinary action is in order. The exercise of this delegated authority is subject to:

(1) Policies, rules, regulations, and standards established by law, Civil Service and USAF regulations.

(2) Appropriate review and inspection by CSC, HQ USAF, and major air commands.

b. To provide for economical and efficient administration, officials directly responsible for planning, directing, and supervising the work of others should be designated by authorized commanders to act for them in disciplinary matters. The designations should be consistent with those in paragraph 3 AFR 40–752. The first level of full-time line supervisors of employees are expected to have—as a part of their personnel management responsibilities—authority to orally admonish employees they supervise. A specific designation for this purpose is not necessary. Supervisors at the first level of supervision performing the full range of personnel management responsibilities should be designated to sign and issue notices, receive replies, and make decisions on reprimands, suspensions, and discharges.

5. WHO IS RESPONSIBLE FOR MAINTAINING DISCIPLINE

a. *Commanders:*

(1) Administer fair, impartial, and uniform disciplinary programs within their activity.

(2) Provide means for making known to all civilian employees under their jurisdiction, the rules and regulations and other conditions of employment to be observed.

b. *CPOs:*

(1) Guide and help commanders, operating officials, and supervisors to assure that all requirements are met for disciplinary actions.

(2) Take actions which are directed by CSC or higher levels of authority in the Air Force; or which are outside of a supervisor's normal personnel management responsibilities.

(3) Insure that disciplinary actions are consistent with the law, regulations, policy, and installation-wide practices.

c. *Supervisors.* Supervisors assign, review, and check the work of their employees; select, promote, and reassign personnel; evaluate performance; approve leave; resolve grievances; and maintain proper conduct and discipline among their employees. They:

(1) Maintain an office or shop atmosphere which generates good employee-management relations and efficient work production.

(2) Keep employees informed of rules, regulations, and standards of conduct.

(3) Gather and analyze all the facts and carefully consider circumstances before taking or recommending disciplinary action.

(4) Whenever necessary, constructively admonish employees individually and in private.

(5) Recommend more severe disciplinary action to the appropriate operating official.

(6) When designated by the commander, coordinate, sign, and issue letters of official reprimand or proposed and final decision letters of suspension and discharge. Supervisors must coordinate these notices with the CPO for statutory and regulatory compliance before delivery to the employee.

(7) Defend any disciplinary action taken if the employee requests a grievance inquiry, or appeal. Management must establish the validity of the charges and appropriateness of the penalty.

d. *Employees.* Employees must discharge their assigned duties conscientiously; conduct themselves (both on and off the job) in a manner which will reflect credit on USAF and themselves; respect the administrative authority of those directing their work; and observe the spirit as well as the letter of the laws and regulations governing their conduct. In many instances their conduct must be subject to more restrictions and to higher standards than that required in non-Federal employment. The Air Force will not interfere in the private lives of its employees; but it does require that they be honest, reliable, trustworthy, and of good character, reputation, and unquestioned loyalty to the Government and USAF.

6. ENFORCED LEAVE

a. When he is ready, willing, and able to perform his duties, an employee may not be forced to take accumulated annual or sick leave for purposes of discipline or for other reasons requiring the application of adverse action procedures.

b. There are some situations when an employee may be placed on leave without his consent which are occasioned by his own actions or conditions. These situations appear to be disciplinary but are not. When an employee is not ready, willing, and able to work as required, a supervisor may not carry him in a duty status but must make an appropriate charge to his annual or sick leave (see AFR 40–601 as to the types of leave available). Example: an employee reports without required safety equipment or in an intoxicated condition, or for some other reason is not physically able to perform his duties. Since placing an employee on leave in such situations may be regarded as an unfavorable action, full documentation must be made of the specific reasons and circumstances leading to the determination of the type of leave to be charged, in case the employee later contends it was disciplinary. The fact that an employee is placed on leave without his consent in the above situations does not preclude the taking of appropriate disciplinary or other adverse action. However, the reasons given the employee in the notices for the adverse action must be for the specific actions or conditions which prompted his being placed on leave—rather than the fact that he was placed on leave without his consent.

c. Adverse action procedures must be followed in any case where an employee is placed in a non-pay status without his consent except in cases of absence without leave.

7. SPECIFIC DISCIPLINARY SITUATIONS

a. *Absence Without Leave:*

(1) *When a supervisor determines that an employee should not be granted any type of leave (including leave without pay) for absence where advanced authorization was not obtained or where the employee's request for leave on the basis of alleged sickness has been denied.* In such cases, the supervisor may take disciplinary action for failure to secure approval for leave as required by regulations (see AFR 40–601) if he considers that action advisable.

(2) *Prolonged absence and failure to return from leave:*

a. When an employee fails to report for duty or return from leave and fails to inform his supervisor or employing activity of his intentions, the supervisor or activity should attempt to determine his intentions. If he replies that he has

quit, a resignation is processed. (See AFR 40–296.) If he requests additional time, consideration should be given to granting the leave; and the employee must be informed of the decision. When an employee absents himself without approved leave but indicates his intent to return to duty, the supervisor may institute disciplinary action consistent with paragraph 9.

b. When, after a reasonable time, the supervisor or activity has been unable to ascertain the employee's intentions concerning his return to duty, a discharge action may be processed for absence without leave. Special procedures for discharge of an employee who fails to report after a transfer of function are in AFR 40–362. In no case may the charge, "abandonment of his position" be used to discharge an employee.

b. *Delinquency and Misconduct.* A wide variety of situations fall under this heading. Some examples are: Failure to carry out assignments, disobedience of instructions, disorderly conduct, use of intoxicants habitually to excess, and dishonesty. Matters of conduct are generally covered in attachment 1 and in AFRs 40–711 and 30–30. There are other AF regulations dealing with administrative procedures which, if violated, are also cause for disciplinary action.

c. *Preappointment Considerations as Grounds for Disciplinary Actions.* Occasionally, through investigation of an employee after he is appointed, information is developed about his actions or condition which raises a question as to his retention in service. When, prior to his current appointment, such information has been fully disclosed and reviewed by either the Air Force appointing officer or by CSC, no disciplinary action may be taken solely on the basis of such previously disclosed preappointment actions. If the information was not known or disclosed, disciplinary action may be taken. The type of disciplinary action taken will depend on the circumstances, and supervisors should consult with the CPO for guidance before initiating any action. Generally, an employee who is serving under other than a temporary appointment or who is in a probationary period may not be discharged unless the preappointment consideration would have been material in preventing his appointment. When discharge of an employee is considered, based upon falsification of preappointment documents, the charges must meet the following criteria:

(1) The falsification must be a material fact which, if known, would clearly justify denial of employment.

(2) The falsification must have been intentional.

(3) The falsification must be recent (within the past 3 years, except where fraud is established).

d. *Unsatisfactory Performance of Duties:*

(1) Actions based on unsatisfactory performance of duties not due to disability are taken under AFR 40–714.

(2) Actions based on unsatisfactory performance of duties due to disability are taken under AFR 40–716.

e. *Security Risks.* The procedures to be followed in taking disciplinary actions in the interest of national security against employees in sensitive positions are covered in AFR 40–12.

8. CHOOSING AMONG DISCIPLINARY ACTIONS

In many situations which may call for corrective action, a wide variety of such actions are available—ranging from a discussion and oral admonishment to a reprimand, suspension, or discharge from service. In choosing a disciplinary action, the responsible supervisor must not make the mistake of demanding that the employee resign or retire to keep from being disciplined; nor should the supervisor intimate that resignation or retirement would clear the record. A resignation or retirement obtained by such means is treated as a discharge and is therefore subject to the adverse action procedures of AFR 40–752.

a. *Reasonableness.* Any disciplinary action demands the exercise of responsible judgment, so that an employee will not be penalized disproportionately to the character of the offense. This is particularly true of an employee who has a previous record of completely satisfactory service.

b. *Uniformity in Disciplinary Actions:*

(1) Attachment 1, "Table of Offenses and Penalties," assures that comparable penalties are imposed throughout the Air Force for like offenses.[1] It explains the offenses and the range of penalties for first, second, and third offenses. For offenses not listed, penalties consistent with those shown in the table will be imposed for offenses of comparable seriousness. In those instances where a range is specified in the table (i.e., reprimand to discharge) any suspension action taken within this range must not exceed 30 calendar days.

(2) The table will not be used mechanically. A supervisor must consider the circumstances carefully when evaluating offenses and penalties. Take into account the work history of the individual and his contribution to the Air Force, his reputation in the community, and the opportunity for rehabilitation—as well as elements of enticement and provocation and the consequences of the offense. Also, consider the extent to which the penalty will serve as a constructive example to other employees. Determine each case individually.

(3) In arriving at the appropriate degree of penalty, only offenses for which penalties were imposed within the 3 preceding years will be used to determine whether a second or third offense has occurred. Before disciplinary action is taken for a second offense, it must be determined that disciplinary action was taken for the first offense. Likewise, before disciplinary action is taken for a third offense, it must be determined that disciplinary action was taken for the first and second offenses. An oral admonishment is not considered to be a penalty for the purpose of determining that a second or third offense has occurred or for determining the degree of penalty for subsequent offenses.

(4) When an employee commits a series of unrelated offenses over a period of time, or a combination of different offenses at the same time, a greater penalty than is listed for a single offense may be considered. Whether to apply a penalty within the range for a second or third offense will be determined by the total number of offenses committed.

c. *Nondiscrimination.* A disciplinary action may not be taken against an employee for political reasons, except as required by law; nor may disciplinary action be based on discrimination because of marital status, sex, race, creed, color, or national origin; nor because of a physical handicap with respect to any position whose duties may be efficiently performed by a person with such a handicap.

9. TYPES OF DISCIPLINARY ACTIONS

a. *Oral Admonishment:*

(1) An oral admonishment is an interview between a supervisor and an employee on the subject of the employee's conduct and performance or his failure to observe a rule, regulation, or administrative instruction. It is intended to increase an employee's efficiency and value to USAF by changing his conduct, attitude, habits, or work methods. When the need for an oral admonishment arises, the supervisor:

(a) Gathers all the facts concerning the infraction.

(b) Conducts the interview in such a way as to avoid embarrassment or humiliation.

(c) States the reasons for the admonishment so that the employee understands them.

(d) Gives the employee the chance to express his views and explain the circumstances.

(e) Considers the employee's explanation, and if it is acceptable, closes the interview.

(f) If it is not acceptable, explains why and gives specific ways by which the employee can improve or correct his deficiency.

[1] "Offense" is defined as a breach of conduct or violation of law, rule, regulation, or policy by improper actions or failure to take proper action.

(g) Makes a notation of the oral admonishment on AF Form 971, "Supervisor's Record of Employee," for follow-up action and advises the employee that it has been made a matter of record.

(2) If at any time after an employee has been admonished the supervisor considers that the employee's conduct and performance have improved, he so notifies the employee and makes a notation on AF Form 971 concerning the employee's improvement.

b. *Reprimand:*

(1) A reprimand is a formal disciplinary action for significant misconduct, inadequate performance, or repeated lesser infractions. It is as severe a disciplinary action as a suspension, except that the employee is not placed in a non-pay, non-duty status.

(2) When it appears that a reprimand is warranted, an employee must be given:

(a) Notice of the proposed action, with specific and detailed reasons for the action.

(b) A chance to reply in writing to the proposed action.

(c) Consideration of any written reply he makes.

(d) A notice of final decision with information on his appeal and grievance rights. The contents of the notices and other procedures to be followed are contained in attachment 2. Samples of proposed and final decision notices are contained in attachments 3 and 4.

c. *Suspension.* A suspension is a temporary enforced absence from duty in a non-pay status which may be imposed as a penalty for significant misconduct or repeated lesser infractions. Periods of suspension in the Table of Offenses and Penalties (attachment 1) are expressed in calendar days. A suspension is a severe disciplinary action which is made a matter of permanent record. It penalizes not only the offending employee but production as well, since the services of the employee are lost during the suspension period. Since the objective is to correct and rehabilitate, the reprimand (which is equated with suspension) normally will be used. However, there may be facts and circumstances in an individual case which require more stringent action to impress those concerned with the necessity for improvement or correction. When suspension is proposed, the employee must be given notice of the proposed action, with specific and detailed reasons for the action; a chance to reply in writing to the proposed action; consideration of any written reply he makes; and a notice of the final decision with information on his appeal and grievance rights. The procedures for a suspension action are contained in attachment 2. Attachments 5 and 6 contain sample notices.

d. *Demotion.* No employee will be reduced in rank, grade, or rate of compensation because of conduct. However, this policy does not prevent a supervisor or an operating official from taking action for reasons other than conduct. Demotions because of inefficiency, reevaluation of position, an employee's inability or lack of qualifications to perform the duties of his position, or reassignment as a result of reduction in force are not considered conduct actions. AFR 40–752 contains procedures for demotion actions.

e. *Discharge.* This is the most severe type of adverse action, since it not only removes the employee from his job but may bar him from future Federal employment. Before it is initiated, the facts and circumstances in an individual case must be carefully analyzed. They must support the conclusion that the employee has clearly demonstrated his unwillingness or refusal to conform to the rules of conduct and that the action is appropriate for the offense and fully warranted. Supervisors must consult with the CPO when deciding whether to propose discharge of an employee. When there is a difference of opinion between the CPO and the supervisor on the merits of the proposed action, the case must be referred for decision to a higher level, up to and including the base commander. The specific steps to be followed when an adverse action is being taken are covered in AFR 40–752.

(1) A discharge for misconduct may be based upon the employee's actions off the job as well as on. It may also be based on actions before his appointment which reflect upon his suitability for Federal employment.

(2) Normally, a progression of disciplinary measures is applied in an effort to rehabilitate an employee before it is decided to discharge him. Discharge actions for misconduct after appointment of the employee *must* be preceded by such progressive disciplinary measures as oral admonishment, reprimand, and suspension—unless the misconduct is so serious or the violation of rules and regulations so flagrant that discharge for a first or second offense is clearly warranted.

(3) Discharges for delinquency or misconduct are reported and recorded as "Removal."

10. RECORDING DISCIPLINARY ACTIONS

All reprimands and suspensions are sent to the Central CPO for permanent retention in the employee's SF 66, "Official Personnel Folder." The submission must include a copy of the proposed notice, any reply the employee may have made, and notice of final decision. Oral admonishments are recorded only on AF Form 971.

11. CANCELLATION OF DISCIPLINARY ACTIONS

When a reprimand, suspension, or discharge becomes an accomplished fact, it becomes a permanent part of the employee's SF 66. A reprimand may not be withdrawn from the SF 66 unless it has been determined under AFR 40–771 or by authorized officials at HQ USAF to be unjustified or unwarranted. A suspension or discharge may not be canceled except under AFR 40–771 procedures or on appeal to CSC.

12. APPEALS AND GRIEVANCE PROCEDURES

a. An employee may request review of an oral admonishment, reprimand, discharge, or suspension under the procedures in AFR 40–771. He must submit the request not later than 10 days after the effective date of the action. The request must be in writing and must set forth the reasons for the request, together with proof and such pertinent documents as he desires to submit.

b. Employees may elect to appeal suspension actions for 30 days or less to CSC on the procedural aspects of the action but not on its merits. To be entitled to this benefit, the employee must be serving under a career, career-conditional, overseas limited, term, or indefinite appointment and have completed his probationary period, or be serving under a non-temporary appointment in a Schedule B position and have competitive status. This entitlement must be exercised not later than 10 days after the effective date of the suspension and be in writing to the appropriate CSC office. If an employee chooses to exercise this entitlement, he may not use USAF grievance procedures on the procedural aspects of the suspension, but may submit a grievance on the merits of the suspension to the Air Force not later than 10 days after the suspension becomes effective. Appeal rights to CSC on suspensions for more than 30 days and on discharges are stated in AFR 40–752.

By Order of the Secretary of the Air Force.

OFFICIAL.

J. P. MCCONNELL,
General U.S. Air Force,
Chief of Staff.

R. J. PUGH,
Colonel, U.S. Air Force,
Director of Administrative Services.

5 Attachments.

1. Table of Offenses and Penalties.
2. Procedural Requirements for a Reprimand or Suspension.
3. Sample Notice of Proposed Reprimand.
4. Sample Notice of Decision to Reprimand.
5. Sample Notice of Proposed Suspension.
6. Sample Notice of Decision to Suspend.

This regulation supersedes AFR 40–712, 13 August 1963.

ATTACHMENT 1

Table of offenses and penalties [1]

Offense	Explanation	Penalties		
		1st offense	2d offense	3d offense
1. Failure to carry out assignment:				
(a) Minor	Deliberate delay or failure to carry out assigned work or instructions in a reasonable period of time.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	Refusal to obey legitimate orders, disrespect, insolence, and like behavior.	Reprimand to 10 days' suspension.	Reprimand to discharge.	Discharge.
2. Absence without leave: [2]				
(a) Minor	Unauthorized absence of 8 hours or less, repeated tardiness, leaving the job without permission. Consider all circumstances in determining whether an offense has occurred.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major [3]	Unauthorized absence of more than 8 hours. If misrepresentation is involved, see item 8.	Reprimand to 10 days' suspension.	Reprimand to discharge.	Discharge.
3. Loafing or sleeping on duty:				
(a) Minor	Unauthorized participation in activities during duty hours which are outside of regularly assigned duties. The offense is usually considered "minor" when danger to safety of persons or property is not acute or injury or loss is not involved.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	The offense is usually considered "major" when danger to safety of persons or property is acute or injury or loss is involved.	Reprimand to discharge.	Discharge	
4. Careless workmanship or negligence:				
(a) Minor	When spoilage or waste of materials or delay in production is of significant value.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	When spoilage or waste of materials or delay in production is extensive and costly; covering up or attempting to conceal defective work; removing or destroying defective work without permission.	Reprimand to discharge.	Reprimand to discharge.	Discharge.
5. Violation of safety practices and regulations:				
(a) Minor	Failure to observe safety practices and regulations and danger to safety of persons or property is not acute. This may occur in conjunction with other offenses listed in this table.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	Failure to observe safety practices and regulations and danger to safety of persons or property is acute. This may occur in conjunction with other offenses listed here.	Reprimand to discharge.	Discharge	

6. Loss of, damage to, unauthorized use, or willful destruction of Government property, records, or information: [4]				
(a) Minor	When loss or damage is of small value and willfulness or intent is not involved.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	When willfulness or intent is involved	Reprimand to discharge.	Reprimand to discharge.	Discharge.
7. Theft, actual or attempted taking and carrying away Government property, or property of others.	Penalty will be determined primarily by value of property, mitigating circumstances, and employee's explanation.	do	Discharge	
8. False statements, misrepresentation: [5]				
(a) Minor	When there is substantial evidence of misunderstanding and the falsification, concealment, or misrepresentation is not deliberate.	Reprimand to 10 days' suspension.	do	
(b) Major	Deliberate misrepresentation; falsification, exaggeration, or concealment of a material fact in connection with any official document, or withholding of material facts in connection with matters under official investigation.	Discharge		
9. Disorderly conduct:				
(a) Minor	Rude, boisterous play which adversely affects production, discipline, or morale; use of disrespectful, abusive, or offensive language; quarreling or inciting to quarrel.	Reprimand to 5 days' suspension.	Reprimand to discharge.	Discharge.
(b) Major	Fighting; threatening or inflicting bodily harm to another; physical resistance to competent authority; any violent act or language which adversely affects morale, production, or maintenance of discipline; indecent or immoral conduct.	Reprimand to discharge.	Discharge	
10. Gambling:				
(a) Minor	Participation in gambling during working hours	Reprimand	Reprimand to 5 days' suspension.	Discharge.
(b) Major	Promotion of, or assisting in operation of organized gambling.	Reprimand to discharge.	Discharge	
11. Use of intoxicants:				
(a) Minor	Drinking or selling intoxicants on duty or on Government premises except where authorized. Reporting for duty drunk or impaired by intoxicants.	Reprimand to 5 days' suspension.	Reprimand to discharge.	Discharge.
(b) Major	Being on duty so intoxicated as to be unable to properly perform assigned duties, or to be a hazard to self or others.	Reprimand to discharge.	Discharge	
12. Misconduct off duty: [6]				
(a) Minor	Overt action constituting breaches of legal or social codes of a community which come to the attention of management.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(b) Major	Misconduct which adversely affects the reputation of the employee, or reflects unfavorably on the Air Force.	Reprimand to discharge.	Discharge	
13. Failure to honor valid debts or legal obligations.	In determining whether an offense has occurred, consider whether extenuating circumstances developed after the employee incurred the obligation and the employee's previous record. (See AFR 40-711.)	Reprimand	Reprimand	Reprimand to discharge.

See footnotes at end of table, p. 901.

ATTACHMENT 1

Table of offenses and penalties—Continued [1]

Offense	Explanation	Penalties		
		1st offense	2d offense	3d offense
14. False, malicious, irresponsible statements against management officials, supervisors, or other employees.	Making false, malicious, unfounded or highly irresponsible statements or unauthorized disclosures against other employees, supervisors, or officials with the intent to destroy or damage the reputation, authority, or official standing of those concerned.	Reprimand to discharge.	Discharge	
15. Discrimination: [7]				
(*a*) Minor	Any action or failure to take action based on race, color, religion, or national origin of an employee, former employee, or applicant which affects his rights, privileges, benefits, dignity, and equality of economic opportunity. Consider circumstances and the effect on the person discriminated against, use of abusive language, violent treatment, or insulting demeanor.	Reprimand	Reprimand to 5 days' suspension.	Reprimand to discharge.
(*b*) Major	If the discriminatory practice was deliberate	Reprimand to 30 days' suspension.	30 days' suspension to discharge.	Discharge.
16. Issuing worthless checks:				
(*a*) Minor	Apparent oversight or error by employee in maintaining record of bank account balance which results in nonpayment of check for insufficient funds. Consider all circumstances in determining whether an offense has occurred.	Reprimand	Reprimand to 3 days' suspension.	5 days suspension. (Note: Repeated offenses can result in discharge.)
(*b*) Major	Deliberate issuance of a check against an inadequate bank account balance or on a bank in which no account exists.	Reprimand to discharge.	Discharge	
17. Compromise or discredit of merit examination materials or process				
(*a*) Minor	Compromise resulting from discussion of specific question(s) or content of examination with other employe(s) based on experience in the examination when there is no deliberate effort or intent to compromise the examination materials or process.	Reprimand	Reprimand to 10 days' suspension.	Discharge.
(*b*) Major	Compromise of an examination through unauthorized possession, use, or furnishing to others of examination information or materials.	10 days' suspension to discharge.	Discharge	

18. Violation of security regulations:				
(a) Minor	When the breach does not result in release of security information to unauthorized sources, and there is no evidence of a compromise of classified information. Consider all circumstances surrounding the breach in determining if an offense has occurred.	Reprimand	Reprimand to 30 days' suspension.	Discharge.
(b) Major	When the violation is intentional or results in unauthorized release or compromise of security information.	Reprimand to discharge.	Discharge	
19. Prosecuting claims against United States.	Aiding and assisting in prosecution of claim against the United States, or receiving any gratuity or any share of or interest in claim from any claimant otherwise than in discharge of proper official duties.	Discharge		
20. Gifts to official superiors	Soliciting contributions from other Government officers or employees for gifts or presents to those in superior official positions. Accepting gifts or presents offered or presented as contributions from persons in Government employ receiving lower salary.	Reprimand	Reprimand to 10 days' suspension.	Reprimand to discharge.
21. Violations of other administrative rules or regulations not specifically mentioned here: [8]				
(a) Minor	Consider the employee's obligation to be aware of pertinent rules or regulations; the significance or frequency of violations; and the degree of adverse effect on production, morale, maintenance of discipline, external relationships, or reputation of the Air Force.	do	Reprimand to 30 days' suspension.	Do.
(b) Major		Reprimand to discharge.	Discharge	

[1] All periods of suspension for offenses are expressed in calendar days.

[2] Unauthorized absence without obtaining approval as specified in AFR 40-601, which is charged as absence without leave on the time and attendance report.

[3] See AFR 40-711 for appropriate action after absence of 7 calendar days.

[4] 5 U.S.C. 78(c) provides that any officer or employee who willfully uses or authorizes use of Government passenger motor vehicles or aircraft for other than official purposes shall be suspended for not less than 1 month and shall be suspended for a longer period or removed if circumstances warrant.

[5] Apparent oversights and errors, where satisfactorily explained, may be excused if not disqualifying. For restrictions on salary payment, see AF 5201, AFM 40-1.

[6] Discharge is warranted when U.S. citizens employed overseas become culpably involved with the law enforcement authorities of a host government in whose country the USAF facility is a guest. Such involvement reflects upon the United States and affects the success of its misison overseas.

[7] When a supervisor has engaged in an act of discrimination, an evaluation will be made of the manner in which he discharges his personnel management responsibilities to determine whether he should be reassigned or changed to lower grade. See AFR 40-713.

[8] When violations of conflict of interest regulations are involved, see AFR's 30-30 and 40-711.

ATTACHMENT 2

PROCEDURAL REQUIREMENTS FOR A REPRIMAND OR SUSPENSION

1. REQUIREMENTS

The purposes and use of a reprimand or suspension are explained in paragraph 9 of this regulation. The following paragraphs explain requirements surrounding contents and delivery of notices, the employee's answer, and the consideration that must be given it.

2. PROPOSED NOTICE

The proposed notice must be signed, dated, and received by the employee *at least 14 calendar days before the proposed action is to be* effective. It must be clear that it is a proposed action and not a matter already decided. The initiator of the action should carefully avoid making any statements in the initial notice which can be construed as indicating that a decision has been reached. The proposed notice must:

a. *Identify the Specific Proposed Action and When it Is Proposed to be Effective.* It should cite the specific failure or violation for which the action is being taken, such as failure to request leave in advance.

b. *Specify the Reasons.* The notice must state the reasons supporting the proposed action, specifically and in detail—including names, times, and places. The notice must be self-contained, so that an individual unacquainted with the facts and circumstances involved can obtain from the notice a clear understanding of the reasons for the proposed action.

(1) *Supporting Details.* It is necessary to state the factual reasons in enough detail to give the employee a clear understanding of the reasons so that he can prepare an answer. Mere statements of conclusions such as "you are guilty of disorderly conduct," without supporting details, do not meet the requirements for specificity.

(2) *Factual Clarity.* The notice must also include the date and type of disciplinary action and offense, if any, of the employee's past record which the initiator proposes to consider as contributing toward the severity of the proposed action.

b. *State the Employee's Right to Reply.* The notice must tell the employee that he has a right to reply in writing and to submit affidavits in support of his answer. The notice should tell him that his reply, if any, will be considered. It should identify the person to whom reply is to be made (either to the signer or other designated official who has authority to recommend final action in the case) and the time allowed for reply. At least 5 workdays must be given.

c. *State That the Final Decision Has Not Been Made.* The notice must tell the employee that no final decision will be made to put the proposed action into effect until his answer has been considered.

3. DELIVERY OF NOTICE

Personal delivery of the notice must be made to the employee, if possible, and his written acknowledgement of its receipt obtained on the retained copy of the letter.

4. EMPLOYEE'S ANSWER

The employee has a right to reply in writing and to submit affidavits in support of his answer, showing why any of the charges or reasons are incorrect and any reasons why the proposed action should not be taken. If he requests additional time within which to make his reply, the request should be honored if it is reasonable.

5. CONSIDERATION OF THE EMPLOYEE'S REPLY

The employee's reply is considered by the person who signed the proposed notice or other official named in the notice. The reply may contain denials or offer evidence which contradicts the charges or lessen their seriousness. It is the responsibility of the official who initiates the action to establish the correctness of the charges, so the reply must be given detailed and objective consideration before a final decision is reached. If there is conflicting evidence,

decision as to whether to modify, to withdraw, or to take the action as proposed depends on the preponderance and credibility of the evidence. In no case may the decision to take the action be based on charges not stated in the proposed notice. If there is need for collecting additional evidence, or other unusual circumstances cause undue delay in arrival at a final decision, the person deciding the final action must notify the employee in writing, estimating the date final decision will be made.

6. NOTICE OF FINAL DECISION

If the decision is to put into effect the action originally proposed, or some action less severe, the employee must be given a prompt, written notice of this decision. The notice must be delivered as provided in paragraph 3 of this attachment. The final decision notice contains:

a. A reference to the proposed notice and the reply received, if any, by dates. If no reply received, a statement to that effect.

b. A finding with respect to each reason, identifying the reason(s) by paragraph and subparagraph of the proposed notice.

c. Action decided upon and effective date. (Effective date is established to afford the employee the minimum notice period to which he is entitled as provided in paragraph 2 of this attachment.)

d. His appeal or grievance rights (see paragraph 12 of this regulation) and the name, phone number and location of the person in the central CPO who can give further information about how to make an appeal or grievance.

ATTACHMENT 3

SAMPLE NOTICE OF PROPOSED REPRIMAND

(Use Appropriate Letterhead)

(date)

Subject: Notice of Proposed Reprimand.
To: Name
Position
Organization

1. This is a notice of proposed reprimand for tardiness. On 7 April 1965 you did not report for work until 0900. As you are aware, the hours of duty are from 0830 to 1700. Your statement that you overslept because of social activities the preceding evening is not an acceptable excuse. It is your responsibility to arrange your off duty activities to enable you to report for work on time.

2. This is the third time you have been tardy within the past 3 weeks without an acceptable excuse. On 26 March 1965, you were 15 minutes late and had no explanation. On 1 April 1965, you were again 15 minutes late and stated that this was caused by the necessity to pay a bill en route to work. On each of these occasions you were orally admonished and reminded that you were expected to report for duty on time unless there was a genuine emergency.

3. You may answer these charges in writing to the undersigned. You also may submit affidavits in support of your answer. You will be allowed 5 workdays from the date of receipt of this letter to submit your answer. This right to reply is a significant right granted you. If you believe the proposed action is unwarranted, it is important that you reply, stating completely all the facts supporting why you believe the action should not be taken.

4. No decision to reprimand you has been made or will be made until after the time allowed you for reply. Any reply you make will be given careful consideration before final decision is made. Whether or not you reply, a written notice of final decision will be given to you.

5. If you wish to read the regulations pertinent to the action or obtain further informaton about how to make a reply, you may contact Mr. _____, of the civilian personnel office, building _____, telephone extension _____.

FOR THE COMMANDER
Signed_____
Title_____

AFR 40–751

ATTACHMENT 4

SAMPLE NOTICE OF DECISION TO REPRIMAND

(date)

Subject: Decision to Reprimand.
To: Name
Position
Organization

1. By letter dated _____, you were informed of a proposal to reprimand you for a third tardiness offense.

2. No reply to the proposed action was received from you. The reasons stated in the letter of _____, pargaraphs 1 and 2 are fully supported by the evidence and warrant your being reprimanded. Therefore, this reprimand will become a part of your official personnel folder.

3. If you consider this action improper, you may submit a grievance under the Air Force grievance procedures in AFR 40–771 but not later than 10 days afer the date of this letter. Your grievance must be in writing and state all facts and details with respect to time, place, dates, and other information. It should state what change in the action you believe should result from your grievance. Address your grievance to Commander _____ Air Force Base, Attn: Civilian Personnel officer.

4. If you need any further assistance about this decision, you may consult with _____ of the civilian personnel office, building _____, telephone extension _____.

FOR THE COMMANDER
Signed_____
Title_____

ATTACHMENT 5

SAMPLE NOTICE OF PROPOSED SUSPENSION

(Use Appropriate Letterhead)

(date)

Subject: Notice of Proposed Suspension for 5 Days.
To: Name
Position
Organization

1. This is a notice of proposed action to suspend you from duty without pay for 5 days beginning not earlier than 14 calendar days after you receive this letter. The reasons for this proposed action are as follows:

a. *Failure to carry out assigned work within a reasonable period of time.* On 19 April 1965, at about 0830 hours, you were instructed by your supervisor, _____, to prepare a supplemental pay voucher on _____ for salary due her for the period between 3 April to 17 April 1965. You were also told that the preparation of the voucher was to take priority over regular scheduled work, as the voucher was to be paid to her before 1500 hours by the Finance Office. At 1030 hours the same day, _____ inquired as to the completion of the voucher. You said you had not completed the voucher. She again told you that the preparation of the voucher took priority over other work and that it was it be completed and turned in to her before you left for your lunch at 1200 hours. You did not turn in the completed voucher before you left at 1200. A supplemental pay voucher requires not more than 1 hour to prepare. You had ample time to complete the voucher from the time you were given the assignment at about 0830 hours to the time you left at 1200 hours for lunch.

b. *Failure to request leave in advance of absence.* On 19 April 1965, you failed to report for duty at 1300 from your lunch hour. You neither requested nor were granted leave for the period from 1300 to 1500 hours when you reported for duty. Your explanation of that absence was to attend to business. Your explanation was not considered justified to waive the requirement for requesting leave in advance nor to grant you leave.

2. You may answer these charges in writing to the undersigned. You also may submit affidavits in support of your answer. You will be allowed 5 workdays from the date of receipt of this letter to submit your answer. This right

to reply is a significant right granted to you. If you believe the proposed action is unwarranted, it is important that you reply, stating completely all the facts supporting why you believe the action should not be taken.

3. No decision to suspend you has been made or will be made until after the time allowed you for reply. Any reply you make will be given careful consideration before final decision is made. Whether or not you reply, a written notice of final decision will be given to you.

4. If you wish to read the regulations pertinent to the action or obtain further information about how to make a reply, you may contact Mr. _____, of the civilian personnel office, building _____, telephone extension _____.

FOR THE COMMANDER
Signed_____
Title_____

ATTACHMENT 6

SAMPLE NOTICE OF DECISION TO SUSPEND

(date)

Subject: Decision to Suspend for 5 Days.

To: Name
Position
Organization

1. By letter dated _____ you were informed of a proposal to suspend you from duty without pay for 5 days.

2. Full consideration has been given to your written reply of _____. The reasons stated in the letter of _____, paragraph 1a and b, are fully supported by the evidence and warrant your suspension without pay. Therefore, the decision has been made to suspend you without pay for 5 days beginning on 17 May and ending on 21 May 1965. You will report for duty on 24 May 1965.

3. If you consider this action improper, you may submit a grievance under the Air Force grievance procedure immediately, but not later than 10 days after the effective date of your suspension. Your grievance must be in writing and state all facts and details with respect to time, place, dates, and other information. It should state what change in the action you believe should result from your grievance. Address your grievance to Commander, _____ _____Air Force Base, Attn: Civilian Personnel Officer.

4. (Include this paragraph only if employee has right to appeal to CSC (see paragraph 12b of this regulation)). You also have a right to appeal to the Civil Service Commission. In order to be considered, any appeal to the Civil Service Commission must be in writing, setting forth your reasons for appealing, with offer of proof and such pertinent documents as you are able to submit; and must be submitted not later than 10 days after you are suspended, to the (give name and address of appropriate CSC office). As the Civil Service Commission will only consider the procedural aspects of the action, its merits are appealable as indicated in paragraph 3 of this letter under Air Force grievance procedures.

5. If you need any further information about this action, you may consult with _____ of the Civilian Personnel Office, building _____, telephone extension _____.

FOR THE COMMANDER
Signed_____
Title_____

VIII. COMMAND INFLUENCE (S. 749)

Question 1: Assuming that "command influence" may be present when members of a court, or a counsel, imagine that a certain result is desired by higher authority, even though this authority has in no way expressed or indicated his judgment of the case, could any form of legislation counteract this type of "command influence"?

Question 2: What would be your opinion of a proposed amendment to the UCMJ which would specify that the exercise of command influence is a court-martial offense?

a. Because of the circumstances necessarily attendant to a case under such a proposed article, how likely would prosecution be?

b. Would this proposal nonetheless have value as an expression of the seriousness with which such activity is viewed, thereby greatly assisting the services in their efforts to educate officers to their responsibilities in area (Transcript page 131), and to the need for careful judgment in these situations? If so, would this justify, in your judgment, such an amendment?

Answer: The Department of Defense concurs in the views expressed in the individual Military Department responses to these interrogatories.

Question 3: The Subcommittee has received information to the effect that, subsequent to *U.S.* v. *Kitchens*, allegations of command influence were made in the case of *U.S.* v. *Perry and Sparks* in which review was requested by the Court of Military Appeals. The Command influence had allegedly been exercised over the two defense counsels who originally defended the accused in their trial at Fort Bragg and over the defense counsel who defended the accused at their retrial at Fort Jackson. What investigation was made of the allegations in that case, what conclusions were reached, and what, if any, disciplinary action was taken?

Answer: See Army response.

Question 4: The Subcommittee has been informed that there are currently pending two cases in the Court of Military Appeals which involve allegations of an improper lecture to members of the court-martial in connection with trials at Fort Devens, Massachusetts. One of the cases is *U.S.* v. *Albert* (18,960). What were the contentions made by the accused in those cases? In how many cases which reached the Boards of Review have there been contentions of command influence in recent years?

Answer: For first part, see Army response. For second part, see individual Department responses.

IX. Miscellaneous

Question 1: In the Navy and the Army, it is current practice not to have senior board members rate the performance of junior members. The reasons given during the hearings (Transcript pages 101–109) may be summarized as follows:

a. In establishing an independent judicial organization it was considered desirable to make the system free from improper influences in form as well as substance.

b. Since the members of the boards are personally known to some extent by the non-board rating officer, the board member is not prejudiced by being evaluated by persons ignorant of his performance.

(c) The opinions and knowledge of other board members may be solicited by the rating officer; as a consequence there is insulation from conscious or unconscious prejudice on the part of senior board members, without the danger of a member being rated by persons ignorant of the true nature of his performance.

General Manss, what personal comments do you have on each of these observations? If you consider these observations are valid, what additional reasons, in your opinion, outweigh them so as to warrant continuation of Air Force's present policy?

Answer: See Air Force response.

Question 2: In view of the fact that during war or national emergency the supply of legally-trained officers is likely to increase as the number of men in uniform increases (Transcript page 110), to what extent is it necessary to have "time of war" exceptions for those proposals (such as S. 750, S. 752, S. 754 and S. 758) which require expanded use of legally-trained personnel? Why is this exception required for section 35, UCMJ and S. 745?

Question 3: To what extent is the file on cases presented to BCMR or DRB sent to the JAG office for its opinion (Transcript page 91)?

a. How often is this done, and in what kind of cases?

b. In what percentage of cases is the opinion of the JAS followed by the respective boards? How often is more extensive corrective action taken than that recommended or suggested by JAG?

Question 4: It is currently the practice of the service, by regulation or otherwise, to inform the parents or guardians of members under 21 years, or those whose parents' permission was necessary for enlistment, of the fact that steps to court-martial or administratively process these members are being instituted?

a. What provisions are made to afford disinterested counsel and advice to immature servicemen, or others not capable of making effective decisions, as to the factors to be weighed in making various elections or choosing between different courses of action in these cases?

Question 5: In view of the DoD position in opposition to the bills affecting administrative discharge procedures, what would be the position of the services on the legislative enactment of the provisions of DoD Dicharge Directive 1332.14?

Question 6: Are there any provisions for review of an administrative discharge in an adversary proceeding prior to the execution of the discharge?

a. What is your feeling with respect to the legislative establishment of an adversary review prior to discharge upon the grounds of failure of due process in the board proceeding?

Question 7: What articles of the Code apply to cases of homosexuality presently handled administratively?

a. Of the cases handled administratively, what kinds of homosexual activity could not have been prosecuted as violations of Articles 125 or 134 of the Manual?

b. What is your position on the suggestion that the Code be amended to contain an article expressly making these kinds of homosexuality a court-martial offense?

Answer: Answers to these interrogatories are contained in the replies of the Military Departments.

[Army answers]

DEPARTMENT OF THE ARMY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, D.C., May 24, 1966.

Hon. SAM J. ERVIN, Jr.
Chairman, Committee on the Judiciary, Subcommittee on Constitutional Rights, United States Senate, Washington, D.C.

DEAR SENATOR ERVIN: Reference is made to your letter of February 24, 1966 and the questionnaire inclosed therewith.

Inclosed are detailed replies (Incl. 1) to the questionnaire and supplemental responses (Incl. 2) to certain of the questions in your 1962 questionnaire and *aide memoire.* I trust that the inclosed responses reflecting the Army viewpoint on your questions will be of assistance of the committee.

Sincerely yours,

KENNETH J. HOBSON,
Brigadier General, USA,
Assistant Judge Advocate General for Military Justice.

I. NAVY JAG CORPS (S. 746)*

1. In his statement, Secretary Morris stated that the Department of Defense has supported the concept of a Judge Advocate General Corps in the Navy (Transcript page 31). However, it was requested that this committee defer pending action on proposed revision of officer personnel laws (Transcript page 30).

a. Is this still the position of the DOD?

b. Admiral Hearn, what is your personal opinion as to the need for a Judge Advocate General's Corps in the Navy?

c. Is it your position that independent consideration of only that part of the Bolte proposals, specifically subsections 43–45 which deal with creation of the Corps, also be deferred until the entire package is acted upon?

2. What is the history of the Bolte package; how did it originate, when was it first introduced into Congress, and what legislative action has been taken to date?

a. In respect to the history of the Bolte proposals, what part has the Navy JAG proposal played? Was it included in the original package? If not, when was it added?

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*Answers to all of the questions in Part I will be submitted by the Navy.

b. What is the present status of the Bolte package in DOD?

c. What is its present status in Congress? Are hearings scheduled or anticipated in this session?

d. Is it contemplated in the DOD that the Bolte package might be divided for easier consideration by the Congress?

e. If such were proposed, would this be opposed by DOD?

f. If broken down, would the Navy JAG Corps remain a part of the package, or would it be dropped?

g. Would the Navy support a separate Corps proposal if subsections 43–45 were dropped from the Bolte package?

h. Would Navy support a separate Corps bill such as S. 746 if subsections 43–45 remained a part of the omnibus Bolte bill? If they were removed from the package bill?

3. What comments are there to the Corps proposal as presently set forth in S. 746 and what technical changes are recommended?

a. Would the Navy and DOD recommend passage of S. 746 if it were changed to incorporate the Corps provisions presently comprising subsections 43–45 of the Bolte package?

b. Which of the two proposals, S. 746 or subsections 43–45, is preferred, and for what reasons?

II. Field Judiciary (S. 745)

1. Question: In addition to the necessity for maintaining the flexibility permitted by the administrative authorization of a field judiciary, what other reasons exist for not legislatively establishing this program (Transcript page 113)?

Answer: We have not yet had enough experience with the program and need additional time to study and evaluate it. Each service should be able to determine, on the basis of its own needs, the best method of meeting its responsibilities in this matter. The program may not serve another service's requirements as well as those of the Army.

a. Question: Except for the unforeseen circumstances produced by wartime, what other situations can be foreseen in which the legislative creation of a field judiciary would prove too inflexible?

Answer: The fact that the effect of various emergency-type situations on the law officer program *cannot* be foreseen is evidence of the need for flexibility and of the disadvantages inherent in a rigid program that could only be changed through legislation.

b. Question: Would including an exception for "time of war" or "national emergency" provide the desired flexibility?

Answer: No. We need the flexibility to enable us to improve upon the program *whenever* the desirability of providing new policies and methods of administration of the program becomes apparent as a result of additional experience with the program and continual study into ways in which the program can be made more efficient.

c. Question: Assuming that the legislative creation of a field judiciary is considered necessary, what changes or additional provisions would you suggest to overcome the problems or objections set forth above?

Answer: The Army recommends that the legislation be written substantially as follows:

"A BILL To provide for the designation, detail, assignment, and utilization of military judges of general courts-martial, and for other purposes

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

"(1) Subchapter V is amended by striking out the following item in the analysis:

"'*826. Law officer of a general court-martial.*' and inserting the following item in place thereof:

"'*826. Military judge of a general court-martial.*'

"(2) Section 826 is amended:

"(A) by striking out the words "Law officer" in the catchline and inserting the words "Military judge" in place thereof;

"(B) by striking out subsection (b) and inserting the following in place thereof:

"'(b) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail by the convening authority, and, unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial shall be assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when these duties are assigned to him by or with the approval of that Judge Advocate General or his designee.'; and

"(C) by adding the following new subsection at the end thereof:

"'(c) The military judge may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.'

"(3) Sections 801(10) (article 1(10)), 806(c) (article 6(c), 816(1) (article 16(1)), 826(a) (article 26(a)), 827(a) (article 27(a)), 829(b) (article 29(b)), 837 (article 37), 839 (article 39), 841 (a) and (b) (article 41(a) and (b)), 842(a) (article 42(a)), 851 (b) and (c) (article 51 (b) and (c)), 854(a) (article 54(a)), and 936(b) (article 136(b)) are amended by striking out the words 'law officer' wherever they appear in such sections and inserting in place thereof the words 'military judge'.

"SEC. 2. The amendments made by this Act shall become effective with respect to general courts-martial convened on or after the first day of the tenth calendar month following the date of enactment of this Act."

A sectional analysis of the above proposed substitute legislation follows:

Section analysis of a bill to provide for the designation, detail, assignment, and utilization of military judges of general courts-martial, and for other purposes

Section 1(1) amends Subchapter V by changing the title designation of "law officer" to "military judge" in the analysis item for article 26 in accordance with the amendments made in Sections 1 (2) and (3).

Section 1(2) amends article 26 by changing the title designation of "law officer" to "military judge" in the catchline and by adding a new subsection (b) prescribing the method of designating and detailing military judges and providing for their assignment and utilization. The new subsection (b) will enact into law the general principles of a judiciary system already adopted administratively by some of the armed forces but will retain a desirable degree of flexibility in achieving those improvements in detail which may be indicated by additional experience. Subsection (c) of the amendment contains the present provisions of article 26(b), except that the words "law officer" have been changed to "military judge" consistently with the provisions of the new subsection (b) of article 26 and the amendments made in section 1(3) of the bill.

Section 1(3) amends articles 1(10), 6(c), 16(1), 26(a), 27(a), 29(b), 37, 39, 41 (a) and (b), 42(a), 51 (b) and (c), 54(a), and 136(b), by changing the title designation of "law officer" to "military judge" to provide for a greater judicial atmosphere in the military court-martial system and to recognize the judicial statute of law officials in that system, who perform duties comparable to those of a judge of a district court of the United States.

Section 2 provides that these amendments becomes effective on the first day of the tenth calendar month following the month in which enacted.

To complement the above proposed substitute legislation concerning the field judiciary, the following substitute meausre for S. 748, concerning the intermediate appellate judiciary is submitted. This proposed bill, which adopts the improved organizational structure of the intermediate appellate judiciary contained in S. 748, including the title "Court of Military Review", eliminates the technical deficiencies and deletes the more unacceptable provisions of S. 748, such as the requirement that each panel of the Court of Military Review have at least one civilian member and that the chief judge on each panel be a civilian.

The text of the Army's proposed bill and a sectional analysis follow:

"A BILL To amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by providing for the establishment of Courts of Military Review by each Judge Advocate General, prescribing qualifications for the judges thereof, providing for certain related administrative and procedural changes, and for other purposes

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, is amended as follows:

"(1) The catchline and subsection (a) of section 866 (article 66) are amended to read as follows:

" '§ 866. Art. 66. Review by Court of Military Review

" '(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and any such panel shall be composed of not less than three military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f) of this section. Military judges who are assigned to a Court of Military Review may be 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. The Judge Advocate General shall designate as chief judge one of the military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the military judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.'

"(2) Section 868 (article 68) is amended to read as follows:

" '§ 868. Art. 68. Branch offices

" 'The Secretary concerned may direct the Judge Advocate General to establish a branch office with any distant command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Military Review with one or more panels. That Assistant Judge Advocate General and any Court of Military Review established by him may perform for that command, under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Military Review established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.'

"(3) Sections 865(b) (article 65(b)); 866(b), (c), (d), and (e) (article 66(b), (c), (d), and (e)); 867(b), (c), (d), and (f) (article 67(b), (c), (d), and (f)); 869 (article 69); 870(b), (c), and (d) (article 70(b), (c), and (d)); 871(c) (article 71(c)); and 873 (article 73) are amended by striking the words 'board of review' wherever they appear and inserting the words 'Court of Military Review' in place thereof.

"(4) Section 866(f) (article 66(f)) is amended by striking the words 'boards of review' and inserting the words 'Courts of Military Review' in place thereof.

"SEC. 2. This Act becomes effective on the first day of the tenth month following the month in which it is enacted."

Sectional analysis of a bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by providing for the establishment of Courts of Military Review by each Judge Advocate General, prescribing qualifications for the judges thereof, providing for certain related administrative and procedural changes, and for other purposes

Section 1(1) amends article 66(a) to require each Judge Advocate General to establish a Court of Military Review in the place of "one or more boards of review" as is provided in the present article 66(a). The amendment also provides that the Court of Military Review shall be composed of one or more panels and that each panel shall be composed of not less than three military judges. In reviewing court-martial cases, the Court of Military Review may sit as a whole, or in panels, in accordance with uniform rules of procedure prescribed by the Judge Advocates General in accordance with article 66(f). Qualifications of the military judges who may be assigned to the Court remain the same as the present qualifications for members of boards of review. Under the amendment, the Judge Advocate General designates as chief judge one of the military judges of the Court of Military Review established by him. The chief judge determines on which of the panels of the Court the military judges assigned to the Court will serve and which military judge assigned to the Court will act as the senior

judge on each panel. The purpose of the amendment is to provide a single appellate agency for the review of court-martial cases within each service, to improve and enhance the stature and independent status of these appellate agencies, and to provide for sound internal administration within the Court of Military Review.

Section 1(2) amends article 68 to provide that the Secretary concerned, instead of the President as provided in the present article, may direct the Judge Advocate General to establish a branch office under an Assistant Judge Advocate General with any distant command. That Asistant Judge Advocate General, with the consent of the Judge Advocate General, may establish a Court of Military Review with one or more panels. In other respects the provisions of the amendment are similar to the provisions of the present article 68 respecting the Assistant Judge Advocate General and boards of review.

Sections 1(3) and 1(4) amend sections 865(b) (article 65(b)); 866(b), (c), (d), (e), and (f) (article 66(b), (c), (d), (e), and (f)); 867(b), (c), (d), and (f) (article 67(b), (c), (d), and (f)); 869 (article 69); 870(b), (c), and (d) (article 70(b), (c), and (d)); 871(c) (article 71(c)); and 873 (article 73) to conform with the amendments made in sections 1(1) and 1(2) by striking the words "board of review" or "boards of review" and substituting in place thereof the words "Court of Military Review" or "Courts of Military Review", as appropriate.

Section 2 provides that these amendments become effective on the first day of the tenth month following the month of enactment.

d. Question: Is the field judiciary system used at all in the Viet-Nam operation, or has it been used at any time under wartime conditions? What problems have been raised in these circumstances, and how have they been overcome?

Answer: The field judiciary system is presently being used in Vietnam. Initially Vietnam was serviced from Okinawa, but a law officer was sent to Vietnam in July, 1965, when the case load began to build up. There have been some 30 cases since that time, and since the case load continues to build up, another law officer will soon be sent.

2. Question: What is the present situation in the Air Force with respect to the assignment of law officers (Transcript page 115)?

a. Question: Are there such JAG personnel permanently stationed in every command where special courts-martial are conducted? Is it the present practice in the Air Force to have all trials requiring a law officer in one or a few geographical areas?

b. Question: Why would the establishment of a field judiciary require the Air Force to "spot people around in various parts of the world" and why would the program require "about four times as many people"? Please specify how the enactment of S. 745 would impose a greater manpower burden on the Air Force.

Answers to question 2, 2a, and 2b will be submitted by the Air Force.

III. Summary Courts-Martial (S. 759)

1. Question: What has been the number of summary courts-martial in recent years since the 1963 amendment to Article 15 (Transcript page 215)?

Answer: FY 63 (New Art. 15 effective 1 Feb 63)—32,316. FY 64 (First full FY under new Art. 15)—16,926. FY 65—17,090.

a. Question: Have certain commands eliminated the summary court-martial (Transcript page 66)?

Answer: In the Army, no.

b. Question: Does the frequency of summary courts-martial vary significantly in different commands? What is the high, low, mean, and median number of summary courts-martial in various commands?

Answer: There is, of course, a substantial variation in the actual number of summary courts-martial between a command to which a large number of troops are assigned and one to which a much smaller number of troops are assigned. However, the number does *not* vary significantly in different commands when considered on a rate per 1000 strength basis and in view of the differences between the locations and missions of the various installations and commands. In calendar year 1965, in the Army, the rate per 1000 strength in the number of summary courts-martial varied from a low of about 3.24 per 1000 strength through a median of about 10 per 1000 strength to a high of about 19.68 per 1000 strength.

c. Question: To what is the variation in number of summary courts-martial attributed?

Answer: The reason for any disparity in the number of summary courts-martial, without an exhaustive study, cannot be pinpointed. We can only list possible factors, including the nature of assignments and work and the location and missions of the various installations and commands.

2. Question: Of the number of summary courts-martial in recent years, how many represent trials resulting from refusal to accept Article 15 punishment?

Answer: In FY 1965, of 17,090 persons tried by summary court-martial, 2,718 or about 16 percent had first refused nonjudicial punishment.

a. Question: Are there statistics on the number of Article 15 imposed or offered? In how many cases did the refusal to accept Article 15 punishment *not* result in summary courts-martial?

Answer: In fiscal year 1965, nonjudicial punishment was imposed upon a toital of 189,608 persons in the Army. There are no statistics available as to how many refusals of Article 15 punishment did *not* result in summary court-martial. However, a sampling of judge advocates from throughout the world indicated that the number is very low. The highest estimate given was 10 percent, several judge advocates indicated a summary court-martial was convened in every case of refusal of nonjudicial punishment, and a majority of those "polled" estimated that a summary court-martial was *not* convened in only about 5 percent or less of the cases involving refusal of Article 15 punishment.

3. Question: How many special courts-martial have there been in recent years?

Answer: In fiscal year 1965, there were approximately 24,813 special courts-martial in the Army.

a. Question: Of this number, how many resulted from refusal to accept summary court-martial?

Answer: We have no statistics on the number of special courts-martial resulting from refusal to accept summary court-martial. However, a sampling of judge advocates from throughout the world indicates that accused persons generally prefer a summary court-martial if it is offered. A compilation of the reponses of judge advocates to this question indicates that only about one percent or, at the very most, between one and five percent of special courts-martial results from refusal of a summary court-martial. Several of those "polled" said refusal of a summary court-martial almost never occurred.

b. Question: Of the number given in (a), in how many special courts-martial did the accused request legally-qualified counsel and how often was this request granted?

Answer: In view of the very small number of cases in which there is a refusal to accept a summary court-martial, no reliable answer can be given to this question. However, it may be stated that requests for appointment of legally qualified counsel at a special court-martial are rarely granted in the Army, because these counsel are *in fact* not often reasonably available from their required duties. A sampling of judge advocates indicates that legally trained non-judge advocate officers occasionally are available and that civilian attorneys sometimes appear with counsel at special courts-martial.

4. Question: What procedural protections for the accused are present in a special court-martial that are not present in summary court-martial (Transcript page 70)?

Answer: Like its civilian counterpart, the police court, or magistrates court, the summary court consists of one person who performs the function which judge and jury perform in the higher courts. The next higher court in the military system is the special court-martial which consists of at least three members (jurors) and counsel for both sides. The accused may request that enlisted members serve on a special court-martial. Special court-martial trials are conducted somewhat more formally from a procedural standpoint, and more complete summarized records of trial are prepared for Army special courts-martial than for Army summary courts-martial.

a. Question: From the standpoint of ensuring impartiality of adjudicatory procedures, including review, what advantages are there for the accused in a special court-martial that are not present in a summary court-martial?

Answer: Concerning the factor of impartiality as mentioned in the question, there are no advantages in Army special courts-martial that are not present in Army summary courts-martial. Impartiality is insured at all stages of the proceedings in special and summary court-martial cases.

b. Question: What is the difference in review procedures after a summary court-martial conviction, and those available after special court-martial? Is

there any difference when that special court-martial trial resulted from a refusal to accept a summary court-martial?

Answer: There is no difference in the review procedures followed for Army summary and special courts-martial, except that a detailed summarized record of trial is provided in a special court-martial. Special courts-martial resulting from the accused's refusal of trial by summary courts-martial get the same treatment at all stages, including review, as other special courts-martial.

5. Question: Considering the number of instances in which a summary court-martial is elected by a member in lieu of the offer of Article 15 punishment, and considering also the frequency in which special courts-martial are held because of a refusal to accept a summary trial, what is the estimate of times in which a special court-martial would be elected in lieu of an Article 15, if the summary court-martial were abolished?

Answer: Statistics for FY 1965 indicate that about 16 percent of the Army summary courts-martial resulted from election of the accused to be tried by court-martial in lieu of accepting nonjudicial punishment. While statistics are not available, experience would indicate that a much smaller portion of special courts-martial result from the accused's refusal to be tried by summary court-martial. In this connection it must be remembered that an accused has a right to refuse trial by summary court-martial only as to offenses for which he has not been offered nonjudicial punishment. If the summary court-martial were abolished it would be necessary to resort to special or general courts-martial to dispose of the minor offenses formerly tried by summary courts-martial. Since these higher courts have far greater sentencing power than the summary court-martial, persons convicted by them stand the risk of receiving more punishment than if they were tried and convicted by summary court-martial. Therefore, it is estimated that, if the summary court-martial were no longer available, many of the accused who would now elect trial in lieu of nonjudicial punishment would decide to take nonjudicial punishment in lieu of risking potentially greater punishment before a special court-martial.

6. Question: What opportunities exist for the accused in a summary court-martial to review the record and note his objections or comments (Transcript page 63)?

Answer: Under Army regulations (AR 27–12) each accused who is tried by summary court-martial is furnished a copy of the record of trial as soon as practicable after the convening authority takes his action. The accused may then review the record and may communicate any objection or comments he desires to the supervisory authority or reviewing judge advocate for consideration in connection with the automatic legal review of the record.

a. Question: What objection is there to allowing the accused to note his concurrence, or explain his non-concurrence, on the record sheet of a summary trial?

Answer: Although it is not currently the practice, there would be no objection to allowing the accused an opportunity to note his concurrence or explain his nonconcurrence on the summary court-martial record of trial. As previously indicated, the accused now has the opportunity to do this, if he desires, by separate communication.

7. Question: Are defendents permitted by official Defense Department or service policy or regulation to have counsel assist them in summary courts (Transcript pages 70 and 81)?

Answer: In answer to this question the following excerpt from paragraph 2, DA Pamphlet 27–7, "*Military Justice Handbook-Guide for Summary Court-Martial Trial Procedure*", is quoted as follows:

"The accused may be represented during the summary court-martial proceedings by a civilian lawyer provided by him or by military counsel if one has been made available for that purpose by competent authority. Civilian or military counsel representing the accused should be allowed to examine witnesses for the defense, cross-examine witnesses for the Government, state his objections to the reception of evidence and questions asked of witnesses by the summary court-martial, make argument concerning the weight or sufficiency of the evidence or the appropriateness of a sentence, and otherwise perform the normal functions of counsel."

a. Question: May they have special assistance from non-legal personnel of their own choosing, whether in service or not?

Answer: As indicated in the answer to the basic question 7, above, an accused person is permitted to be represented by a lawyer at a summary court-martial.

However, there are no restrictions on the accused's receiving assistance out of court from non-legal personnel—such as from persons in the personnel field—and this is often done.

b. Question: If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

Answer: A "sampling" of judge advocates from throughout the world indicates that it is the policy in most commands not to appoint counsel for an accused tried by summary court-martial. As indicated in the answer to the basic question 7, above, an accused may be represented at a summary court-martial by a civilian lawyer provided by him. In addition, our "sampling' of judge advocates indicates that in most commands, accused tried by summary courts-martial are urged to seek the advice and assistance of a judge advocate officer in the preparation of their cases prior to trial.

c. Question: Are servicemen regularly informed prior to trial of their right to have counsel in summary courts?

Answer: No. There is no right under the Uniform Code of Military Justice or *Manual for Courts-Martial, United States, 1951.*

d. Question: In how many cases have counsel appeared to assist the accused in summary courts-martial, and how often have they been legally trained or qualified?

Answer: Again the Army has to rely on its "sampling" of judge advocates for an answer to this question. The responses to this question clearly indicate that the appearance of counsel for the accused at a summary court-martial is very rare, and almost never is such counsel legally qualified. As indicated in the answer to 7b, above, however, judge advocate officers are generally available to give advice to an accused prior to his trial by summary court-martial. Indications are that only in a very small percentage of summary court-martial cases does the accused appear with a civilian lawyer provided by him.

e. Question: What is the comparison of acquittal rates when counsel is present in summary courts and when they are not?

Answer: Because the Army maintains no statistics in this regard, and because of the small number of summary court-martial cases in which the accused is represented by counsel, no reliable answer can be given to this question. Most of the officers questioned in our "sampling" of judge advocates stated they could give no answer to this question. The consensus among those who did give an answer is that there is very little, if any, difference in the acquittal rate when counsel is present at summary courts-martial.

8. Question: What official guidelines are issued to commanders to assist them in the decision as to whether a minor offense warrants an offer of an Article 15 or a summary court-martial. Is the decision whether to offer an Article 15 or a summary court-martial essentially a matter of the officer's good judgment?

Answer: General information and instructions in the proper use of Article 15 is provided in chapter XXVI, *Addendum to the Manual for Courts-Martial, United States, 1951,* and AR 27–15. In specific reply to the question posed, the following excerpt from AR 27–15, *Nonjudicial Punishment,* 12 April 1965, is quoted as follows:

"*b. Personal exercise of discretion.* An officer who is considering a case for possible disposition by him under Article 15 will exercise his own discretion in evaluating the case, both as to whether punishment should be imposed under that Article at all and as to the amount and nature of the punishment if it is to be imposed. No superior may direct or recommend that an inferior authority impose punishment under Article 15 in a particular case, nor may a superior issue regulations, orders, or so-called 'guides' which either directly or indirectly suggest to inferior authorities that certain categories of minor offenses should be disposed of by punishment under Article 15, as distinguished from nonpunitive measures, or that predetermined kinds or amounts of punishments should be imposed for certain classifications of Article 15. A superior commanding officer may, however, reserve to himself or his delegate the right to exercise Article 15 authority over a particular case or over certain categories of offenses or offenders (see para. 2*c*)."

The primary purpose of this directive, of course, is to prevent improper command influence. See also para. 30*f* and 33*h*, MCM, 1951.

a. Question: Is it true that the practical effect of the officer's initial decision to offer an Article 15 or a summary court-martial is to determine whether the serviceman has an election to trial by special court-martial?

Answer: To begin with it must be made clear that under no circumstances does an accused have a right to "elect" trial by special court-martial. Only two elections of this type are available to an accused. First, he may elect to be tried by court-martial in lieu of nonjudicial punishment, in which case he may be tried by either of the three types of courts-martial. In most such instances, the summary court-martial is used in the case of enlisted men, but it is not necessary that a summary court-martial be used as the question seems to imply. Second, an accused may "elect" to refuse trial by summary court-martial for any offense as to which he has not been offered nonjudicial punishment. In these cases the accused may be tried by either special or general court-martial. While a commanding officers' initial determination as to whether or not to offer an accused nonjudicial punishment has a practical effect upon whether the accused may or may not subsequently be tried by special court-martial for the offense under consideration, it may be most confidently stated that this factor is not one that is specifically considered by commanders in making their decision as to whether to offer an accused nonjudicial punishment. Commanders know that if an accused refuses nonjudicial punishment he may be tried by any type of court-martial and that most such cases are tried by summary courts-martial, and they might consider what type of court they will recommend if the accused refuses nonjudicial punishment. This would be about the extent of the commanding officer's consideration as to what type of trial would follow a refusal of nonjudicial punishment.

9. Question: In view of the fact that the special court-martial contains certain procedural protections not afforded to summary courts-martial, why should not a man be permitted to elect a special court-martial, whether or not he has been offered and has refused an Article 15, if he believes he has a better chance thereby of establishing his innocence, and is willing to risk the possible harsher punishment of a special court-martial?

Answer: To the extent that the question suggests that an accused should be able to make an election, binding on the government, as to the type of court in which he wants to be tried when he refuses nonjurisdictional punishment, it is pointed out that this suggestion fails to take into account the interests of the government, which in every case are equal to the interests of the accused. Any idea or suggesion that all the options should be in favor of the accused and that only his interests are to be protected is rejected. It is not considered to be in the best interests of economy or justice to permit an accused charged with a minor violation to require the government to hold a full-scale trial involving a minimum of 5 officers.

a. Question: Aside from the additional manpower requirements of a special court-martial, and that it is possible to impose harsher punishment, what factors militate against offering a special court-martial to any serviceman who requests it?

Answer: The reasons indicated in the question are very good reasons for not permitting an accused to force the government to try him by special court-martial in lieu of nonjudicial punishment or trial by a summary court-martial in any case in which he desires to be tried by a special court-martial. The implication that the accused should be permitted to choose the trial forum cannot be accepted. In most of these cases, the offenses are entirely too minor in nature to warrant a trial by special court-martial. On the other hand, in some instances, it may be determined that a case should be referred to a general court-martial for trial after refusal of nonjudicial punishment or summary court-martial. This option should not be taken away from the government.

b. Question: What is your estimate of the influence that the creation of a single law officer special court-martial would have on the manpower demands involved in giving an election of a special court-martial to every serviceman who requests one?

Answer: Creation of a single-officer special court-martial would not lessen the overall manpower requirements. It would increase the number of lawyers required in the Army, particularly if the purpose of the creation of the one-officer special court-martial were to provide a forum for the trial of all cases in which the accused refused nonjudicial punishment.

c. Question: Would the objections to abolishing summary courts-martial because of the manpower requirements be met by permitting only trial by a single law officer special court-martial when an Article 15 is refused?

Answer: It is assumed that the question contemplates the abolition of the summary court-martial entirely—not just in those cases in which Article 15 punishment is refused. In this connection, it should be borne in mind that in fiscal year 1965, in the Army, fully 84 percent, or 14,372, of the 17,090 summary court-martial cases were *not* cases in which Article 15 punishment had been refused. Under the terms of the question, all of these cases would also have to be referred for trial to a special court-martial or to a general court-martial and would thus require a full-scale trial. In addition, it is likely that the one-officer special courts-martial resulting from refusals of Article 15 punishment would escalate into a full-scale trial. Again it is emphasized that this would not be desirable in view of the very minor nature of the great majority of offenses for which nonjudicial punishment or summary court-martial is offered. This would result in thousands of these minor-type offenses either going unpunished or being tried by a court with greater punishment powers.

IV. CHANGES IN SPECIAL COURTS-MARTIAL (S. 752)

1. Question: In how many special courts-martial has there been legally-qualified counsel present for the accused?

Answer: The Army sampling of judge advocate officers indicates legally qualified counsel is very seldom *appointed* to defend an accused at a special court-martial, and the concensus of those questioned is that in perhaps five percent of special court-martial cases the accused is represented by legally qualified civilian counsel provided by him.

a. Question: How often has legal counsel been requested, and how often has it not been made available?

Answer: Our sampling indicates that the number of requests for legally qualified counsel at special courts-martial may very widely from command to command and from time to time for no known reasons. Several officers "polled" on this question replied that these requests were made in only about one percent of the total number of special court-martial cases, and by far the majority of officers estimated they occur in no more than ten percent of the cases. The highest estimate made was about 30–40 percent of the total number of special court-martial cases. There is wide agreement that, in the Army, as stated in the answer to the basic question 1, above, legally qualified counsel, because of their other duties, are very seldom available to serve on special courts-martial.

b. Question: What is the comparative acquittal, appeal, and successful appeal rates for special courts-martial in which legal counsel has and has not been made available?

Answer: Because no statistics are maintained in this regard, and because of the relatively few special court-martial cases at which legally qualified counsel is present for the accused, this question cannot be given a really reliable answer. However, our sampling shows that most judge advocates believe there is very little difference.

c. Question: How often has there been legally-qualified counsel on the defense side but not the other?

Answer: This varies from command to command. Our sampling indicates that in some commands, legally qualified counsel is provided as trial counsel whenever possible if the accused is represented by legally qualified counsel. On the other hand, some judge advocates indicated that the trial counsel is very seldom legally qualified in cases where the accused provides his own civilian lawyer or is otherwise represented by legally trained counsel.

d. Question: Are any trends evident, and are any conclusions suggested by this experience?

Answer: No trends are evident from the sampling made by the Army, and the only conclusion that can be drawn with real assurance is that legally qualified counsel is rarely available from *required* duties for appointment as counsel on a special court-martial.

2. Question: In how many cases has there been a lawyer present on the special court-martial (Transcript page 137)?

Answer: The Army's sampling of judge advocates indicates it is extremely rare to find a lawyer present on a special court-martial; actually, almost all of the officers questioned indicated they believe this situation almost *never* exists.

a. Question: In how many cases has the lawyer been a member, but not the President?

Answer: In view of the answer to the basic question 2, above, the answer here is that very seldom, if ever, has a lawyer been either.

b. Question: In how many cases has there been legal counsel for the defense but no lawyer present on the court?

Answer: In view of the above, this would undoubtedly be the situation in practically every case in which legally qualified counsel appears for the accused, which is itself not often (see the answer to 1, above).

c. Question: How often has a lawyer been assigned to the court because of the presence of legally-qualified defense counsel?

Answer: The sampling indicates this has probably never been done.

d. Question: In how many cases has a lawyer been challenged from a special court-martial and how does this compare with challenges of non-legally trained personnel?

Answer: No answer is possible in view of the above answers to the other parts of question 2.

e. Question: What is the comparative rate of successful appeal, on any grounds, to COMA when the President is legally-qualified and when he is not?

Answer: No Army special court-martial cases are reviewed by the Court of Military Appeals.

f. Question: Similarly, what is the comparison of results when these two classes of cases are reviewed under Articles 65–67?

Answer: No answer is possible in view of the above answers to the other parts of question 2.

g. Question: Are the above answers (e) and (f) affected where the defense counsel is legally qualified?

Answer: The Army sampling of judge advocates shows that, because of the small percentage of special court-martial trials at which there is a legally qualified defense counsel, there is very little, if any, basis for comparison, so that no reasonably reliable answer can be given.

3. Question: When issues such as the admissibility of evidence, voluntariness of confessions, sufficiency of proof, form of instructions, etc., are raised by legal counsel, what guidance is available to the non-legally trained Court President and members in deciding them? May they seek the advice of JAG personnel (Transcript page 136)?

Answer: Decisions of the Court of Military Appeals (U.S. v. Bridges, 12 USCMA 96, 30 CMR 96 (1961); U.S. v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957)), make it clear that in open sessions the president of a special court-martial performs the functions which are performed by a law officer in a general court-martial. Thus, all instructions and guidance to the court members on legal matters are communicated by the president. The same court decisions also provide that only the president may have access to the *Manual for Courts-Martial* and other legal authorities during open sessions of a trial. In addition, presidents of Army special courts-martial are provided, and required to use. DA Pamphlet 27–15 "*Military Justice Handbook—Trial Guide for the Special Court-Martial President*" and may also refer to DA Pamphlet 27–9, "*Military Justice Handbook—The Law Officer*". If the president desires legal information not available to him in the courtroom, he may request the trial counsel and defense counsel in open session to obtain the information. In obtaining the requested legal information, counsel may consult a judge advocate for help. Counsel then communicate the requested information to the president in open session.

4. Question: Assuming that the law is changed to require the appointment of a law officer before a special court-martial can adjudge a BCD, to what degree is there a danger that the mere appointment of a law officer will suggest that a BCD is considered appropriate by the Convening Authority?

Answer: In the situation posed in the question, there is about the same degree of danger that court members will draw an improper inference as to the convening authority's desire that a bad conduct discharge be adjudged as there presently is when a case is referred to a general court-martial, which can adjudge penalties far in excess of a special court-martial and is the only court which can adjudge a dishonorable discharge. In each instance possibility of an improper inference being drawn would be present but remote. Any remote danger would be removed when the law officer advises the court members in the pre-sentencing period that they are the sole judges of the penalty, if any, to be adjudged. Not all general courts-martial result in a punitive discharge,

evidencing that general court-martial members do not infer that they are expected to adjudge one.

a. Question: Would the mandatory assignment of a law officer in every case in which the possible penalty is a BCD completely eliminate the problem or at least mitigate it sufficiently? What objections, if any, would there be to such a provision?

Answer: It would be preferable to make the appointment of a law officer permissive. A law officer would be detailed in the more difficult cases, involving complex legal issues. As indicated in the answer to question 4, the danger suggested by this question is considered remote and thus the drastic requirement that a law officer be detailed in every potential bad conduct discharge case is not necessary. The rights of the accused can be adequately protected without this step, which would further overtax the legal manpower resources and require additional lawyers in the armed forces.

b. Question: What suggestions can be made for avoiding this danger?

Answer: One way to avoid the danger is to provide no requirement that a law officer be detailed to a special court-martial as a condition precedent to the court having power to adjudge a bad conduct discharge. Assuming that such a condition precedent is created by statute, then any danger of an improper inference could be overcome by instructions of the law officer during the presentencing period to the effect that the court members are the sole judges as to what, if any, sentence is to be adjudged, as is presently done in the Army in general courts-martial. (See the answer to the basic question 4, above.)

V. Administrative Discharges

1. Question: What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for the specific charges upon which the action was based; for instance, homosexuality conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

Answer: Such information is not available in the detail requested. However, a recently instituted reporting system initiated by the Army will in the future enable the Army to extract all information solicited in the question except whether an administrative board hearing took place. Under the new system the Army will also be able to determine the number of Regular Army soldiers with less than four years service; more than four years service; and the number of inductees discharged for all reasons by the major command to which the individual was assigned at the time elimination action was initiated by his commander. It s anticipated the information to become available under the new system will enable the Army to better analyze the specific reasons for loss of enlisted persons through administrative discharge for cause. Information presently available is shown in the following chart:

Misconduct

Reason	Fiscal year 1964		Fiscal year 1965	
	Under honorable conditions [1]	Undesirable	Under honorable conditions [1]	Undesirable
Desertion:				
Trial waived or deemed inadvisable	0	14	2	11
Trial barred by statute of limitations	2	2	0	2
Honorable wartime service subsequent to desertion	1	0	4	0
Absent without leave, trial waived	1	12	1	20
Fradulent entry	418	315	409	252
Conviction by civil court	54	1,084	84	867
Adjudged juvenile offender by civil court	3	31	2	27
Other good and sufficient reasons determined by Headquarters, Department of the Army [2]	0	50	0	64
Total	479	1,508	502	1,243

[1] Includes both honorable and general discharges.

[2] Under DOD directive 1332.14, Dec. 20, 1965, discharges under this authority may now be only general or honorable.

Unfitness

Reason	Fiscal year 1964		Fiscal year 1965	
	Under honorable conditions [1]	Undesirable	Under honorable conditions [1]	Undesirable
Involved in frequent incidents of a discreditable nature with civil or military authorities	703	5,517	1,045	5,752
Established pattern showing dishonorable failure to pay just debts	154	142	181	142
Drug addiction or unauthorized use or possession of habit-forming narcotic drugs or marihuana	18	66	12	43
Established pattern for shirking	78	584	72	716
Sexual perversion, including but not limited to lewd and lascivious acts, indecent exposure, indecent acts with or assualt upon a child, or other indecent acts or offenses	51	59	37	62
Total	1,004	6,368	1,347	6,715

[1] Includes both honorable and general discharges.

Unsuitability

Reason	Fiscal year 1964		Fiscal year 1965	
	Under honorable conditions [1]	Undesirable	Under honorable conditions [1]	Undesirable
Apathy (lack of appropriate interest), defective attitudes, and inability to expend effort constructively	2,158	(2)	2,156	(2)
Inaptitude	1,181	(2)	1,399	(2)
Enuresis	87	(2)	89	(2)
Character and behavior disorders	7,368	(2)	8,619	(2)
Chronic alcoholism	207	(2)	154	(2)
Acceptance of discharge (class III homosexual)	166	(2)	211	(2)
Homosexual tendencies	119	(2)	110	(2)
Total	11,286	(2)	12,738	(2)

[1] Includes both honorable and general discharges.
[2] Not authorized.

a. Question: Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

Answer: Information of this type is not maintained. Since counsel for administrative boards are not required to be legally qualified, it is presumed that the number of cases in which the respondent was represented by such counsel would be relatively few.

b. Question: If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

Answer: Although such information is not available, Army regulations provide that no convening authority will direct discharge of an enlisted person if a board recommends retention, nor will he authorize the issuance of a discharge of less favorable character than that recommended by the board. However, a convening authority may direct retention when discharge is recommended, or he may issue a discharge of a more favorable character than that recommended by the board, (para. 8*e*(3), Change 11, AR 635-200).

2. Question: What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

Answer: It has been the policy of the Department of the Army since 21 October 1964 that administrative discharges should not be issued to enlisted persons based upon conduct which has already been considered at a prior admin-

istrative or judicial proceeding and disposed of in a manner indicating that discharge is not warranted. Accordingly, administrative discharge proceedings initiated against enlisted persons by reason of security, homosexuality, misconduct, unfitness, or unsuitability are subject to the following limitations:

No member will be considered for administrative discharge because of conduct which:

(a) Has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof.

(b) Has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service.

(c) Was considered by a general court-martial if a sentence to a punitive discharge was authorized but was not adjudged, or was disapproved or suspended on review by the convening authority or any appellate agency, and remains suspended.

The above limitations are not applicable when—

(a) Substantial new evidence is discovered, which was not known at the time of the original proceedings, despite the exercise of due diligence, and which will probably produce a result significantly less favorable for the member at a new hearing.

(b) Subsequent conduct by the member warrants considering him for discharge. Such conduct need not independently justify the member's discharge, but must be sufficiently serious to raise a question as to the members potential for further useful military service. However, this exception does not permit further consideration of conduct of which the member has been absolved in a prior final factual determination by an administrative or judicial body.

(c) An express exception has been granted by Headquarters, Department of the Army, pursuant to a request by a convening authority through channels that, due to the unusual circumstances of the case, administrative discharge should be accomplished, (paragraph 8e, Change 11, AR 635–200).

Data are not maintained on the number of enlisted persons discharged under the circumstances described. Any such cases would be extremely rare, however, in light of the above policies to preclude this type of "double jeopardy".

As a matter of policy, officer elimination cases have been processed under the safeguards afforded enlisted persons from 21 October 1964 to 3 August 1965, at which time similar safeguards were incorporated into regulations pertaining to officers. Specifically, no officer will be considered for elimination by reason of substandard performance of duty, moral or professional dereliction, or in interests of national security because of conduct which has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof, except when:

(a) Substantial new evidence is discovered, which was not known at the time of the original proceedings despite the exercise of due diligence, which would probably produce a result significantly less favorable for the member at a new hearing.

(b) Subsequent conduct need not independently justify the officer's elimination, but must be sufficiently serious to raise a substantial question as to the officer's potential for further useful military service. However, this exception does not permit further consideration of conduct of which the officer has been absolved in a prior final factual determination by a judicial body.

(c) An exception has been granted by Headquarters, Department of the Army, as in the case of enlisted persons.

Similarly, officers may not be considered for elimination for the reasons cited because of conduct which has been the subject of administrative proceedings resulting in a final determination that he should be retained in the service. However, an officer who has been considered for elimination for substandard performance of duty and retained may again be considered for elimination for the same reason at any time one year after the prior case has been closed by The Adjutant General or by a major commander, (para 5 and 9, Change 7, AR 635–105).

a. Question: Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules not going to the merits, because the sentence did not include a discharge, or because of some other reason.

Answer: There have been no known cases of the type described since adoption of the policies described in response to question 2. Data are not available of any such cases prior to adoption of the policies.

3. Question: What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

Answer: See reply to question 2 for the Army's policy in this area. No information is available as to the number of individuals discharged under the circumstances described. The best information available indicates that only three cases pertaining to enlisted men have been submitted to Department of the Army for discharge or rehearing by a board, after a previous board recommended retention, since the prohibition against such action was announced in October 1964. In all three instances discharge or a second board was not authorized. Information is not available on actions taken prior to adoption of the policies described in response to question 2.

a. Question: Please classify these cases separately according to the various reasons for deciding on a second proceeding and, the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

Answer: Such data are not maintained and could only be secured through a hand search of hundreds of thousands of records—a costly venture in time, manpower, and funds.

4. Question: What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc.?

Answer: Data are not available to show the number of discharges based upon a single act for one or more of the reasons cited. As a matter of policy, however, the Department of the Army does authorize discharges based upon a single act of the following types of misconduct: homosexuality, fraudulent entry, conviction by a civil court, desertion, absent without leave for more than one year, sexual perversion, drug addition, and unauthorized use or possession of drugs. More than one act would be required to substantiate discharge by reason of failure to pay just debts or shirking, since an established pattern for such acts must be shown. Similarly, discharge by reason of frequent incidents of a discreditable nature with civil or military authorities must, by the very description, consist of more than one act.

5. Question: Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (Transcript pages 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

Answer: It is the policy of the Department of the Army that homosexual personnel will not be permitted to serve in the Army in any capacity; prompt separation of homosexuals is mandatory. The Army considers homosexuals to be unfit for military service because their presence impairs the morale and discipline of the Army, and that homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society. No distinction is made between an individual who commits a single act of homosexuality and one who commits several such acts. However, the Army does not discharge an individual as a homosexual when he:

(a) Seeks to avoid military service by an unverifiable assertion of homosexuality.

(b) Has been involved in homosexual acts solely as a result of immaturity, curiosity, or intoxication.

An individual is subject to trial by court-martial or administrative separation for unfitness if the case involves an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate in or consent to the homosexual act, or, if the act is cooperated in or consented to, where the cooperation or consent was obtained by fraud; or when the individual is involved in a homosexual act with a child under the age of 16 years, without regard to whether the child cooperated in or consented to such an act. Individuals involved in such homosexual acts are classified as Class I.

A Class II homosexual is considered to be an individual who has been engaged in one or more homosexual acts during active military service. It is immaterial whether the individual participated in an active or passive manner. These individuals may also be tried or administratively discharged for unfitness.

Individuals who are determined to be homosexuals but have not engaged in a homosexual act during active military service, and other homosexuals determined to be neither Class I or II, may be discharged by reason of unsuitability. Such individuals are classified as a Class III homosexual.

When a commander receives information that an individual under his command is a homosexual or has engaged in an act of homosexuality, he is required to inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. When the report of investigation does not substantiate the allegation of homosexuality or the commission of a homosexual act, the case is closed. When the report of investigation substantiates such allegations, the individual is referred for a medical evaluation; in the absence of a major mental illness the individual's case may be processed for court-martial or administrative action depending upon whether he is classified as a Class I, II, or III homosexual. If the commander determines, on evaluation of all relevant facts pertaining to an alleged Class I homosexual, not to prefer charges for court-martial, or, where charges are preferred, not to refer them to trial, he may process the case for administrative discharge of the individual as a Class II homosexual. Each case is considered individually on the merits of the case. (AR 635–89).

a. Question: In how many cases were administrative discharge proceedings instituted in these circumstances?

Answer: Since the Army does not differentiate between individuals who commit one or several homosexual acts, there are no data maintained that can be furnished in reply to this question.

b. Question: Of these, in how many cases did the member request a court-martial?

Answer: See the answer to 5a, above. In addition, an individual does not have the right to a trial by court-martial in these cases. Consequently, no information is available as to the number of cases, if any, in which individuals requested trial.

c. Question: What were the final dispositions of these cases?

Answer: Such information is not available. However, if the individual was determined to be a Class II or Class III homosexual, it may be assumed that he would have been discharged through administrative procedures. Class I homosexuals may have been tried by court-martial or processed under administrative procedures as determined by the commander concerned. A request for trial by court-martial is not a determining factor in such cases.

d. Question: In how many cases was pre-service homosexuality a factor in these instances? Associating with known homosexuals?

Answer: Information is not available to show the number of individuals discharged on the basis of a single act of homosexuality committed prior to entry on active duty. Association by an individual with a known homosexual is not, in itself, sufficient grounds to discharge an individual from the Army by reason of homosexuality.

e. Question: Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

Answer: Finite information of the type requested is not maintained by the Army.

f. Question: Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer?

Answer: See response to e, above.

6. Question: Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the UCMJ, except in cases of homosexuality (Transcript page 184)? Is this policy expressed in formal regulations or directives?

Answer: See the answer to question 4 above. Depending on the factual situation involved, most of the acts referred to in that answer are cognizable as

violations of the UCMJ. However, special circumstances sometimes render administrative action more beneficial to all parties concerned.

7. Question: Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless court-martialed and what were the dispositions (Transcript page 179)?

Answer: Army Regulations 22-12, 24 April 1958, provides in part as follows:

"2. *Policy.* 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 or punished under the Uniform Code of Military Justice, Article 15, for the same act or acts over which the civil court has exercised jurisdiction."

Other provisions of this regulation make it clear that nonjudicial punishment or trial by court-martial in these cases will not take place unless authorized by the officer exercising general court-martial jurisdiction. No statistics are available to show the number of cases in which there was a trial by court-martial after trial in a civilian court, but the responses to the Army's sampling of judge advocates indicates that this is very rare.

a. Question: When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed.

Answer: It is Department of the Army policy that an individual will be considered for discharge by reason of conviction by civil authorities when one or more of the following conditions has been determined:

(a) Conviction by a civil court—when initially convicted by civil authorities, or action taken which is tantamount to a finding of guilty, of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year. If the offense is not listed in the Table of Maximum Punishments, *Manual for Courts-Martial,* or is not closely related to an offense listed therein, the maximum punishments authorized by the United States Code or District of Columbia Code, whichever is lesser, will apply.

(b) Conviction of an offense involving moral turpitude—when initially convicted by civil authorities of an offense which involves moral turpitude regardless of the sentence received or maximum punishment permissible under any code.

(c) Adjudication as a juvenile offender—when initially adjudged a juvenile offender by civil authorities for an offense which involves moral turpitude.

The mere fact that an individual is considered for discharge by reason of civil conviction is not in itself sufficient grounds to discharge him. The board of officers hearing the case may, and has on occasions, recommended the individual be retained in the service based upon a favorable reaction to long and trouble-free service prior to the incident that prompted initiation of the elimination action.

b. Question: When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if guilt had been established in a military tribunal or is it based merely on the fact of civil conviction?

Answer: The reason for discharge of the individual may be based upon a civil conviction, but the character of discharge issued is based upon the individual's behavior and performance of duty during his current period of service and any extension thereto. If the case is heard by a board of officers, the individual members weigh the seriousness of the civil offense against the merits of discharging the individual and determine what type of discharge is to be issued. When a board hearing is waived by the individual, the convening authority makes the determination based upon the best information available to him.

8. Question: Are there procedures in the UCMJ for court-martial and discharge of members who are habitual offenders?

Answer: In answer to this question, the attention of the committee is first invited to a portion of the testimony given on Wednesday, March 2, 1966, and found on pages 728–739 of the transcript. As was pointed out in that testimony, there is no habitual offender provision in the Uniform Code of Military Justice or the *Manual for Courts-Martial.* The military services do have a procedure for imposing "permissible additional punishments" upon accused persons who have previous convictions of record. Under section B of paragraph 127*c* of the *Manual for Courts-Martial,* proof of two or more admissible previous convictions will authorize imposition of a bad conduct discharge even though it could not otherwise be adjudged for the offense or offenses of which the accused has

been convicted. In addition, proof of three or more previous convictions during the year next preceding the commission of any offense of which the accused stands convicted will authorize dishonorable discharge even though it could not otherwise be adjudged for the offense or offenses of which the accused has been convicted. In this connection it should be emphasized that, under paragraph 75*b*(2) of the *Manual*, evidence of previous convictions is limited to "offenses committed during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted." Nonjudicial punishment under Article 15 does not result in a "conviction" and, thus, cannot be used, and evidence of convictions by civilian courts is likewise inadmissible for this purpose.

a. Question: What is the policy of utilizing the authority set forth in section 127c(B) of the Manual? Is this authority utilized to its maximum?

Answer: In answer to this question, see the answer to the basic question 8, above, where the strict limitations on admissible previous convictions are set out. The question appears to suggest the adoption of a policy that the authority of section B of paragraph 127*c* of the *Manual* will be used by courts-martial to the fullest extent possible. There is certainly no policy of that kind now, and to adopt one would deprive the members of courts-martial of the absolute discretion granted them by the Uniform Code of Military Justice with respect to the findings and sentence in every case. This would, of course, constitute unlawful command influence which the committee has indicated it is as anxious to avoid as are the services.

b. Question: Please set forth the number of courts-martial based on section 127c(B), and compare this to the number of administrative separations of various types given for similar reasons.

Answer: As reflected in the answers to the other parts of question 8, no courts-martial are "based" on section B of paragraph 127*c*. That is, there is no authority in the military services for trying a person as a habitual offender and, thus, securing a discharge by sentence of court-martial based solely on the existence of two or more previous convictions. There must first be an offense triable by court-martial, and in the Army the case must be referred to a general court-martial, since Army special courts-martial cannot adjudge a punitive discharge. Once a case has been referred to a general court-martial, and if there is a finding of guilty, the accused may, at the discretion of the court members (the jury), be sentenced to a punitive discharge if the conditions set forth in the answer to the basic question 8 are met. Although statistics maintained by the Army would show the total number of cases in which previous convictions were considered by general courts-martial in determining an appropriate sentence, they do not show in how many of these cases a punitive discharge could not have otherwise been adjudged but was adjudged under authority of section B of paragraph 127*c* of the *Manual*.

9. Question: What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (Transcript page 180)?

Answer: Any case involving a sex offense against a minor could fall within this category.

a. Question: How many administrative discharge cases have there been for each type of case given above?

Answer: No statistics of this type are available.

10. Question: Assuming that it is considered advisable to enact S. 758 to give an election of a court-martial in some instances to members accused of offenses under the UCMJ when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (Transcript pages 184–194)?

Answer: The election should not be available to an accused in those cases of unfitness and misconduct listed in sections I and J, respectively, of DOD Directive 1332.14, December 20, 1965. The reasons why this election should not be made available in these classes of cases are explained in detail in the transcript of testimony given on Wednesday, March 2, 1966, beginning on page 727.

11. Question: Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum elements of due process, what is the order of preference of the following alternatives or groups of alternatives from the standpoint of the services.

a. Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the Subcommittee.

b. Give an unqualified election of a court-martial to the member.
c. Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.
d. Grant post-discharge review of legal issues to COMA.
e. Some other legislative change (please specify) desired by the service.

Answer: The provisions of the current DOD administrative discharge directive and Army Regulations are considered to contain satisfactory guarantees of due process. None of the alternatives listed in this question are considered necessary or desirable. However, if the committee deems it necessary to enact legislation in this area attention in invited to the proposed substitute bill concerning administrative discharges submitted with the DOD report on S. 750.

VI. Review of Administrative Discharges by COMA (S. 753)

1. Question: Does the number of cases referred to in General Hodson's statement (Transcript page 54) represent the number of discharge cases reviewed by Discharge Review Boards? How was this figure computed?

Answer: The number of Army cases (6,000) does *not* represent the number of discharges reviewed by the Army Discharge Review Board, but rather is an estimate of the *total* case load of both the Army Discharge Review Board and the Army Board for Correction of Military Records, an average of about 3,000 for each board. The estimate for the ABCMR is *not* limited to discharge cases, but includes all types, which would be susceptible to review under S. 753.

a. Question: What is the number of administrative discharges reviewed by Army Discharge Review Boards for prior years?

Answer: FY 1951 through FY 1961—see page 833, published hearings of 1962. Since FY 1961:

	Heard	Changed	Percent changed
Fiscal year 1962	3,269	207	6
Fiscal year 1963	2,882	281	10
Fiscal year 1964	2,070	348	17
Fiscal year 1965	2,339	543	23

b. Question. How many administrative discharge cases are there annually for unfitness, unsuitability, or misconduct in each service?

Answer:

Fiscal year	Unfitness	Unsuitability	Misconduct
1961	7,852	11,456	2,022
1962	6,908	12,639	2,223
1963	7,569	9,894	2,219
1964	7,372	11,286	1,987
1965	8,062	12,738	1,745

c. Question: What is the breakdown of these cases in terms of type of discharge, and of these, which are the result of board hearings?

Answer:

Fiscal year	Unfitness		Unsuitability		Misconduct	
	UHC [1]	Undesirable	UHC [1]	Undesirable	UHC [1]	Undesirable
1961	1,509	6,343	11,456	(2)	472	1,550
1962	1,125	5,783	12,639	(2)	586	1,637
1963	1,258	6,311	9,894	(2)	628	1,591
1964	1,004	6,368	11,286	(2)	479	1,508
1965	1,347	6,715	12,738	(2)	502	1,243

[1] Under honorable conditions; no breakdown is available to show the number of such discharges that are honorable or general.
[2] Not authorized.

Information is not available to show the number of discharges as a result of board hearings. Whether the final discharge for the reasons cited is accomplished as a result of a board hearing or waiver of the board by the individual cannot be determined from available data.

d. Question: Of the number of discharge cases reaching DRB and BCMR, what is the breakdown in terms of type of discharge?

e. Question: For each of these types of discharge, in how many cases have the DRB and the BCMR changed the character of discharge, and to what have they been changed?

Answer: Answers to questions 1d and 1e are combined in the following tabulation. The DRB tabulation covers only four fiscal years, namely, FY 1962 through 1965. Statistics of the type requested in these two questions (1d and 1e) are not reasonably available for periods prior to FY 1962.

Results of hearings—Army Discharge Review Board

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Undesirable (other than honorable)	2,282	2,010	1,391	1,586
Changed to honorable	21	20	17	26
Changed to general	113	175	228	348
Modified [1]	0	2	0	3
General heard	928	827	639	716
Changed to honorable	64	81	90	159
Modified [1]	7	1	11	6
BCD heard	32	20	18	17
Changed or modified [1]	0	0	0	0
Honorable heard	27	25	22	20
Modified [1]	2	2	2	1
Total heard	3,269	2,882	2,070	2,339
Total changed	207	281	348	543

[1] A modified discharge is one in which the discharge is not changed as to character, but the authority for the discharge is changed. An example would be an honorable discharge given under "unsuitability" regulations modified to an honorable discharge "for convenience of the Government."

ABCMR

Information as to the exact number, in terms of type of discharges reviewed by ABCMR, is not readily available for the previous five years; however, a review of records currently available shows that during the year 1965 the Board considered appeals involving the following type of discharge:

General Discharge	51
Undesirable (includes Other Than Honorable—Blue)	208
Bad Conduct & Dishonorable	266

During the year 1965 the ABCMR made the following changes in the character of these discharges:

	Number changed	Honorable	Type of change		Other relief
			General	Undesirable	
General discharge	3	2			1
Undesirable (includes other than honorable—Blue)	22	11	8		3
Bad conduct and dishonorable	14	5	8	1	

2. Question: Of the cases reaching review, how many of them involve determination of legal questions, and what are the usual kinds of legal questions raised?

a. Question: Does this answer include as a "legal" question, issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulation"?

DISCHARGE REVIEW BOARD

Answer: There are no statistics available as to the number of cases reaching the Army Discharge Review Board which involve legal determination; however, in the personal knowledge of the incumbent presiding officer of that board, the number is quite small and probably would account for substantially less than one per cent of all cases considered.

The usual kinds of legal questions raised are those concerned with the general categories of cases including, but not limited to: (a) Discharges for Conviction by Civil Courts which involve subsequent probation, pardon, or parole; (b) security; (c) jurisdiction of the Discharge Review Board to act in specific cases; (d) minority, juvenile and youthful offender cases; and (e) occasional interpretation of applicability of state laws or their relationship to regulations.

The Army Discharge Review Board is composed of senior officers assigned to the Army Council of Review Boards which includes in its assigned strength no less than one, and usually two, officers of The Judge Advocate General's Corps. In any case in which a legal question arises and in which such question has a bearing on the issues being considered, the Board will either include a JAG officer as a member, or the determination in the case will be deferred until advice on the legal aspect can be obtained from one or both of the assigned lawyers. In any case in which the Board's own JAG officers cannot provide the answer needed, they will always request an official JAG opinion.

The reviews of administrative discharges by the Army Discharge Review Board, almost without exception, consist of an appraisal of facts as they are contained in written records and supplemented by additional facts developed outside the record but pertinent in point of time to the period of service being considered. There are very few cases which involve legal questions *per se* and those which do usually present mixed questions of law and fact. Whenever legal advice or opinion is needed and sought by the Board, issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulation" (question 2a) are inherent in the request for guidance. The issues which must be settled in most cases involving administrative discharges are those which proceed to the factual merits of the case rather than to the "legal" aspects.

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

There are no statistics available as to the number of administrative discharges reaching review by ABCMR which involve determination of legal questions; however, it is estimated that during the past five years, less than two percent involved legal questions.

The legal questions presented in the cases considered by the ABCMR have no set pattern but vary with each case; however, the following are examples of the legal questions raised:

(1) What effect does the voidance of a conviction by a civil court on appeal based on a legal technicality, have on the character of discharge of an individual who was administratively discharged on the basis of the original conviction?

(2) Was an administrative discharge proper when such discharge was based on substantially the same facts which were considered by a court-martial and which resulted in acquittal?

(3) Does the administrative failure of a discharge board to make a specific finding as required by regulations, although evidence considered warranted such finding, invalidate the board proceeding?

A very small percentage of the above cases include issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulations." For the most part ABCMR considers these issues as being questions of fact and judgment.

b. Question: What types of legal issues (if different from above) would be likely to reach COMA if S. 753 were law?

Answer: This would include various types of legal issues from jurisdictional questions to questions of administrative due process. However, it should again be noted that the great majority of cases considered by the Boards for Correction of Military Records do not involve complex legal issues but center primarily around questions of fact.

3. Question: What factors would operate to dissuade a former serviceman from taking an appeal of an administrative discharge to COMA?

Answer: No such factors are known.

4. Question: On the basis of the total of administrative discharge cases, those reaching review boards, and the answers given above, what is the estimate of the cases of previous years which would have been appealed to COMA if S. 753 had been effective?

Answer: It seems reasonable to assume that most, if not all, respondents would have appealed to COMA if S. 753 had been the law since those respondents would have had nothing to lose, a possibility to gain, and free appellate counsel supplied by the government to handle the appeal for them.

5. Question: In view of the testimony that the number of legal issues in administrative discharges is few (Transcript page 53), what burdens upon COMA would arise from granting this review authority (Transcript page 211)?

Answer: There is nothing in the bill itself which limits the COMA to a review of questions of law, but the court is not, of course, a fact-finding court. The judges of the COMA apparently disagree concerning the extent of the burden that would be thrust upon them by S. 753.

6. Question: Are cases brought before the DRB and BCMR now reviewed by the respective JAG offices? Do JAG personnel as a matter of practice review some or all discharge cases? What standards determine the cases reviewed by the Judge Advocate?

Answer: Cases brought before the Army Discharge Review Board are *not* automatically reviewed by the Army JAG office. JAG personnel in Army do *not*, as a matter of practice, review Army DRB cases. JAG Corps officers assigned to the Army Council of Review Boards, with concurrent membership on the Discharge Review Board, review those cases referred to them by the Board, such cases including but not limited to, ony in which a point of law may be pertinent to the Board's finding. See (2), above, in which a detailed discussion of this subject is contained.

Applications for review of administrative discharges filed with the ABCMR are not submitted routinely to the JAG office for review. In this regard it appears pertinent to state that the staff and the present ABCMR membership is composed in part of employees who are lawyers and experienced in military law. For this reason questions which may involve matters of fact and law are resolved without referral to the JAG office.

As a matter of practice, if during the course of a preliminary examination by the staff or the Board, a question of the legality of some aspect of the proceedings is raised which cannot be resolved by the staff or the Board the case may be submitted to the JAG office for opinion.

Within the ABCMR there are no clearly defined or written standards as to when a case will be referred to JAG for a legal opinion. As previously stated, the number of applications alleging a legal error or otherwise presenting a mixed question of fact and legality in an administrative discharge proceeding are very few. The only standard which could be said to apply is the one of reasonable doubt as to whether the substantive aspects of the regulatory procedures used to effect discharge were properly followed.

7. Question: What additional burden is involved on JAG personnel in reviewing cases which would be susceptible or review by COMA under S. 753 (Transcript pages 53 and 54)?

Answer: The JAG of each service would be required to provide a review of *all* cases considered by the DRB or BCMR in order to determine which cases should be forwarded to COMA for review. As pointed out on page 54 of the transcript, this could amount to a review each year of about 6,000 cases in the Army, 2,800 cases in the Navy, and 5,500 in the Air Force. In addition, legally qualified counsel for both sides would have to be provided in those cases reviewed by COMA. It is estimated that, if S. 753 is enacted, the Army would require about 36 additional judge advocate officers to provide adequate review of these cases and counsel in those cases reviewed by COMA.

VII. Extraterritorial Criminal Jurisdiction (S. 761 and S. 762)*

1. What are the various proposals now being considered for remedying the jurisdictional gap over employees, dependents, and ex-servicemen (Transcript pages 26, 31, and 141)?

*Answers to all the questions under Part VII will be answered by the Office, Secretary of Defense.

a. Please indicate the present status of each of the proposals considered.

b. What problems are raised by each of these suggestions, and what means might be used to overcome these various objections?

c. Please indicate the relative desirability of each of these suggestions?

2. What suggestions are being considered by the Department of State and Justice, and in what stage of consideration are each of these proposals?

a. In what office of these departments are these proposals being considered (Transcript pages 141 and 148)?

3. With respect to the treatment of offenses committed overseas by employees and dependents, are there any formal guides issued to commanders which describe or recommend the type of administrative punishment appropriate for various kinds of offenses? Is there any attempt at standardizing the punishment given in various commands for similar offenses (Transcript page 145)?

4. What kinds of privileges are subject to revocation as sanctions (see column 2 under Sanctions Imposed by U.S. Authorities, Chart A) (Transcript page 142)?

5. What other administrative action (except return to the U.S.) is possible as a sanction (see column 4 under Sanctions Imposed by U.S. Authorities) (Transcript page 142)?

6. What is your evaluation of the suggestion that 18 USC section 7 (maritime jurisdiction) be expanded to cover all crimes committed by U.S. citizens elsewhere than on U.S. soil? By Department employees and dependents only?

a. What practical problems would be encountered by such a provision, and are they different from those now encountered by the section as currently enforced?

b. How are the problems under this section met at present?

c. What possible devices could be employed to eliminate or alleviate these practical problems if section 7 were so amended?

d. If it is your judgment that any provision for extraterritorial jurisdiction would not be practical for ordinary offenses, would you nontheless see value in creating such jurisdiction for the extremely serious offense?

e. What additional means are necessary to assist military authorities in coping with disciplinary problems of overseas dependents, such as juvenile delinqency, minor non-traffic offenses, and in maintaining law and order in the community?

7. What is the number of cases in recent years of crimes committed by servicemen which were discovered subsequent to their release from service? Please classify them as to type of offense and indicate what, if any, judicial or other action was taken against these ex-servicemen.

VIII. Command Influence (S. 749)

1. Question: Assuming that "command influence" may be present when members of a court, or a counsel, imagine that a certain result is desired by higher authority, even though this authority has in no way expressed or indicated his judgment of the case, could any form of legislation counteract this type of "command influence"?

Answer: Responding to the terms posed by the question, the answer is no. It is not believed that legislation directed against the "imagination" of court members or counsel is warranted or could serve any useful purpose. For those who have undue fear as to the existence of improper command influence, attention is invited to the testimony of Chief Judge Quinn of the United States Court of Military Appeals on pages 584 to 585 of the transcript. It is considered that S. 749, together with the changes thereto recommended by the Defense Department, is adequate legislation to deal with any real problem in this field.

2. Question: What would be your opinion of a proposed amendment to the UCMJ which would specify that the exercise of command influence is a court-martial offense?

Answer: As indicated in the answer to question 1, it is considered that S. 749, if amended as recommended by the Defense Department, is sufficient to deal with any real problem in this field. Improper command influence can now be prosecuted under a combination of Artcile 37 and 98 of the Uniform Code of Military Justice. S. 749 would broaden the coverage of these articles.

a. Question: Because of the circumstances necessarily attendant to a case under such a proposed article, how likely would prosecution be?

Answer: As the committee knows, there have been no known prosecutions for improper command influences under the present law. The likelihood of pros-

ecution under a new punitive amendment would be no greater or less than exists under the present law. As Senator Ervin seemed to recognize by his remarks during the hearings (transcript, page 461) there are few, if any, instances of commanders willfully, wrongfully, and knowingly attempting improperly to influence judicial processes. The unfortunate instances which do arise usually result from well intentioned but over-zealous efforts to carry out legitimate command responsibility in connection with the administration of military justice. Such over-enthusiasm can never be completely overcome in the military any more than over-zealous efforts can be eliminated in civilian practice. The services have adequate means to deal with such problems as do arise and each case is handled according to its own circumstances.

b. Question: Would this proposal nonetheless have value as an expression of the seriousness with which such activity is viewed, thereby greatly assisting the services in their efforts to educate officers to their responsibilities in this area (Transcript page 131), and to the need for careful judgment in these situations? If so, would this justify, in your judgment, such an amendment?

Answer: As indicated by the answer to question 2 and 2a, no additional legislation of this type is considered necessary or desirable. Presently available resources, including decisions of the Court of Military Appeals, provide adequate tools for educating all persons concerned with their responsibilties in the administration of military justice.

3. Question: The Subcommittee has received information to the effect that, subsequent to *U.S.* v. *Kitchens*, allegations of command influence were made in the case of *U.S.* v. *Perry and Sparks* in which review was requested by the Court of Military Appeals. The command influence had allegedly been exercised over the two defense counsel who originally defendel the accused in their trial at Fort Bragg and over the defense counsel who defended the accused at their retrial at Fort Jackson. What investigation was made of the allegations in that case, what conclusions were reached, and what, if any, disciplinary action was taken?

Answer: The case of *United States* v. *Perry and Sparks* began as *United States* v. *Wells* and others, including the accused Perry and Sparks. The defense counsel for the accused Wells was stationed with Headquarters, Third United States Army, at Fort McPherson, Georgia, when he was appointed defense counsel in the case, which was tried at Fort Bragg, North Carolina. He alleged that because of his efforts as defense counsel in that case, illegal command reprisal actions were taken against him by the staff judge advocate, Third United States Army, at Fort McPherson, and the staff judge advocate, XVIII Airborne Corps and Fort Bragg, at Fort Bragg. It was contended that the actions of both of these staff judge advocates disqualified them from writing the post-trial review in the case. In this regard, it should be pointed out that the case was referred to the United States Continental Army Command for the post-trial review, thus eliminating the necessity for the preparation of a review by either of the staff judge advocates against whom the defense counsel's allegations were directed.

An exhaustive and impartial investigation into the defense counsel's allegations was conducted. In material respects, the findings of the investigating officer were that all persons involved in the case acted in good faith but misunderstood each other's motives; no counsel in the case engaged in borderline, unprofessional, or unethical conduct; no retaliatory actions had been taken against any of the defense counsel because of their defense efforts on behalf of any of the accused persons; and, thus, that there had been no illegal command influence in the case.

In view of the findings, the investigating officer recommended that no disciplinary or unfavorable administrative action be taken with respect to any of the personnel involved in the investigation. The Secretary of the Army approved that recommendation.

Following the review of the record of trial in the case, the Commanding General, United States Continental Army Command, took action disapproving the findings of guilty and sentences as to each of the four accused in the case. He dismissed the charges as to the accused Wells, and Greene, and he ordered a rehearing on the charges against the accused Perry and Sparks.

At the rehearing, held at Fort Jackson, South Carolina, both Perry and Sparks were convicted upon their pleas of guilty of assault intentionally inflicting grievous bodily harm in violation of Article 128 of the Uniform Code of Military Justice.

The sentences as ultimately approved by the convening authority, were, as to Perry, confinement at hard labor for one year, forfeiture of $75.00 per month for six months, and reduction to the grade of Private (E–1), and, as to Sparks, confinement at hard labor for one year and six months, forfeiture of $75.00 per month for ten months, and reduction to the grade of Private (E–1). The convening authority also directed that each accused be credited with confinement previously served. A board of review approved the findings and sentences, and a petition to the Court of Military Appeals was denied.

At the rehearing, the defense made a motion to dismiss the charges on grounds that the report of investigation concerning alleged command influence in the original trial had not been made available to them. The law officer denied the motion on the basis that there was no showing of command influence with respect to the rehearing and no evidence that the previous allegations or subsequent investigation had any bearing on the rehearing proceedings. In the post-trial review of this case, the staff judge advocate, Headquarters, United States Continental Army Command, Fort Monroe, Virginia, pointed out:

"There was presented no evidence whatsoever that illegal command influence had been exercised with respect to this rehearing; accordingly, whatever may have been the situation at the first trial, any error committed would have been purged by the disapproval of those proceedings and could not be considered as having affected this rehearing. Accordingly, the fact that the report of investigation was not made available by the Secretary of the Army cannot be said to have prejudiced the defense case."

4. Question: The Subcommittee has been informed that there are currently pending two cases in the Court of Military Appeals which involve allegations of an improper lecture to members of the court-martial in connection with trials at Fort Devens, Massachusetts. One of the cases is *U.S.* v *Albert* (18,960). What were the contentions made by the accused in those cases? In how many cases which reached the Boards of Review have there been contentions of command influence in recent years?

Answer: The *Albert* case and two related cases involved a lecture given by the staff judge advocate at Fort Devens, Massachusetts. The details are set forth in the opinion of the Court of Military Appeals in *United States* v. *Albert*, 16 USCMA 111, 36 CMR 267 (1966). The Court, with one judge dissenting, affirmed each conviction, finding that there was no illegal command influence in the case.

Available records indicate that since 1 January 1961, the command influence issue was raised before the Boards of Review in fifteen cases resulting in thirteen affirmances and two reversals.

IX. Miscellaneous

1. Question: In the Navy and the Army, it is current practice not to have senior board members rate the performance of junior members. The reasons given during the hearings (Transcript pages 101–109) may be summarized as follows:

a. In establishing an independent judicial organization it was considered desirable to make the system free from improper influences in form as well as substance.

b. Since the members of the boards are personally known to some extent by the non-board rating officer, the board member is not prejudiced by being evaluated by persons ignorant of his performance.

c. The opinions and knowledge of other board members may be solicited by the rating officer; as a consequence there is insulation from conscious or unconscious prejudice on the part of senior board members, without the danger of a member being rated by persons ignorant of the true nature of his performance.

General Manss, what personal comments do you have on each of these observations? If you consider these observations are valid, what additional reasons, in your opinion, outweigh them so as to warrant continuation of the Air Force's present policy?

An answer to the above question will be submitted by the Air Force.

2. Question: In view of the fact that during war or national emergency the supply of legally-trained officers is likely to increase as the number of men in uniform increases (Transcript page 110), to what extent is it necessary to have "time of war" exceptions for those proposals (such as S. 750, S. 752, S. 754 and S. 758) which require expanded use of legally-trained personnel? Why is this exception required for section 35, UCMJ and S. 745?

Answer: "Time of war" exceptions were included in the bills mentioned in the question at the time they were originally introduced. Exceptions for "time of war" on "time of national emergency" provide flexibility which would permit adjustment to meet the unforeseeable and rapidly changing circumstances of war. Although more lawyers probably would be serving in the armed forces in the event of large scale mobilization, the percentage of lawyers to troop strength might not be at an acceptable level to permit providing all the legal services envisioned by the legislation referred to in the question. Also, there is no assurance that all the lawyers in the service, or a sufficient number of them, could be used in the performance of legal services. Without some wartime exceptions to guard against these contingencies, the administration of justice could become hopelessly snarled. As to Article 35 of the Uniform Code of Military Justice, the drafters of that article properly considered that the time of limitations prescribed therein would be unrealistic except in time of peace. On page 1013 of the House Hearings of Wednesday, March 23, 1949, on the Uniform Code of Military Justice, it is pointed out that "in times of war, the operational problems are such that [it was felt to be] inappropriate to tie it [the trial] to a time limit."

3. Question: To what extent is the file on cases presented to BCMR or DRB sent to the JAG office for its opinion (Transcript page 91)?

a. How often is this done, and in what kinds of cases?

b. In what percentage of cases is the opinion of the JAG followed by the respective boards? How often is more extensive corrective action taken than that recommended or suggested by JAG?

Answer:

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

In a very limited number of cases the ABCMR, based on an examination of the application for change of discharge and the military records of the individual concerned, will refer the complete file and all evidence of record to JAG for an opinion as to the legality of certain action.

a. The ABCMR does not keep any statistical record which would indicate the number of cases which it has referred to the JAG for opinion or the action taken by the Board on the basis of the opinion received; however, it is estimated that of the total discharge cases processed within the past five years, less than two percent have been referred to JAG for opinion regarding some possible procedural deficiency in the administrative board proceedings.

b. The opinions received from the JAG office are advisory only, are not binding upon the Board or the Secretary, and are regarded as a matter to be considered with all the evidence of record. The Board and the Secretary of the Army in the final analysis must determine the action to be taken in a given case.

DISCHARGE REVIEW BOARD

In the past five years (calendar years 1961 through 1965), there have been eight JAG opinions requested in connection with Army Discharge Review Board cases. Of those opinions, five dealt with jurisdiction of the Board in particular cases, two with minority, and one with security (subversion). According to available records and the best recollection of Board members, the opinion of JAG was followed by the Board in every case. Information is not available from ADRB records whether "more extensive corrective action . . . than that recommended or suggested by JAG" has ever been taken.

4. Question: Is it currently the practice of the service, by regulation or otherwise, to inform the parents or guardians of members under 21 years, or those whose parents' permission was necessary for enlistment, of the fact that steps to court-martial or administratively process these members are being instituted?

Answer: This is not the practice in the Army when administrative action is pending. However, with regard to cases in which trial by court-martial or foreign court appears probable, Army Regulation 633–56, 31 March 1959, provides as follows:

"1. Purpose. These regulations establish the policy of the Department of the Army concerning the notification to the parents, spouse, or guardian of an enlisted person charged with a serious offense before a court-martial or a criminal offense before a foreign court.

"2. Policy. *a.* Whenever an enlisted person is charged as above and trial appears probable, a chaplain will counsel him to advise his parents, spouse, or guardian, as appropriate, of the circumstances, or, in the alternative, to author-

ize the chaplain to communicate directly with these individuals. If the enlisted person refuses to do either, and he is 21 years of age, or over, no further action will be taken except to have the fact of his refusal and the name of the officer receiving such refusal recorded in his personnel file.

"*b.* When the enlisted person concerned is under 21 years of age, however, and where it appears that the parents, spouse, or guardian will not otherwise be informed, the chaplain will, unless there is some compelling reason to the contrary, inform the parents, spouse, or guardian by letter or other communication of the details he considers pertinent and proper under the circumstances.

"*c.* For purposes of these regulations a serious offense will be construed to include any offense for which a punitive discharge may be adjudged by a court-martial, and a criminal offense before a foreign court will include any offense which may result in discharge under the provisions of AR 635–206 or other applicable regulations.

"*d.* When a chaplain is not stationed within the country in which an enlisted man is to be tried, or if stationed within such a country, is not reasonably available because of the distance, transportation facilities, or other cogent reasons to perform the duties specified in *a* or *b* above, these duties may be performed by commissioned officer personnel of other branches of the service."

a. Question: What provisions are made to afford disinterested counsel and advice to immature servicemen, or others not capable of making effective decisions, as to the factors to be weighed in making various elections or choosing between different courses of action in these cases?

Answer: It is assumed that the "decisions" referred to in this question are those, such as whether to waive administrative board proceedings, concerning which the advice of counsel is not afforded by statute. As to these decisions, although no advice is necessarily volunteered, various sources of advice and information are available to the individual concerned. These include his commanding officer, chaplains, judge advocates, and the office of the inspector general.

5. Question: In view of the DOD position in opposition to the bills affecting administrative discharge procedures, what would be the position of the services on the legislative enactment of the provisions of DOD Discharge Directive 1332.14?

Answer: The DOD position is stated on page 725 of the transcript of the recent hearings. However, the Army does not favor the legislative enactment of the provisions of the directive, because we desire to retain the flexibility inherent in handling the matter by departmental regulations.

6. Question: Are there any provisions for review of an administrative discharge in an adversary proceeding *prior* to the execution of the discharge?

Answer: No. The determination of whether to refer administrative discharge cases to a judge advocate for legal review prior to the discharge of the individual concerned is handled under local arrangements made in each command.

a. Question: What is your feeling with respect to the legislative establishment of an adversary review prior to discharge upon the grounds of failure of due process in the board proceeding?

Answer: A review procedure of the type suggested is not considered necessary. The pre-discharge board procedures now employed and the post-discharge relief available through the departmental review and correction boards afford adequate protection to respondents.

7. Question: What articles of the Code apply to cases of homosexuality presently handled administratively?

Answer: Articles 125 and 134.

a. Question: Of the cases handled administratively, what kinds of homosexual activity could not have been prosecuted as violations of Articles 125 or 134 of the Manual?

Answer: Homosexual acts committed prior to the individual's entrance into the service cannot, of course, be charged as violations of the Uniform Code of Military Justice. All other types of overt homosexual acts are cognizable under the Code, but the Army generally will not try an individual by court-martial for this type of offense except where force has been used or in those cases involving minors. Even in these two types of cases the offender may not be tried if a determination is made that trial of the case by court-martial would be harmful to the victim. See, generally, pages 739–740 and pages 810–812 of the transcript.

b. Question: What is your position on the suggestion that the Code be amended to contain an article expressly making these kinds of homosexuality a court-martial offense?

Answer: The question presupposes that the Uniform Code of Military Justice is somehow inadequate in proscribing homosexual conduct. That supposition is incorrect. A statute granting jurisdiction under the Uniform Code of Military Justice to try persons by court-martial for homosexual acts committed prior to their entrance into the service would most probably be held invalid. It would certainly be undesirable. All other homosexual acts by persons subject to the Code are already adequately covered by the Code. The reasons why some of those cases are handled administratively are explained elsewhere in this questionnaire and in the transcript of the hearings.

[Navy and Marine Corps answers]

NAVY AND MARINE CORPS ANSWERS TO QUESTIONS FORWARDED BY LETTER OF FEBRUARY 24, 1966

I. Navy JAG Corps (S. 746)

Question: 1. In his statement, Secretary Morris stated that the Department of Defense has supported the concept of a Judge Advocate General Corps in the Navy (Transcript page 31). However, it was requested that this committee defer pending action on proposed revision of officer personnel laws (Transcript page 30).

Question: a. Is this still the position of the DOD?

Answer: The Department of Defense adheres to its position favoring the creation of a Judge Advocate General's Corps in the Navy. This position is based on the Navy's preference for this organizational form and on the personnel management aspects of the proposal.

Question: b. Admiral Hearn, what is your personal opinion as to the need for a Judge Advocate General's Corps in the Navy?

Answer: My feeling for many years has been that establishment of a Judge Advocate General's Corps would greatly improve the organizational basis for providing the legal services needed by the Navy. The establishment of a Corps—which would afford the Navy lawyer a professional status that is similar to that of other professional groups—would provide a valuable career incentive. The Navy has consistently adhered to the position that career incentives are essential to attracting the highest calibre of personnel. This general rule applies with equal force and validity to the recruiting of legal talent. I therefore believe that a JAG Corps would be beneficial both to the Navy and to the professionl personnel who are its members. As a matter of interest we recently queried 50 young Navy lawyers as to why they did not wish to make a career of the Navy. 30 gave us, as their principal reason, inadequate pay, and 19 lack of professional identity.

Question: c. Is it your position that independent consideration of only that part of the Bolte proposals, specifically subsections 43–45 which deal with creation of the Corps, also be deferred until the entire package is acted upon?

Answer: Since the presentation of our position with respect to S. 746, the conclusion has been reached that enactment of the Bolte legislation should not be pressed at this session. Consequently, our position with respect to separate consideration of a Navy JAG Corps bill now is favorable.

Question: 2. What is the history of the Bolte package; how did it originate, when was it first introduced into Congress, and what legislative action has been taken to date?

Answer: The so-called "Bolte" package derives from a study made from August 1960 to April 1961, at the direction of the Secretary of Defense, with the concurrence of the Bureau of the Budget and the Armed Services Committees. The recommendations of the Committee, as modified after extensive Secretarial and Bureau of the Budget review, were transmitted to Congress as a legislative proposal in March 1963. No bill was introduced. Substantially the same proposal was resubmitted in March 1965. No legislative action has taken place.

Question: a. In respect to the history of the Bolte proposals, what part has the Navy JAG proposal played? Was it included in the original package? If not, when was it added?

Answer: The Navy JAG Corps proposal was incorporated in the Bolte package shortly before Bolte was first submitted to Congress in early 1963. The

JAG Corps proposal had previously been a separate item in the Department of Defense legislative programs for the 86th and 87th Congresses. It was introduced as H.R. 12347 in the 86th Congress and as H.R. 6889 in the 87th Congress. It was made a part of the Bolte package that was submitted to the 88th Congress as a means of integrating legislative effort.

Question: b. What is the present status of the Bolte package in DOD?

Answer: Recently, as noted above, it has been determined that the Bolte package should be deferred at this session.

Question c. What is its present status in Congress? Are hearings scheduled or anticipated in this session?

Answer: In consonance with the conclusion stated in 1c. and 2b., no hearings are contemplated at this session.

Question: d. Is it contemplated in the DOD that the Bolte package might be divided for easier consideration by the Congress?

Answer: The Department of Defense will conduct a new evaluation of the package. This evaluation will determine the content of any proposal to be submitted to the 90th Congress.

Question: e. If such were proposed, would this be opposed by DoD?

Answer: In view of the foregoing responses, this question now has no applicability.

Question: f. If broken down, would the Navy JAG Corps remain a part of the package, or would it be dropped?

Answer: This question now has been overtaken by events.

Question: g. Would the Navy support a separate Corps proposal if subsections 43–45 were dropped from the Bolte package?

Answer: The JAG Corps proposal has been a part of the Navy legislative program since 1959—first separately and then as a part of Bolte. If dropped from Bolte there is no reason for the Navy to change its position.

Question: h. Would Navy support a separate Corps bill such as S. 746 if subsections 43–45 remained a part of the omnibus Bolte bill? If they were removed from the package bill?

Answer: The position of the Department has been to oppose S. 746 since the JAG Corps was incorporated in Bolte. In the light of recent developments, the Navy would still support the concept of a JAG Corps.

Question: 3. What comments are there to the Corps proposal as presently set forth in S. 746 and what technical changes are recommended?

Answer: The provisions of S. 746 are in the main very similar to H.R. 6889 of the 87th Congress which was a Navy-sponsored bill. Certain changes in S. 746 are desirable to provide eligibility for Marine Corps lawyers to be detailed as Deputy Judge Advocate General and the Assistant Judge Advocate General.

Question: a. Would the Navy and DOD recommend passage of S. 746 if it were changed to incorporate the Corps provisions presently comprising subsections 43–45 of the Bolte package?

Answer: The new evaluation of Bolte is not expected to affect the validity of the JAG Corps provisions in the package. The answer, therefore, is affirmative.

Question: b. Which of the two proposals, S. 746 or subsections 43–45, is preferred, and for what reasons?

Answer: The position of the Department has been to oppose S. 746 since JAG Corps provisions were included in Bolte. No position has been developed on the detailed provisions of S. 746 as contrasted with those of Bolte. It is apparent from a comparison of S. 746 and the JAG Corps provisions of Bolte that S. 746 is more favorable to the Navy legal group than Bolte.

II. Field Judiciary

Question: 1. In addition to the necessity for maintaining the flexibility permitted by the administrative authorization of a field judiciary, what other reasons exist for not legislatively establishing this program?

Answer: The program has been functioning for too short a period of time in the Navy to permit an adequate evaluation of the desirability of all its effects. For example, there is presently considerable concern that the program is resulting in the restriction of experience as law officer of a general court-martial to too few officers with the result that, in the event of a materially expanded Navy and Marine Corps, insufficient officers would be available who would be qualified to perform this important function.

Question: a. Except for the unforeseen circumstances produced by wartime, what other situations can be foreseen in which the legislative creation of a field judiciary would prove too inflexible?

Answer: One situation which might occur is the reduction of the incidence of general courts-martial to a point where it would be economically unsound, both with respect to funds and manpower, to continue a Navy-wide program. This point is at present not too remote: in 1965 only 339 general courts-martial were tried.

Question: b. Would including an exception for "time of war" or "national emergency" provide the desired flexibility?

Answer: No.

Question: c. Assuming that the legislative creation of a field judiciary is considered necessary, what changes or additional provisions would you suggest to overcome the problems or objections set forth above?

Answer: The principal suggestion would be the deletion of any statutory restrictions upon the duties which may be assigned to "military judges" (Section 3, subparagraph (d) of S. 745).

Question: d. Is the field judiciary system used at all in the Vietnam operation, or has it been used at any time under wartime conditions? What problems have been raised in these circumstances, and how have they been overcome.

Answer: The judiciary system of the Navy and Marine Corps has been functioning in Vietnam, the judiciary officer being required to travel from his station in Japan to Vietnam for the trial of every case conducted in that country. In recent months the number of general courts-martial in Vietnam has so increased in number and complexity that a decision has been made to station a judiciary officer on a full time basis in Danang. Difficulties are anticipated with respect to housing, office space, adequate research facilities, security, in country travel, adequate reportorial services, and various other facets of the assignment, but they are not considered insurmountable.

The Navy and Marine Corps judiciary system has not been used in any other location under wartime conditions.

Question: 2. (Directed to Air Force only.)

III. Summary Courts-Martial

Question: 1. What has been the number of summary courts-martial in recent years since the 1963 amendment to Article 15?

Answer: Total summary courts-martial tried in the Navy and Marine Corps for the fiscal years indicated were as follows:

Fiscal year:	*Total SCM*
1963	22,756
1964	10,785
1965	11,052

Although figures are not available for the first six months of fiscal year 1966, preliminary indications are that approximately 10,000 summary courts-martial will be tried in fiscal year 1966.

Question: a. Have certain commands eliminated the summary court-martial?

Answer: Although some commands may have actually not referred any cases to trial by summary court-martial during the recent past, no instance is known of any commanding officer who has by regulations or otherwise eliminated recourse to the summary court-martial.

Question: b. Does the frequency of summary courts-martial vary significantly in different commands? What is the high, low, mean, and median number of summary courts-martial in various commands?

Answer: The frequency of summary courts-martial vary with different commands for many reasons, including principally the size of the command, its location, whether it functions as a receiving station for absentees from other commands, whether it is ashore or afloat, whether it has available officers experienced in the trial of special courts-martial, its overall state of discipline, etc.

No statistics are maintained as to frequency, but a check of representative commands revealed the following:

High frequency: 7½ cases per 100 men per year
Low frequency: 0 cases per 100 men per year
Mean frequency: 2 cases per 100 men per year
Median frequency: 2 cases per 100 men per year

The high-frequency commands were those that received a large number of absentees from other commands for disciplinary action, and this frequency does not reflect the incidence of summary courts-martial with respect to permanently assigned personnel.

Question: c. To what is the variation in number of summary courts-martial attributed?

Answer: To many factors, none of which are of primary importance Navy-wide. See the answer to question 1b, above.

Question: 2. Of the number of summary courts-martial in recent years, how many represent trials resulting from refusal to accept Article 15 punishment?

Answer: Statistics are not maintained in the Navy and Marine Corps concerning this subject. However, a check of recent experience in several representative commands ashore indicates that only approximately 2.5% of the total summary courts-martial represent trials resulting from refusal to accept Article 15 punishment. Of course, if assigned to a command afloat, an accused does not have the privilege of refusing Article 15 punishment.

Question: a. Are there statistics on the number of Article 15 imposed or offered? In how many cases did the refusal to accept Article 15 punishment not result in summary court-martial?

Answer: The following statistics represent the number of cases in which Article 15 punishment was imposed by commands afloat and ashore in the Navy and Marine Corps during the years indicated:

	Navy	Marine Corps
Afloat commands:		
Fiscal year 1964	55,154	115
Fiscal year 1965	58,858	1,026
Ashore commands:		
Fiscal year 1964	38,274	33,400
Fiscal year 1965	31,061	27,830

As mentioned above, statistics are not maintained as to the number of cases in which the accused refused to accept nonjudicial punishment. Similarly, no information is held as to the number of cases in which, after refusal of the accused to accept Article 15 punishment, the alleged misconduct was not referred to a summary court-martial.

Question: 3. How many special courts-martial have there been in recent years?

Answer: Total special courts-martial tried in the Navy and Marine Corps for the fiscal years indicated were as follows:

	Total SPCM
1963	15,724
1964	13,816
1965	13,174

Question: a. Of this number, how many resulted from refusal to accept summary court-martial?

Answer: Statistics are not maintained in the Navy and Marine Corps concerning this subject. However, a check of recent experience in several representative commands indicates that somewhat less than 1% of the total special courts-martial resulted from refusal of the accused to accept trial by summary court-martial.

Similarly, statistics are not maintained concerning the number of special courts-martial which resulted from refusal to accept nonjudicial punishment, but this number is very small. It is estimated that not more than 5 or 6 of such cases occur yearly in the Navy and Marine Corps.

Question: b. Of the number given in (a), in how many special courts-martial did the accused request legally-qualified counsel and how often was this request granted?

Answer: Information in response to this question is not available in the Navy or Marine Corps.

Question: 4. What procedural protections for the accused are present in a special court-martial that are not present in summary court-martial?

Answer: The following procedural matters, apparently related to the protection of the accused, are present in a special court-martial but not present in a summary court-martial:

a. The latter court may not be convened by an accuser. Although there is no specific prohibition against an accuser convening a summary court-martial, the MCM discourages such action and it rarely occurs in the naval service.

b. The convening authority may not serve as a member of a special court-martial. Although, if only one officer is in the command, the convening authority may also be the summary court, this very rarely, if ever, occurs in the naval service.

c. Challenges may be exercised against members of special courts-martial.

d. The accused has the right to be represented by counsel in a special court-martial. Although such a *right* does not exist with respect to summary courts-martial, see the detailed answers to question 7, below.

e. The record of trial by special court-martial must contain a verbatim or summarized transcript of the evidence considered by the court; whereas the record of trial by summary court-martial may omit this in the discretion of cognizant authority (see Section 0114b, JAG Manual). Generally, however, upon the request of the accused, a summarized transcript of such evidence will be included in the record of trial.

f. The accused before a special court-martial has a right to receive a copy of the record. Although this right is not accorded to an accused before a summary court-martial, see the answer to question 6, below.

Question: a. From the standpoint of ensuring impartiality of adjudicatory procedures, including review, what advantages are there for the accused in a special court-martial that are not present in a summary court-martial?

Answer: The following are the only significant advantages:

The prohibition against the convening authority of a special court-martial being the accuser;

The absence of the right of the accused to challenge the summary court-martial for cause; and

The absence of a mandatory requirement that a summarized transcript of the evidence heard by a summary court-martial be forwarded for appellate review.

These advantages may, of course, be obtained by the accused by the simple expedient of refusing trial by summary court-martial, which is a right possessed by him unless he has previously refused nonjudicial punishment for the same offense or offenses. In the Navy and Marine Corps, however, as noted above in answer to question 2, the accused, if assigned to a shore command, will have this right in all but about 2.5% of the cases, and, if assigned to an afloat command, will have this right in 100% of the cases.

Question: b. What is the difference in review procedures after a summary court-martial conviction, and those available after a special court-martial? Is there any difference when that special court-martial resulted from a refusal to accept a summary court-martial?

Answer: No significant differences exist except where the special court-martial has resulted in an adjudged BCD, in which case, unless the BCD is remitted by the convening or reviewing authority, the record must be forwarded for review by a board of review. There is no difference in the review of special courts-martial which did and did not result from a refusal to accept a summary court-martial in the Navy and Marine Corps.

Question: 5. Considering the number of instances in which a summary court-martial is elected by a member in lieu of the offer of Article 15 punishment, and considering also the frequency in which special courts-martial are held because of a refusal to accept a summary trial, what is the estimate of the times in which a special court-martial would be elected in lieu of an Article 15, if the summary court-martial were abolished?

Answer: It is estimated that approximately the same number of refusals to accept nonjudicial punishment would occur. Although it might reasonably be anticipated that a somewhat lesser number might occur, a substantial number of recent cases in the Navy have involved persons who are self-styled conscientious objectors who have refused nonjudicial punishment for the purpose of airing their views publicly by means of a court-martial. In such cases, as well as in those based upon other undisclosed reasons, it is believed that the accused would seldom be deterred from his refusal because of the possibility of a somewhat greater punishment.

Question: 6. What opportunities exist for the accused in a summary court-martial to review the record and note his objections or comments?

Answer: It is considered that the right that exists for a defense counsel to submit an appellate brief in the event of conviction in any court-martial proceeding (see paragraph 48*j*(2), MCM) exists with respect to an accused before a summary court-martial, whether or not he is represented by counsel. In connection with the preparation and submission of such a brief, it would appear that the accused has the right to examine a copy of the record of his trial by summary court-martial, and no instances in the Navy or Marine Corps of denial of such a right, upon request by the accused or his counsel, is known.

Question: a. What objection is there to allowing the accused to note his concurrence, or explain his nonconcurrence, on the record sheet of a summary court-marital?

Answer: No objection would exist if a request to do so was seasonably made by the accused or his counsel. In view of the extremely high percentage of guilty plea cases in the Navy and Marine Corps, however, to require submission of the record to the accused for his concurrence or non-concurrence in every case, even in the absence of a request therefor, would be unduly burdensome without achieving any appreciable advantage to the accused.

Question: 7. Are defendants permitted by official Defense Department or service policy or regulation to have counsel assist them in summary courts?

Answer: Paragraph 79 of the Manual for Courts-Martial contains this statement, "In the trial of the case the summary court represents both the government and the accused," and then amplifies the duty of the summary court with respect to representation of the accused in various other provisions.

There is no known Department of Defense or naval policy or regulation which would prohibit the appearance of counsel to assist an accused before a summary court-martial. Further, although the right to individual representation is not extended to an accused before a summary court-martial by policy or regulation, the general practice in the naval service is to accord such representation upon request of the accused.

Question: a. May they have special assistance from non-legal personnel of their own choosing, whether in service or not?

Answer: Yes, as a matter of practice, dependent upon the reasonable availability of the military counsel requested.

Question: b. If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

Answer: Yes, dependent upon the reasonable availability of the requested counsel.

Question: c. Are servicemen reglarly informed prior to trial of their right to have counsel in summary courts?

Answer: No.

Question: d. In how many cases have counsel appeared to assist the accused in summary courts-martial, and how often have they been legally trained or qualified?

Answer: Statistics are not maintained in the Navy and Marine Corps concerning this subject. However, a check of recent experience in several representative commands indicates that counsel have appeared for the accused in approximately 1.8% of the total cases, and such counsel have, almost without exception, been legally qualified.

Question: e. What is the comparison of acquittal rates when counsel is present in summary courts and when they are not?

Answer: Statistics are similarly not maintained in the Navy and Marine Corps concerning this subject. However, a check of recent experience in several representative commands indicates that there is no difference in acquittal rates when the accused is not represented by counsel.

Question: 8. What official guidelines are issued to commanders to assist them in the decision as to whether a minor offense warrants an offer of an Article 15 or a summary court-martial? Is the decision whether to offer an Article 15 or a summary court-martial essentially a matter of the officer's good judgment?

Answer: None other than those contained at various places in the MCM. See, for example, paragraphs 129*a* and *b*, MCM. Yes.

Question: a. Is it true that the practical effect of the officer's initial decision to offer an Article 15 or a summary court-martial is to determine whether the serviceman has an election to trial by special court-martial?

Answer: Not at all in all cases which arise afloat, where the accused has no right to refuse nonjudicial punishment. With respect to cases which arise

ashore, in view of the extremely small incidence of refusals to accept nonjudicial punishment in the naval service, it is extremly doubtful if the question of denying the accused an election to trial by special court-martial ever crosses the mind of the commander at the time of his initial decision.

Question: 9. In view of the fact that the special court-martial contains certain procedural protections not afforded to summary courts-martial, why should not a man be permitted to elect a special court-martial, whether or not he has been offered and has refused an Article 15, if he believes he has a better chance thereby of establishing his innocence, and is willing to risk the possible harsher punishment of a special court-martial.

Answer: The principal reason in the naval service is the shortage of officers that may exist within a command who are not disqualified by reason of prior knowledge of the case to sit on a special court-martial. This is especially true on the smaller ships, such as destroyers, where the officers and men are required to live in extremely close quarters with constant association. Further, with respect to such a ship, when it is underway all officers are occupied with routine duties and watches for more than twelve hours daily on the average, and a Commanding Officer is therefore extremely reluctant to impose upon them the additional burden of conducting a special court-martial.

Even on major ships, when they are underway the average working day of all officers exceeds 12 hours, and to assign at least five of such officers to a special court-martial vs. only one to a summary court-martial is looked upon with such disfavor that many offenses which would under other circumstances clearly be appropriate for trial by special court-martial are referred instead to a summary court-martial or disposed of by Article 15 punishment.

Question: a. Aside from the additional manpower requirements of a special court-martial, and that it is possible to impose harsher punishment, what factors militate against offering a special court-martial to any serviceman who requests it?

Answer: A factor that may from time to time exist is a shortage of officers within a command who have any prior training or experience with respect to the conduct of special courts-martial.

Question b. What is your estimate of the influence that the creation of a single law officer special court-martial would have upon the manpower demands involved in giving an election of a special court-martial to every serviceman who requests one?

Answer: The single law officer special court-martial would undoubtedly involve the appointment of legally qualified trial and defense counsel, or a minimum of three functionaries; whereas the summary court-martial requires only one officer. However, with respect to those commands which have a law officer and at least two other lawyers assigned or have reasonable access to such officers, the creation of a single law officer special court-martial would permit according accused greater access to such court than to the present special court-martial. With respect to commands that could not reasonably obtain the services of three such officers, however, such as ships at sea, no such result would be obtained.

Question: c. Would the objections to abolishing summary courts-martial because of the manpower requirements be met by permitting only trial by a single law officer special court-martial when an Article 15 is refused?

Answer: The result is one of degree only: The present special court-martial requires at least five officers: the single law officer special court-martial would require at least three officers; and the summary court-martial requires only one. Thus the manpower requirements are not only not solved but are aggravated by the requirements that the three officers required for the single law officer special court-martial be legally qualified. The answer is therefore negative, and this is particularly so with respect to commands at sea or in such isolated locations that they do not have reasonable access to three legally qualified officers.

IV. Changes in Special Courts-Martial (S. 752)

Question: 1. In how many special courts-martial has there been legally-qualified counsel present for the accused?

Answer: In calendar year 1965, approximately 8,500 special courts-martial were tried by Navy commands and 4,500 by Marine commands. On the basis of an analysis of approximately 92% of these cases, legally qualified counsel were present for the accused in 42.03% of the Navy cases and 10.15% of the Marine Corps cases.

Question: a. How often has legal counsel been requested, and how often has it been made available?

Answer: There are no definitive statistics available regarding requests by accused for legal representation. In certain areas where military lawyers are reasonably available, every accused before a special court-martial has been afforded representation by legally qualified counsel, whether or not he has requested such representation. In other areas where there is an acute shortage of military lawyers, such as in isolated commands, very few requests for legally qualified representation are made because of the known non-availability of such counsel. Perhaps the average situation in the Navy is represented by the experience during 1965 at Headquarters, Sixth Naval District, where 32 requests for legally qualified counsel for accused before special courts-martial were received and 30 of such requests were filled.

Question: b. What is the comparative acquittal, appeal, and successful appeals rates for special courts-martial in which legal counsel has and has not been made available?

Answer: There are no statistics available concerning these subjects. Concerning comparative acquittal rates, a random sampling of cases reveals that action equivalent to acquittal (initial findings of not guilty, setting aside and dismission one or more findings of guilty, or setting aside findings of guilty and authorizing a rehearing, after which the convening authority determined that a rehearing was impracticable and dismissed the charges) occurred in 6% of the cases in which the accused was represented by lawyer counsel and in 8% of the cases in which he was not so represented.

Concerning comparative successful appeal rates, a random sampling of cases reveals that 2% of the cases in which the accused was represented at the trial by legally qualified counsel and 8% of the cases in which the accused was not so represented resulted in a reduction of the findings or a reduction or suspension of the sentence upon appeal.

Question: c. How often has there been legally qualified counsel on the defense side but not on the other?

Answer: With respect to the cases mentioned in response to question 1, and on the basis of the indicated percentage of such cases analyzed, legally qualified counsel have been present on the defense side but not on the other in 56.18% of the total Navy cases in which the accused was represented by legally qualified counsel, and in 14.54% of the total Marine cases in such category.

Question: d. Are any trends evident, and are any conclusions suggested by this experience?

Answer: It appears that the interests of the government dictate that, when legally qualified counsel is present for the accused, the government generally must be similarly represented. Although with respect to certain types of cases, such as those involving only unauthorized absence charges, non-legally qualified counsel are able to develop the expertise necessary adequately to function as trial counsel, such is not the case with respect to the more complicated type of offenses or with respect to trials that may involve difficult evidentiary questions. Also, of course, even the most routine appearing case may frequently develop into one which involves one or more hotly contested issues. In summary, if legislation is enacted which will require the representation of the accused by legally qualified counsel before a special court-martial before a bad conduct discharge may be adjudged, the armed services must be staffed with adequate lawyers to enable them to provide concurrent representation of the government by legally qualified counsel. Any failure of such staffing will so tip the scales in favor of the accused as to be seriously destructive of substantial justice and concomitantly of the discipline necessary for the effective maintenance of a fighting force.

Question: 2. In how many cases has there been a lawyer present on special courts-martial?

Answer: With respect to the cases mentioned in response to question 1, and on the basis of the indicated percentage of such cases analyzed, a lawyer was assigned as a member of the court in 7.31% of the Navy cases and in 1.65% of the Marine Corps cases.

Question: a. In how many cases has the lawyer been a member but not the President?

Answer: In a very few cases, too small to have any appreciable significance.

Question: b. In how many cases has there been legal counsel for the defense but no lawyer present on the court?

Answer: With respect to the cases mentioned in response to question 1, and on the basis of the indicated percentage of such cases analyzed, legally qualified counsel have been present for the defense but no lawyers present on the court in approximately 86% of the total Navy cases in which the accused was represented by legally qualified counsel, and in approximately 87% of the Marine Corps cases in such category.

Question: c. How often has a lawyer been assigned to the court because of the presence of legally qualified defense counsel?

Answer: In general, assignment of a lawyer as a member of the court is dependent upon many factors, only one of which is the presence of legally qualified counsel for the defense. However, with respect to the cases mentioned in response to question 1, and on the basis of the indicated percentage of such cases analyzed, a lawyer was assigned as a member of the court in approximately 14% of the Navy cases in which the accused was represented by legally qualified counsel, and in approximately 13% of Marine Corps cases in such category.

Question: d. In how many cases has a lawyer been challenged from a special court-martial and how does this compare with challenges of non-legally trained personnel?

Answer: There are no definitive statistics available regarding challenges of members of special courts-martial. However, a random sampling of cases reveals that the lawyer president was peremptorily challenged in 1% of the cases in which a lawyer was so assigned and the non-lawyer president was peremptorily challenged in 3% of the cases in which a non-lawyer was so assigned. In the sample analyzed, there were no challenges for cause to the lawyer president.

Question: e. What is the comparative rate of successful appeal, on any grounds, to COMA when the President is legally qualified and when he is not?

Answer: Too few cases in this category have reached the USCMA level to provide a meaningful comparison.

Question: f. Similarly, what is the comparison of results when these two classes of cases are reviewed under Articles 65–67?

Answer: No statistics are available in this area. However, a random sampling of cases indicates that some action favorable to the accused result on appeal (from the action of the convening authority through the action by the board of review) in 12% of the cases in which the president was not legally qualified and in 10% of the cases in which the president was legally qualified.

Question: g. Are the above answers (e) and (f) affected where the defense counsel is legally qualified?

Answer: No significant difference was noted in the sample of cases analyzed.

Question: 3. When issues such as the admissibility of evidence, voluntariness of confessions, sufficiency of proof, form of instructions, etc., are raised by legal counsel, what guidance is available to the non-legally trained Court President and members in deciding them? May they seek the advice of JAG personnel?

Answer: The Judge Advocate General has prepared two publications which cover the majority of issues that arise in other than the most complicated special courts-martial: Trial Guide for Presidents and Members of Special Courts-Martial (NAVPERS 10096, 1962) and Instructional Guide for Presidents of Special Courts-Martial (NAVPERS 10090, 1965). These publications, which have been distributed to all commands in the Navy and Marine Corps which convene special courts-martial, are designed for use by non-lawyers and contain detailed guides as to procedures and requirements relative to the admissibility of evidence, including confessions, motions, instructions, and various other aspects of trials. Generally in those cases which are so complicated as to be beyond the ability of a non-legally trained President, every effort is made to appoint a legally trained President. Any president of a special court-martial may, of course, seek legal advice and assistance from military lawyers that may be available in the area subject, of course, to the restriction that persons who may later be involved in the case cannot provide such advice and assistance.

In addition to the foregoing, the Navy has for many years conducted an intense course of instruction for non-lawyer members and counsel of special courts-martial at the Naval Justice School in Newport, Rhode Island. This course is of seven weeks duration and covers a substantial percentage of all questions of procedure, evidence and the law of crimes that will ordinarily be encountered in the trial of special courts-martial. This school in 1965 graduated 825 officers, and has graduated comparable numbers during the last several years. These graduates are dispersed throughout the Navy, Marine Corps and Coast Guard and are generally assigned as special court-martial members or counsel when

lawyers are not available. It is the opinion of the Judge Advocate General that the excellence of instruction provided at this school has contributed materially to the legal correctness, fairness, and justice which have been achieved in Navy, Marine Corps and Coast Guard trials by special courts-martial conducted by non-lawyer functionaries.

Question: 4. Assuming that the law is changed to require the appointment of a law officer before a special court-martial can adjudge a BCD, to what degree is there a danger that the mere appointment of a law officer will suggest that a BCD is considered appropriate by the Convening Authority?

Answer: Perhaps the best answer to this question can be provided by an illustration. The U.S. Naval Station, Norfolk, Virginia, regularly has three standing special courts-martial to which all cases are presently referred on a rotation basis, subject, of course, to a preliminary inquiry to insure that no member of counsel of the court to which a particular case may be referred is disqualified. Assume that, after the enactment of S. 752, the convening authority assigns law officers to only two of his three courts and modifies his case referral system to hand-pick the cases to be referred to such courts and to the single court that, because of the non-assignment of a law officer, may not adjudge a BCD. In such a case, the very least that would ordinarily be assumed by the members of the courts which had law officers assigned would be that the convening authority desired at least to subject the accused in each case referred to such courts to the jeopardy of a bad conduct discharge, unless, of course, a bad conduct discharge could not legally be adjudged on the basis the offenses charged and the provable prior convictions. In other words, it is the opinion of the Judge Advocate General that there may be a substantial danger of implied command control in all major commands if less than all courts which are routinely convened for the trial of possible BCD cases have law officers assigned.

Question: a. Would the mandatory assignment of a law officer in every case in which the possible penalty is a BCD completely eliminate the problem or at least mitigate is sufficiently? What objections, if any, would there be to such a provision?

Answer: Yes. The objections of the Navy principally, and of the Marine Corps to a lesser degree, is based upon the impracticability if not impossibility of having qualified law officers available to all commands. For example, in 1965, almost 10% of all Navy special courts-martial were conducted at sea on ships which cannot afford the luxury of carrying a law officer; and approximately another 24% of all Navy special courts-martial were conducted by relatively isolated commands which do not have a routine case load sufficient to justify the full time services of a law officer. Such a provision would therefore have the following adverse effects:

(1) Effectively deprive a considerable number of commands (virtually all ships—a single lawyer is presently assigned only on 15 major vessels) of the jurisdiction to convene a special court-martial which could adjudge a BCD.

(2) Impose escalated costs of travel, per diem and lost time with respect to law officers who would be required to travel from their parent bases to remote or isolated commands which did not have law officers assigned.

(3) Increase considerably the number of lawyers required in the Navy and Marine Corps.

Question: b. What suggestions can be made for avoiding this danger?

Answer: If the appointment of a law officer to a special courtmartial is made mandatory before that court may adjudge a BCD, the only recourse will be to require the appointment of law officers to all special courts-martial considering cases which may, on the basis of the offenses charged and provable prior convictions, lawfully adjudge a BCD. This, will, of course, have the disadvantages discussed in a, above.

V. Administrative Discharges

Answers to questions in this part are in two sections: the first includes answers which pertain to the Navy or to both the Navy and Marine Corps; and the second includes answers which pertain only to the Marine Corps.

NAVY ANSWERS

Question: 1. What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for

the specific charges upon which the action was based; for instance, homosexuality, conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

Answer:

U.S. Navy undesirable discharges (enlisted personnel)

Fiscal year	Unfitness		Misconduct	
	Homosexual	Other	Civil conviction	Fraudulent enlistment
1961	1,148	708	1,067	49
1962	1,175	563	709	27
1963	1,162	611	736	26
1964	1,321	941	861	19
1965	1,365	782	692	15

U.S. Navy general discharges (enlisted personnel)

Fiscal year	Unsuitability	Unfit	Misconduct
1961	2,402	2,857	215
1962	2,952	3,081	265
1963	2,715	1,817	245
1964	2,435	1,686	266
1965	2,738	1,366	347

U.S. Navy honorable discharge (enlisted personnel)

Fiscal year	Unsuitability	Unfit	Misconduct
1961	6,390	0	0
1962	8,855	0	0
1963	8,473	0	0
1964	7,328	0	0
1965	7,485	0	0

Question: a. Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

Answer: Specific statistics are not available. However, based on a recent survey of 1000 cases, approximately 20% of the personnel processed for possible undesirable discharge requested a board hearing. Of these that requested a board hearing, about 50% were represented by qualified counsel. These figures compare with other similar surveys and are considered relatively accurate throughout any given period.

Question: b. If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

Answer: Specific statistics are not available; however, prior to mid-May 1965. final action in a very small percentage of cases was less favorable than action recommended by the field board. Such less favorable action usually did not extend to an undesirable discharge. Subsequent to 20 December 1965, the Chief of Naval Personnel has been complying with the precedures set forth in DOD Directive 1332.14 of 20 December 1965.

Question: 2. What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

Answer: Specific statistics are not available but such action is very rare. There have been, and there probably will continue to be, some cases wherein it is prudent to administratively discharge a person who was convicted of a particular violation of the UCMJ and wherein his sentence did not include a punitive discharge. A hypothetical case would be a man convicted by a court, pursuant to a guilty plea possibly, of forcible sodomy. It is not considered in

the best interest of the Navy or the member to retain such a man. It is considered however that this type man, in most cases, should not be issued a discharge under other than honorable conditions. In addition, Administrative Discharge proceedings would be initiated in those cases which are barred by the UCMJ under the statute of limitations but occurred during the current enlistment.

Question: a. Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules not going to the merits, because the sentence did not include a discharge, or because of some other reason.

Answer: See Question 2 above.

Question: 3. What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

Answer: None.

Question: a. Please classify these cases separately according to the various reasons for deciding on a second proceeding and the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

Answer: Not applicable.

Question: 4. What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc?

Answer: Statistics are not available; however, action for a single act is instituted in the following types of cases: (1) sexual perversion, (2) civil conviction, (3) use of drugs, (4) prolonged unauthorized absence of one year or more, and (5) fraudulent enlistment.

Question: 5. Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (Transcript pages 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

Answer: It is the policy of the Navy to process for discharge administratively members who are accused and admit to a single act of homosexuality. This policy has been in effect for several years. Personnel who steadfastly deny and cooperate fully in the investigation normally would not be discharged at all except as a result of court-martial conviction or civil conviction.

Question: a. In how many cases were administrative discharge proceedings instituted in these circumstances?

Answer: Statistics are not available. However, it is estimated that in about 150 cases per year individuals are processed as a result of admitting to one in-service homosexual act.

Question: b. Of these, in how many cases did the member request a court-martial?

Answer: Statistics are not available. It is estimated that one-half of one percent of those accused of sexual perversion elect trial by court-martial rather than request administrative action.

Question: c. What were the final dispositions of these cases?

Answer: Statistics are not available.

Question: d. In how many cases was pre-service homosexuality a factor in these instances? Associating with known homosexuals?

Answer: Pre-service homosexuality is *not* a factor in determining the character of discharge. It may be a factor in establishing a pattern or history of homosexuality. As far as can be determined there have been no discharges based solely on association with known homosexuals. However, it is possible that a man in a sensitive rating who associates with known homosexuals and frequents homosexual "hangouts" could be considered for discharge based solely on his military record, due to the security aspects involved.

Question: e. Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

Answer: Statistics are not available; however, personnel who steadfastly deny and cooperate fully in the investigation normally would not be discharged at all except as a result of a court-martial conviction or civil conviction.

Question: f. Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer?

Answer: Statistics are not available.

Question: 6. Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the UCMJ, except in cases of homosexuality (Transcript page 184)? Is this policy expressed in formal regulations or directives?

Answer: In accordance with Article C–10312, BuPers Manual, personnel are processed for fraudulent enlistment and prolonged unauthorized absence of one year or more. Additionally, personnel who admit to use of narcotics and habit forming drugs are usually processed in accordance with Article C–10311, BuPers Manual.

Question: 7. Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless court-martialled and what were the dispositions?

Answer: In the Navy and Marine Corps the policy to such effect is set forth in Section 0106d of the Manual of the Judge Advocate General, Department of the Navy, which reads as follows:

"d. *Persons whose cases have been previously adjudicated in domestic or foreign criminal courts*

"(1) Policy.—A person in the naval service who has been tried in a domestic or foreign court, whether convicted or acquitted, or whose case has been adjudicated by juvenile court authorities, shall not be tried by court-martial for the same act or acts, except in those unusual cases where trial by court-martial is considered essential in the interests of justice, discipline, and proper administration within the naval service. Such unusual cases, however, shall not be referred for trial without specific permission therefor as provided herein.

"(2) Criteria.—Referral for trial within the terms of this policy shall be limited to cases involving substantial discredit to the naval service and which meet one of the following criteria:

"(a) Cases in which punishment by civil authorities consists solely of probation, and local practice does not provide rigid supervision of probationers, or the military duties of the probationer makes 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 local community.

"(c) Cases of homosexuality in which mild penalties have been imposed upon conviction. Homosexuality with its demoralizing effects 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; for example, cases where conduct leading to trial before a foreign court has reflected adversely upon the naval service itself.

"(3) Procedure.—

"(a) General and special courts-martial.—No case described in subsection (2) above will be referred for trial by general court-martial or special court-martial without the prior permission therefor of the Secretary of the Navy. Requests for such permission shall be forwarded by the general court-martial authority concerned (or by the special court-martial authority concerned via the general court-martial authority) via the Commandant of the Marine Corps or Chief of Naval Personnel, as appropriate, to the Secretary of the Navy.

"(b) Summary courts-martial.—No case described in subsection (2) above will be referred for trial by summary court-martial without the prior permission therefor of the officer exercising general court-martial jurisdiction over the command. Grants of such permission shall be reported by the general court-martial authority concerned by means of a letter addressed to the Secretary of the Navy in which he shall describe the offense alleged,

action by civil authorities, and the circumstances bringing the case within the exception to the general policy.

"(c) Reporting requirements.—The provisions of this section do not affect reporting requirements or other actions required under other regulations in cases of convictions of service personnel by domestic or foreign courts and adjudications by juvenile court authorities.

"(4) Limitations.—Personnel who have been tried by courts which derive their authority from the United States, such as U.S. District Courts, will not be tried by court-martial for the same act or acts (see par. 68d, MCM 1951)."

During calendar year 1965 only three persons were tried under this policy, two by summary courts-martial and one by special court-martial.

Question: a. When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed?

Answer: Commanding Officers are required to include with each case the complete details of the circumstances leading to and surrounding the arrest and the conviction of the member involved. These facts should, if possible, include the original charge and any subsequent charges or any pleas to a lesser included offense.

Question: b. When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if guilt had been established in a military tribunal, or is it based merely on the fact of civil conviction?

Answer: Each case is decided on its individual merits and, in addition to the civil conviction, the member's entire military record is considered. Often a member who possesses a good previous record and has not been sentenced to lengthy confinement is placed on probation for a specified period. Probation, however, is considered appropriate only in cases wherein the nature of the offense is not repugnant.

Question: 8. Are there procedures in the UCMJ for court-martial and discharge of members who are habitual offenders?

Answer: No. The UCMJ and the Manual for Courts-Martial contemplate that appropriate disciplinary action will be taken promptly after each instance of misconduct and does not permit the trial of persons for a pattern of misconduct.

Section B of paragraph 127c of the Manual for Courts-Martial contains punishment escalation clauses which permit a court-martial, upon finding an accused guilty of an offense or offenses for none of which a discharge is authorized. to adjudge a discharge if proof of a certain number of *previous convictions by court-martial* within a certain period is received. This is not, however, equivalent to permitting the court martial of a person for being a habitual offender.

Question: a. What is the policy of utilizing the authority set forth in section 127c(B) of the Manual? Is this authority utilized to its maximum?

Answer: In every case, whether or not the punishment escalation provisions of Section B of paragraph 127c of the MCM shall be utilized is left entirely and exclusively to the discretion of the court-martial upon considerations of all the facts and circumstances of the case.

There are no statistics available as to the precentage of cases in which this section is utilized by courts-martial in the naval service. However, in fiscal year 1965, of all those special courts-martial conducted in the Navy and Marine Corps which, because of the offenses of which the accused was found guilty or because of the punishment escalation provisions of Section B of paragraph 127c of the MCM, could legally have adjudged a bad conduct discharge, only 20.22% did so. Further, a review of a random sample of cases in which the court-martial, solely because of the escalation provisions of Section B could legally have adjudged a bad conduct discharge, reveals that only 8.2% of them did so. Thus it is estimated that the provisions of Section B are utilized in the Navy and Marine Corps in only about 5 to 10% of the cases in which it could be utilized.

Question: b. Please set forth the number of courts-martial based on section 127c(B), and compare this to the number of administrative separations of various types given for similar reasons.

Answer: As indicated in response to a, above, there are no statistics as to the exact number of special court-martial sentences which utilized Section B. However, if the 8.2% figure mentioned above is accurate, 875 special courts-martial did not in fiscal year 1965.

Question: 9. What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (Transcript page 180)?

Answer: Homosexual conduct, indecent exposure, and incest.

Question: a. How many administration discharge cases have there been for each type of case given above?

Answer: Statistics are not available.

Question: 10. Assuming that it is considered advisable to enact S. 758 to give an election of a court-martial in some instances to members accused of offenses under the UCMJ when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (Transcript pages 184–194)?

Answer: It should not be available in those cases where the individual admits the involvement.

Question: 11. Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum elements of due process, what is the order of preference of the following alternatives from the standpoint of the service?

a. Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the Subcommittees.

b. Give an unqualified election of a court-martial to the member.

c. Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.

d. Grant post-discharge review of legal issues to COMA.

e. Some other legislative change (please specify) desired by the service.

Answer: It is considered that there is no basis for this assumption. The Department of Defense Directive 1332.14 of 20 December 1965 protects the constitutional rights of military personnel in administrative discharge proceedings.

V. Administrative Discharges

MARINE CORPS ANSWERS

Question: 1. What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for the specific charges upon which the action was based; for instance, homosexuality, conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

Answer: See accompanying chart at end.

Question: a. Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

Answer: No statistics are available.

Question: b. If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

Answer: No statistics are available.

Question: 2. What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

Answer: While no statistics are available, it should be noted that the Secretary of the Navy has restricted to himself the authority to award undesirable discharges in cases where the recommendation is based solely or primarily upon an offense or offenses which have been tried by court-martial. Further, Section V.A. 7 of DOD Directive 1332.14 provides that no member will be administratively discharged under conditions other than honorable if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by court-martial resulting in acquittal or action having the effect thereof, except where such acquittal or equivalent disposition is based on a legal technicality not going to the merits. Discharges based on "frequent involvement of a discreditable nature with civil or military authorities" may be based upon prior convictions by courts-martial since such discharges are primarily based on the Marine's over-all conduct record.

Question: a. Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules not going to the merits, because the sentence did not include a discharge, or because of some other reason.

Answer: No statistics are available.

Question: 3. What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

Answer: No statistics are available. It is believed that no such cases have occurred in the Marine Corps. Further, Section II.A.8 of DOD Directive 1332.14 prohibits such practice where the evidence before both boards would be the same, unless legal prejudice to the substantial rights of the accused is found upon review of the first board's proceedings, or where the findings of the first board favorable to the respondent are determined to have been obtained by fraud or collusion.

Question: a. Please classify these cases separately according to the various reasons for deciding on a second proceeding and the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

Answer: No statistics are available.

Question: 4. What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc.?

Answer: No statistics are available. However, where a single act of misconduct clearly demonstrates that the member is unfit for retention, such member can and should be processed for administrative separation. This is particularly true when the single act of misconduct involves sexual perversion, fraudulent enlistment, conviction by civil authorities of a felony or an offense involving moral turpitude, and continuous unauthorized absence of more than one year.

Question: 5. Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (Transcript pages 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

Answer: The Marine Corps has never processed anyone for an administrative discharge who is simply *accused* of homosexuality. In every case the accusation must be supported by evidence.

Question: a. In how many cases were administrative discharge proceedings instituted in these circumstances?

Answer: As previously stated, there have been no instances in the Marine Corps where an administrative discharge was based simply on an *accusation* of homosexuality. There are no accurate statistics available as to the number of cases where a member has received an administrative discharge based on a single established homosexual act. However, it is not uncommon, when investigation is initiated, based upon evidence of but one act, to have other acts disclosed during the course of investigation.

Question: b. Of these, in how many cases did the member request a court-martial?

Answer: No statistics are available. However, such requests are rare and it is Marine Corps practice, when such a member requests adjudication of his case by court-martial, to grant his request. If trial is not possible and the accused has consistently denied his participation in the alleged misconduct, the matter is normally dropped and the accused person is retained in the service.

Question: c. What were the final dispositions of these cases?

Answer: No statistics are available.

Question: d. In how many cases was pre-service homosexuality a factor in these instances? Associating with known homsexuals?

Answer: No statistics are available. Pre-service homosexual acts may form the basis for discharge, if they establish homosexual tendencies. Discharges directed in such cases are always under honorable conditions.

Question: e. Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

Question: f. Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer.

Answer: The basic answers to these questions have been set forth above, i.e., where a member consistently denies participation in a homosexual act, even where there is evidence thereof provided by alleged participants, the member is not normally processed for an administrative discharge based on such an alleged act. It is estimated that in 97% of the cases in which an administrative discharge is based on homosexuality, the member admits his participation and does not request trial by court-martial. In all cases where the member desires a hearing before an administrative discharge board, he has the right to appear before the board, to be represented by counsel, and to call or cross-examine witnesses or present any evidence he may so desire. In no case, where a member being processed for administrative discharge based on homosexuality denies his participation, would a discharge be based solely upon written reports or summaries by an investigating officer, accusations by unknown informants, etc.

Question: 6. Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the UCMJ, except in cases of homosexuality (Transcript page 184)? Is this policy expressed in formal regulations or directives?

Answer: There are, and properly should be, provisions for the administrative discharge of service members who are clearly unqualified or unfit for military service. The reasons why such provisions are necessary have been amply developed in the testimony of the various Department of Defense representatives before the Committee and have been summarized by Senator Ervin himself. There are a substantial number of reasons which require that a member be administratively discharged, quite apart from his commission of criminal offense, i.e., hardship, physical disability, enuresis, inaptitude, etc. Even in the area of the undesirable discharge, unfitness demonstrated by frequent involvement of a discreditable nature with civil or military authorities, drug addiction (as opposed to the unlawful sale, use, or possession of drugs), or unsanitary habits, may provide a sufficient basis for administrative discharge even though such acts or conduct do not constitute an offense or offenses which violate the Uniform Code of Military Justice.

Question: 7. Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless courtmartialed and what were the dispositions (Transcript page 179)?

Answer: The Judge Advocate General of the Navy has provided the answer to this question.

Question: a. When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed?

Answer: It is the policy of the Marine Corps to obtain an official copy of the court record evidencing the conviction, the probation report, and the arresting officer's report. Where necessary, direct correspondence is initiated with the prosecuting attorney to obtain sufficient information to permit the Marine Corps to clearly determine the precise offense for which the member was convicted.

Question: b. When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if guilt had been established in a military tribunal, or is it based merely on the fact of civil conviction?

Answer: Once the Marine Corps, through the procedures outlined above, determines the precise offense for which the member was convicted, discharge action based thereon is permitted, both by prior Marine Corps regulations and Section VII.J.1 of DoD Directive 1332.14, only where the conviction was for an offense for which, under the Uniform Code of Military Justice, the maximum permissible punishment is death or confinement at hard labor in excess of one year, or which involves moral turpitude.

Question: 8. Are there procedures in the UCMJ for court martial and discharge of members who are habitual offenders?

Answer: (The Navy's answer is satisfactory.)

Question: a. What is the policy of utilizing the authority set forth in section 127c(B) of the Manual? Is this authority utilized to its maximum?

Answer: (The Navy's answer is satisfactory.)

Question: b. Please set forth the number of courts-martial based on section 127c (B), and compare this to the number of administrative separations of various types given for similar reasons.

Answer: (The Navy's answer is satisfactory.)

Question: 9. What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (Transcript page 180)?

Answer: Some examples of such cases would include those involving an aged or severely physically handicapped victim; a victim who is legally incompetent to testify; or a victim in a rape or sodomy case where competent medical opinion predicts additional lasting injury to the victim, if his testimony in court is required.

Question: a. How many administrative discharge cases have there been for each type of case given above?

Answer: No statistics are available, but it is reasonably certain that the percentage, in comparison to the total number of cases actually tried by court-martial, is very small.

Question: 10. Assuming that it is considered advisable to enact S. 758 to give an election of a court-marital in some instances to members accused of offenses under the UCMJ when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (Transcript pages 184–194)?

Answer: As pointed out by Brigadier General William W. Berg, Deputy Assistant Secretary of Defense for Military Personnel, in his statement before the Committee, it would be unnecessary and unrealistic to permit members being processed for an administrative discharge, even where the basis therefor is an offense under the UCMJ, to elect trial by court-martial. "S. 758 would permit a member of an armed force to demand trial by court-martial in any case in which action is proposed to administratively discharge or separate him under conditions other than honorable on grounds of alleged misconduct. The typical administrative discharge action in which a service member may be issued a discharge under other than honorable conditions for misconduct is one where the member has a record of misconduct over a period of time for which he has received Article 15 punishment and/or court-martial convictions. In such cases punitive action has been taken on these specifiec offenses and there remains no offense for which the respondent may be tried. Yet in these instances the member's record of frequent involvement in misconduct has demonstrated his unfitness for service. If it is determined that he should be discharged, the military departments should be able properly to characterize his service as undesirable.

In a few cases there may be one heinous offense, such as child molestation or sodomy which, under the rules governing a trial by court-martial or for policy reasons based on social considerations, could not be successfully prosecuted. In such a case the military services could not, under this bill, conduct an administrative discharge proceeding and, if warranted, discharge the individual under other than honorable conditions. The retention of such an individual in the service or his receipt of a dischrage under honorable conditions would be detrimental to the morale of the military community.

The Department of Defense opposes S. 758 because the government has a vital interest in accomplishing early separation of individuals in the classes described above, with an appropriate discharge."

Question: 11. Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum elements of due process, what is the order of preference of the following alternatives or groups of alternatives from the standpoint of the service:

a. Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the Subcommittees.

Answer: There is no reason why the applicable provisions of DOD Directive 1332.14 could not be incorporated into statute, should Congress consider that to be necessary. However, the services themselves have been consistently moving in the direction of granting the member being processed for an administrative discharge more, not less, rights, and there is no reason to believe such trend will change.

b. Give an unqualified election of a court-martial to the member.

c. Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.

d. Grant post-discharge review of legal issues to COMA.

Answer: The alternatives suggested in subparagraphs b, c, and d are not really alterantives, nor do they guarantee elements of due process to any greater degree than they are presently guaranteed. Current regulations and review procedures insure substantive due process and afford greater protection for individual rights than can be found in any other administrative procedures of a comparable nature. None of the alternatives suggested are demonstrably superior to the protections currently provided by law and regulation.

e. Some other legislative change (please specifiy) desired by the service.

The Marine Corps does not desire nor consider necessary any other legislative changes pertaining to administrative discharges.

U.S. MARINE CORPS

General discharges (enlisted)

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Total general discharges	2,618	2,265	2,488	1,836
Total discharges for unsuitability	2,304	1,956	2,577	2,207

Undesirable discharges (enlisted)

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Unfitness:				
Lewd acts	34	30	9	8
Homosexual acts	72	40	27	29
Sodomy	274	292	226	208
Indecent exposure	8	8	4	2
Indecent acts with child	14	5	11	6
Other indecent acts	2	4	3	3
Frequent involvement	196	220	267	205
Pattern for shirking	46	55	47	45
Drug addiction or possessiong	18	6	7	5
Failure to pay debts	44	53	31	23
Other good and sufficient reasons	10	11	17	3
Misconduct:				
Prolonged unauthorized absence	8	7	6	59
Fraudulent enlistment:				
Police record	26	13	17	16
Juvenile record	12	5	7	4
Previous service in another branch	26	14	19	10
Physical defects	0	1	2	0
Marriage or dependents	28	5	13	4
Other	46	42	53	55
Conviction by civil authorities	776	678	653	470

Enlisted discharges, U.S. Marine Corps

Fiscal year	Discharges, honorable and general	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
1962	19,309	21,098	40,407	1,482	982	1,670	44,541
1963	20,498	29,671	50,169	1,310	821	1,584	53,884
1964	20,766	37,149	57,915	1,288	913	2,103	62,219
1965	18,419	33,402	51,821	1,003	766	1,957	55,547

VI. Review of Administrative Discharges by COMA

Question: Does the number of cases referred to in General Hodson's statement (Transcript page 54) represent the number of discharge cases reviewed by Discharge Review Boards? How was this figure computed?

Answer: This question is directed to the Army.

Question: a. What is the number of administrative discharges reviewed by DRB for prior years?

Answer:

Breakdown of types of dicharges received by NDRB from 1961 to 1965

Type of discharge	1961	1962	1963	1964	1965
Honorable	19	76	87	63	84
General	546	568	636	577	401
Undesirable	678	599	597	616	463
Bad conduct	235	265	245	204	150

Question: b. How many administrative discharge cases are there annually for unfitness, unsuitability, or misconduct in each service?

Answer: See answer to Question 1, part V.

Question: c. What is the breakdown of these cases in terms of type of discharge, and of these, which are the result of board hearings?

Answer: See answer to Question 1, part V. Statistics are not maintained as to the percentage of discharges which are and are not the result of board hearings.

Question: d. Of the number of discharge cases reaching DRB and BCMR, what is the breakdown in terms of type of discharge?

Answer: Both the Discharge Review Board and the Correction Board review honorable, general, undesirable and bad conduct discharges. Additionally the Correction Board reviews dishonorable discharges. See also answer to question 1a, above, and 1e, below.

Question: e. For each of these types of discharge, in how many cases have the DRB and the BCMR changed the character of discharge, and to what have they been changed?

BOARD FOR CORRECTION OF NAVAL RECORDS

Answer: The following figures represent the number of discharge cases reviewed by the Correction Board during the years 1961 through 1965 and the percentage of the cases changed.

	Number of cases	Percentage changed		Number of cases	Percentage changed
1961	313	22.6	1964	385	31.2
1962	258	31.8	1965	365	31.0
1963	239	21.8			

Information pertaining to the answers of the various type discharges reviewed by the Correction Board during the years 1961 through 1964 is not reasonably available. However, the following information concerning the discharge cases reviewed during the year 1965 is generally descriptive of the type of discharges reviewed in the preceding years:

Dishonorable Discharges:	
Number reviewed	37
Number changed	10
Number not changed	27

Of the 10 dishonorable discharges changed, 1 was changed to an honorable discharge by reason of convenience of the Government. 5 to general discharges by reason of unfitness. 4 to general discharges by reason of one of the following: convenience of the Government, physical disability, unsuitability, and misconduct.

Bad Conduct Discharges:

Number reviewed	187
Number changed	46
Number not changed	141

Of the 46 bad conduct discharges changed, 2 were changed to honorable discharges by reason of convenience of the Government. 44 were changed to general discharges for the following reasons: 17 convenience of the Government; 13 unsuitability; 4 unfitness; 4 expiration of enlistment; 3 minority; 2 physical disability; and 1 dependency or hardship.

Undersirable Discharges:

Number reviewed	92
Number changed	40
Number not changed	52

Of the 40 undesirable discharges changed, 10 were changed to honorable discharges, 7 by reason of convenience of the Government and 3 by reason of minority. 30 were changed to general discharges for the following reasons: 14 unsuitability; 8 convenience of the Government; 4 unfitness; 3 misconduct; and 1 physical disability.

General Discharges:

Number reviewed	47
Number changed	16
Number not changed	31

The general discharge category includes some discharges under honorable conditions which are no longer issued, such as ordinary, special order, good, and under honorable conditions.

The 16 general discharges changed were changed to honorable discharges as follows: 8 convenience of the Government, 6 unsuitability and 2 physical disability.

Honorable Discharges:

Number reviewed	2
Number changed	0
Number not changed	2

NAVY DISCHARGE REVIEW BOARD

Definitions of Reason of Authority:

COG	Convenience of the Government
PD	Physical Disability
EE	Expiration of Enlistment
INAPT	Inaptitude
EOS	Expiration of Obligated Service
COM	Convenience of Man
CCA	Conviction by Civil Authorities
NPQ	Not Physically Qualified
FE	Fraudulent Enlistment
UCOTH	Under Conditions Other Than Honorable
SpCM	Special Court Martial
SCM	Summary Court Martial
MISC	Misconduct
H	Homosexual
OC	Own Convenience

Modification from 1961 to 1965

Hon(OC) to Honorable	1
Hon(Unsuit) to Hon(COG)	1
Hon(EE) to Hon(COG)	1
Gen(Unfit) to Gen(Unsuit)	5
Gen(Unfit) to Gen(COG)	3
Gen(Unsuit) to Gen(EE)	1
Und(Unfit) to Und(FE) (2-H)	4
Und (CCA) to Und(Unfit)	1
Und(FE) to Und(Unfit)	2
Und(Misc) to Und(FE)	1

Navy Discharge Review Board

CHANGED FROM BAD CONDUCT TO HONORABLE

From—	To—	1961	1962	1963	1964	1965
BCD(SpCM)	Hon(COG)		1			
BCD(SpCM)	Hon(Unsuit)			1		
BCD(SCM)	Hon(Unsuit)				1	
Total			1	1	1	

CHANGED FROM BAD CONDUCT TO GENERAL

BCD(SCM)	Gen(Unsuit)	1				1
BCD(SCM)	Gen(Unfit)	1	1			1
BCD(SpCM)	Gen(Dependency)		1			
BCD(SpCM)	Gen(Unsuit)		3			1
BCD(SpCM)	Gen(EE)		1			
BCD(SpCM)	Gen(Unfit)			1	2	
BCD(SpCM)	Gen(COG)				2	
Total		2	6	1	4	3

CHANGED FROM UNDESIRABLE TO HONORABLE

Und(Unfit)	Hon(COG)	8 (4-H)	10 (5-H)	3 (3-H)		
Und(Unfit)	Hon(Unsuit)	2		2 (2-H)		
Und(CCA)	Hon(COG)	3	6	1	1	2
Und(CCA)	Hon(Unsuit)		1	1		
Und(FE)	Hon(COG)		1		1	1
Und(Unfit)	Honorable				2	1
Total		13	18	7	4	4

CHANGED FROM UNDESIRABLE TO GENERAL

Und(Unfit)	Gen(Unsuit)	11 (1-H)	8 (4-H)	20 (5-H)	12 (6-H)	2
Und(Unfit)	Gen(Unfit)	22	11	7 (2-H)	7 (2-H)	2
Und(FE)	Gen(Unsuit)	1	1		5	1
Und(FE)	Gen(COG)	1		1		
Und(CCA)	Gen(Unsuit)	1	1	2	1	
Und(CCA)	Gen(Unfit)	1				
Und(CCA)	Gen(COG)	1 (1-H)			1	
Und(CCA)	Gen(Misc)	1	1			
Und(CCA)	Gen(Inapt)	1				
Und(Unfit)	Gen(COG)		4		1	
Und(CCA)	Gen(CCA)		2		3	1
UCOTH	General		1			
UCOTH	Honorable					1
UCOTH	Hon(COG)					1
Total		40	29	30	30	8

Navy Discharge Review Board—Continued

CHANGED FROM GENERAL TO HONORABLE

From—	To—	1961	1962	1963	1964	1965
Gen(Unsuit)	Hon(Unsuit)	52	97	48	46 (1-H)	46 (1-H)
Gen(Unsuit)	Hon(COG)	8 (2-H)	6	2	1 (1-H)	
Gen(PD)	Hon(Unsuit)	1				
Gen(PD)	Hon(PD)	2	1	4	1	8
Gen(COG)	Hon(COG)	16	9	4	8	3
Gen(EE)	Hon(COG)	1				
Gen(EE)	Hon(EE)	5	2	7	5	9
Gen(Inapt)	Hon(COG)	2				
Gen(Inapt)	Hon(Unsuit)		1	1		
Gen(Unfit)	Hon(COG)	4 (1-H)	1			1 (1-H)
Gen(COG)	Hon(EOS)		1			
Gen(EOS)	Hon(EOS)		19	33	32	22
Gen(EE)	Hon(EOS)		1	1		1
Gen(EOS)	Hon(EE)			2	3	2
Gen(COM)	Hon(COG)			1		
Gen(CCA)	Hon(COG)			1		
Gen(COG)	Hon(Unsuit)			1		1
Gen(EOS)	Honorable				1	
Gen(Inapt)	Hon(Inapt)				1	
Gen(NPQ)	Hon(NPQ)					1
Total		91	138	105	98	94
	"Cause"	(64)	(104)	(51)	(47)	(47)

Question: 2. Of the cases reaching review, how many of them involve determination of legal questions, and what are the usual kinds of legal questions raised?

Answer: All cases reviewed by the Discharge Review Board or Board for the Correction of Naval Records involve consideration of the matter in the context of the applicable regulations; therefore, all cases involve a legal question to some degree. However, very few cases (less than one percent of the DRB cases) involve questions which must be resolved which are considered purely questions of law.

The majority of cases which do contain questions of law are reviewed in light of advisory JAG opinions rendered for the particular case or a previous similar case. The following summary of JAG opinions received in the past five years by the Discharge Review Board reflect the types of legal questions considered in the reviews:

(a) One on the jurisdiction of the NDRB in discharge cases involving statute of limitations.

(b) Four which pertain to the weight and sufficiency of evidence, including finality of court-martial convictions.

(c) Four on the legality of regulations prescribing rights or privileges prior to separation.

(d) Four on whether there was substantial legal compliance with regulations.

(e) Four on interpretation or applicability of court decisions.

(f) Four on the effect of court actions modifying a conviction which had been the basis for discharge.

Question: a. Does this answer include as a "legal" question, issues concerning "sufficiency of proof" and "application of facts to the standards set forth in the applicable regulation"?

Answer: Yes.

Question b. What type of legal issues (if different from above) would be likely to reach COMA if S. 753 were law?

Answer: If S. 753 is enacted it is assumed that dischargee would contend before COMA that the Department did not fully comply with all applicable regulations; denied the respondent a full and fair hearing; denied the respondent various constitutional rights, whether or not regulations were followed; etc.

Question 3. What factors would operate to dissuade a former serviceman from taking an appeal of an administrative discharge to COMA?

Answer: None can be foreseen, especially since representation will be provided free of charge.

Question 4. On the basis of the total of administrative discharge cases, those reaching review boards, and the answers given above, what is the estimate of the cases of previous years which would have been appealed to COMA if S. 753 had been effective?

Answer: Substantially all cases in which the full relief by the appellant was not granted by the NDRB or BCNR.

Question 5. In view of the testimony that the number of legal issues in administrative discharges is few (Transcript page 53), what burdens upon COMA would arise from granting this review authority (Transcript page 211)?

Answer: The burdens which would be placed upon COMA would be the necessity of reviewing all petitions received to determine those in which good cause for review was actually shown; and, of course, conducting full hearings on those cases in which good cause for review was apparently shown and which the JAG's had forwarded for review.

Question: 6. Are cases brought before the DRB and BCMR now reviewed by the respective JAG offices? Do JAG personnel as a matter of practice review some or all discharge cases? What standards determine the cases reviewed by the Judge Advocate?

Answer: Not as a matter of course. The Navy Discharge Review Board has available a law specialist who is on the staff of the Navy Council of Personnel Boards. Additionally, the Board is privileged to request legal advice from the Judge Advocate General in any case.

The Correction Board's staff is composed of eight civilian lawyers. Also, the board is authorized to request legal advice from the Judge Advocate General whenever it determines a need for such advice. JAG personnel as a matter of practice do not review all discharge cases. Some are reviewed, as previously stated, when a legal opinion is requested by the Discharge Review Board or the Correction Board.

Each case reviewed by the Discharge Review Board and the Correction Board is reviewed on the individual merits of the particular case. Therefore, there are no specific standards which determine the cases either Board may refer to the Judge Advocate General for legal opinion.

Question 7. What additional burden is involved on JAG personnel in reviewing cases which would be susceptible of review by COMA under S. 753 (Transcript pages 53 and 54)?

Answer: In every case in which the respondent indicated a desire to seek review (estimated to be substantially all cases in which the full relief sought was not granted by the board), JAG appellate counsel would be required to review the full file meticulously; to prepare a petition for review upon any issue, real or assumed, which might be within the scope of "legal questions"; to prepare briefs on both sides and to argue the case before the Court of Military Appeals if review was granted; and to handle all administrative details involved in the above activity. In addition, of course, all cases, whether or not the respondent petitioned, would require review by a different section of JAG to determine whether a ground for sending the case to the Court existed, and, if any such ground were found, the full appellate process would be invoked.

VII. Extraterritorial Criminal Jurisdictions

All questions will be answered by the Office of the Secretary of Defense.

VIII. Command Influence

Question: 1. Assuming the "command influence" may be present when members of a court, or a counsel, imagine that a certain result is desired by higher authority, even though this authority has in no way expressed or indicated his judgment of the case, could any form of legislation counteract this type of "command influence"?

Answer: The form or content of such legislation cannot be imagined. However, it is sincerely doubted, after fifteen years of educating court members and counsel that "command influence" is evil, that such a situation would ever exist.

Question: 2. What would be your opinion of a proposed amendment to the UCMJ which would specify that the exercise of command influence is a court-martial offense?

Answer: I would be most emphatically opposed to such an amendment for several reasons, not the least of which is that the present Article 98 of the UCMJ is fully adequate for this purpose. This Article now proscribes the offense of "knowingly and intentionally" failing to . . . comply with any provision of the UCMJ, including the provision which prohibits unlawful command influence (see paragraph 177b, MCM).

Question: a. Because of the circumstances necessarily attendant to a case under such a proposed article, how likely would prosecution be?

Answer: If the proposed article proscribed only command influence which was the result of a knowing and intentional act or attempt to influence the decision of a judicial body or functionary, it is doubted that any convictions would occur in the naval service. Of the relatively few cases of alleged command influence which have occurred in the naval service in recent years, none have involved such a state of mind or such an intent. On the other hand, if the proposed article proscribed command influence without a requirement of proof of some *mens rea*, such action would be grossly unfair.

Question: b. Would this proposal nonetheless have value as an expression of the seriousness with such activity as viewed, thereby greatly assisting the services in their efforts to educate officers to their responsibilities in this area, and to the need for careful judgment in these situations? If so, would this justify, in your judgment, such an amendment.

Answer: Article 98 is fully adequate for the purposes cited. Such purposes would not, therefore, constitute any sound justification for the enactment of another punitive article solely to make knowing and intentional command influence an offense.

Question: 3. (This question is directed to the Army.)

Question: 4. The subcommittee has been informed that there are currently pending two cases in the Court of Military Appeals which involve allegations of an improper lecture to members of the court-martial in connection with trials at Fort Devens, Massachusetts. One of the cases is U.S. v. Albert (18,690).[1] What were the contentions made by the accused in those cases? In how many cases which reached the Boards of Review have there been contentions of command influence in recent years?

Answer: The first question is directed to the Army.

In response to the second question, five cases reached Navy boards of review in 1964 and one in 1965 in which command influence was contended to have prejudiced the accused with respect to the findings or sentence. Boards of review held that the accused had been prejudiced in three of such cases, and took appropriate corrective action.

IX. Miscellaneous

Question: 1. (Directed to Air Force.)

Question: 2. In view of the fact that during war or national emergency the supply of legally-trained officers is likely to increase as the number of men in uniform increases, to what extent is it necessary to have "time of war" exceptions for those proposals (such as S. 750, S. 752, S. 754, and S. 758) which require expanded use of legally trained personnel? Why is this exception required for section 35, UCMJ, and S. 745.

Answer: The purpose of all "in time of war" exceptions is to provide the armed forces with the necessary flexibility to meet whatever conditions may then exist. In view of the rapid advance of technology, fantastic new weapons and weapons systems, constantly increasing speed and mobility of armed forces, and many other factors, it is just not possible to predict what a future general war may be like or what it may entail. It will in all probability be totally unlike the conflict which was waged during World War II. In view of this uncertainty, on the one hand, and the absolute necessity of permitting the armed forces to maintain their optimum combat efficiency, on the other, it is thought most unwise to tie the armed forces to procedures which may possibly, even though unforeseeably, have some deleterious effect upon their wartime effectiveness.

Question: 3. To what extent is the file on cases presented to BCMR or DRB sent to the JAG office for its opinion (Transcript page 91)?

Question: a. How often is this done, and in what kinds of cases?

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[1] The opinion of this case is reprinted in Part 2, p. 764.

Question: b. In what percentage of cases is the opinion of the JAG followed by the respective boards? How often is more extensive corrective action taken than that recommended or suggested by JAG?

Answer: As previously stated in the answer to question 6, Section VI, Correction Board and Discharge Review Board cases are not reviewed by the Judge Advocate General as a matter of course. Each board is authorized to request legal advice and when advice is requested a legal opinion is furnished.

During the year 1965 the Correction Board requested legal opinions in 9 cases. Two of the cases were discharge cases, one concerned the legal effect of the dismissal of a civil court indictment and the other related to a former officer who was discharged because of misconduct while a midshipman prior to his appointment. The Board requested advice as to the legality of his discharge. The other cases posed questions pertaining to the legality of a nonjudicial punishment; the validity of a marriage, a line of duty and misconduct determination, the application of laws relative to the granting of constructive service credit; and the legality of a court-martial.

Question: 4. Is it currently the practice of the service, by regulation or otherwise, to inform the parents or guardians of members under 21 years, or those whose parents' permission was necessary for enlistment, of the fact that steps to court-martial or administratively process these members are being instituted?

Answer: In answer to this question the following is quoted from Article C–10111, BuPers Manual: "Whenever an enlisted person is to be tried by a general or special court-martial; is to be involuntarily separated from the service prior to the expiration of enlistment; is to be tried by a civil court charged with a felony; or is charged with a serious offense before a foreign court and trial appears probable, it is considered desirable that the parents, spouse or guardian, as appropriate, be advised of the circumstances. (A serious offense before a foreign court is construed to include any offense for which confinement for more than six months, whether or not suspended, is normally imposed.) Accordingly, when any of the above occurs, the following action shall be taken:

"The commanding officer should see that the individual is counseled to advise his parents, spouse or guardian, as appropriate, of the circumstances or, in the alternative, to authorize the commanding officer to do so.

"If the enlisted person is over 21 years of age and refuses to do either, no further action will be taken except to have the fact of his refusal and the name of the officer receiving such refusal recorded in the individual's service record.

"If the enlisted person is under 21 years of age and refuses to do either, the commanding officer will, unless some compelling reason to the contrary appears, inform the parents, spouse, or guardian, as appropriate, by letter or other means, of the details considered pertinent and proper under the circumstances. In the case of an involuntary separation, the commanding officer will inform the parents, spouse, or guardian, as appropriate, of at least the scheduled date and place of discharge."

Question: a. What provisions are made to afford disinterested counsel and advice to immature servicemen, or others not capable of making effective decisions, as to the factors to be weighed in making various elections or choosing between different courses of action in these cases?

Answer: Counselling by the Commanding Officer or officer delegated by the Commanding Officer.

Question: 5. In view of the DOD position in opposition to the bills affecting administrative discharge procedures, what would be the position of the services on the legislative enactment of the provisions of DOD Discharge Directive 1332.14?

Answer: In view of the circumstance that the Department of Defense has indicated that it would have no objection to this action, the Navy has no objection. However, it is the view of the Judge Advocate General that enactment of the provisions of the DOD Directive into law would be unwise at this time. Such action would materially reduce flexibility in establishing additional or alternative requirements or limitations, if desired, and could create substantial legal problems of interpretation of the selected language, which, if arising under the DOD Directive, could quickly and easily be clarified. It is further to be pointed out that the new provisions of the DOD Directive, which was effective only on 20 March 1966, are as yet totally untested and untried by experience, and with even a brief period of implementation it may be found desirable to make various revisions, both editorial and substantive.

Question: 6. Are there any provisions for review of an administrative discharge in an adversary proceeding *prior* to the execution of the discharge?

Answer: An undesirable discharge and certain other discharges for cause may not be executed prior to a review of the entire case by a staff assigned to the Chief of Naval Personnel.

Question: a. What is your feeling with respect to the legislative establishment of an adversary review prior to discharge upon the grounds of failure of due process in the board proceeding?

Answer: Legislation is not desired or required in view of the answer to question 6 above.

Question: 7. What articles of the Code apply to cases of homosexuality presently handled administratively?

Answer: Primarily Articles 125 and 134, although occasionally misconduct is committed which would be chargeable under Article 133, Article 80, Article 81, etc.

Question: a. Of the cases handled administratively, what kinds of homosexual activity could not have been prosecuted as violations of Article 125 or 134 of the Manual?

Answer: The problem does not involve "kinds of homosexuality; instead, the difficulty which is presented is that certain cases may not be prosecuted because of inadequate evidence reasonably to support a prosecution. For example, consider the "male prostitute" who confesses to several acts of homosexuality for pay with various persons who he is totally unable to identify or describe, except possibly for a first name. Homosexual activity, other than the assault type, is usually conducted in private between two consenting parties, and under these circumstances there will generally be totally insufficient evidence to corroborate the confession of one of such parties; even to corroborate the testimony of one who may turn "state's evidence."

Question: b. What is your position on the suggestion that the Code be amended to contain an article expressly making these kinds of homosexuality a court-martial offense?

Answer: No need is seen for amendment of the Code in this respect.

[Air Force answers]

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS UNITED STATES AIR FORCE,
Washington, D.C., April 29, 1966.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
United States Senate.

DEAR MR. CHAIRMAN: Thank you for the kind words in your letter of February 24, 1966, concerning my testimony during the hearings on the military justice bills.

Responding to your requests at the hearings and in your letter, I am returning the written interrogatories and my answers, which may be considered to complement my oral testimony.

Please let me know if there is any other way I can be helpful. I share your confidence that the effective exercise of military command need be in no way inconsistent with traditional concepts of fair play.

Sincerely,

ROBERT W. MANSS,
Major General USAF,
The Judge Advocate General,
United States Air Force.

AIR FORCE RESPONSE TO SUBCOMMITTEE QUESTIONNAIRE OF 24 FEBRUARY 1966

I. NAVY JAG CORPS (S. 746)

The Air Force has been advised that these questions concerning the proposed Navy Jag Corps and the Bolte "package" will be fully answered by the Navy and the DOD.

II. Field Judiciary (S. 745)

Q. 1. In addition to the necessity for maintaining the flexibility permitted by the administrative authorization of a field judiciary, what other reasons exist for not legislatively establishing this program (Transcript page 113)?

a. Except for the unforeseen circumstances produced by wartime, what other situations can be foreseen in which the legislative creation of a field judiciary would prove too inflexible?

b. Would including an exception for "time of war" or "national emergency" provide the desired flexibility?

c. Assuming that the legislative creation of a field judiciary is considered necessary, what changes or additional provisions would you suggest to overcome the problems or objections set forth above?

d. Is the field judiciary system used at all in the Viet-Nam operation, or has it been used at any time under wartime conditions? What problems have been raised in these circumstances, and how have they been overcome?

These questions are fully answered by the other services that have current experience with the field judiciary system. We would add only that one very obvious circumstance in which the "field judiciary" would be inappropriately inflexible, would be a reduction in the number of trials in any of the other services to the point where the field judiciary would be prohibitively expensive in manpower and money, as in the present situation in the Air Force.

Q. 2. What is the present situation in the Air Force with respect to the assignment of law officers (Transcript page 115)?

The Air Force practice is to assign Law Officers who are stationed conveniently near to the site of the trial, but who have had no previous disqualifying connection with the case to be tried.

a. Are there such JAG personel stationed in every command where special courts-martial are conducted? Is it the present practice in the Air Force to have all trials requiring a law officer in one or a few geographical areas?

The Air Force does not have qualified Law Officers stationed in every command exercising special court-martial jurisdiction. The Staff Judge Advocate of these subordinate commands is often qualified to serve as a Law Officer, but of course may not serve in that capacity in cases arising within his jurisdiction.

b. Why would the establishment of a field judiciary require the Air Force to "spot people around in various parts of the world" and why would the program require "about four times as many people"? Please specify how the enactment of S. 745 would impose a greater manpower buden on the Air Force.

The Air Force does not hold all trials requiring a Law Officer at centralized geographical locations. Both essential fairness and practical necessity require that, in general, criminal trials be held reasonably near to the place the crime was allegedly committed. As a result the Air Force must be, and is, prepared to convene summary, special, and general courts-martial in virtually all parts of the world where Air Force troops are stationed, subject only to such limitations as may be imposed by international law.

The Air Force must have Law Officers available to serve, with reasonable convenience both to themselves and the litigants, wherever general court-martial trials are held. In general terms, this means from Turkey, westward through Europe, Africa, and the Americas, to Japan, the Philippine Islands, and Vietnam. We have this capability at the present time, and would have to maintain it under the field judiciary system. Members of an Air Force field judiciary would therefore have to be widely dispersed throughout the world.

With the small number of general court-martial trials in the Air Force, our requirement for Law Officers uses about three man-years annually. This includes the minor travel involved in a Law Officer's going to and from the place of trial, from his own relatively convenient permanent station. Of course, no single command or region either provides, or requires the use of, a full-time Law Officer; and it is equally clear that no three individual men could meet the world-wide requirement.

The Air Force exercised the field judiciary concept against its 1965 general court-martial trials. We found that an optimum arrangement, giving Law Officer service nearly as good as the present system, would require the assignment of 11 senior Judge Advocates as Law Officers, and that, without regard to per diem allowances or any other overhead, the salaries, clerical support, and actual travel costs would exceed a quarter of a million dollars annually.

The manpower burden involves not merely the eight "spaces" representing the difference between eleven and three, or the clerical support. Presumably the members of a field judiciary would be selected from among our best qualified military justice people. These officers are now assigned to our most demanding tasks. To remove such a man from his present assignment, so he can participate in possibly as many as fifty trials a year, deprives his former command of his services, which may have involved the rights of as many as 60,000 people. The entirely problematical enhancement of the rights of the one who may be tried, at the expense of those of the thousand, or more, who are not, is not consistent with our mission to provide the best possible legal service to all the members of the Air Force.

III. Summary Courts-Martial (S. 759)

Q. 1. What has been the number of summary courts-martial in recent years since the 1963 amendment to Article 15 (Transcript page 215)?

The Air Force had the following numbers of trials by summary court-martial in the calendar years indicated: 1963, 5,959; 1964, 3,097; 1965, 1,659.

a. Have certain commands eliminated the summary court-martial (Transcript page 66)?

Summary courts-martial have not been eliminated in the Air Force, and they probably could not lawfully be except by amendment of the Uniform Code of Military Justice. However, the use of these courts, except when the accused has refused Article 15 punishment, has declined to the extent that in the last quarter of CY 1965 there were only 59 cases in the Air Force in which the accused had not refused Article 15 punishment and demanded trial by court-martial. As indicated in answer to the preceding question, the overall number of summary courts-martial has declined 72.2% from 1963 to 1965.

b. Does the frequency of summary courts-martial vary significantly in different commands? What is the high, low, mean, and median number of summary courts-martial in various commands?

The Air Force summary court-martial rate for the last quarter of CY 1965 was 0.5 per thousand personnel assigned. By major commands, the highest rate was 0.8 per thousand; the lowest, 0.0; the mean, 0.37; and the median, 0.4. Disregarding commands with less than 10,000 persons assigned, the mean is 0.45, and the median 0.5. We do not believe that these variations in rates, amounting to approximately one-half man per thousand assigned, are particularly significant.

c. To what is the variation in number of summary courts-martial attributed?

Certain relatively small major commands, for example, Air University and the Air Force Academy, are composed of an unusually large percentage of very highly selected enlisted persons in senior grades. In these organizations, all disciplinary rates are extremely low. Among the large operational commands of the Air Force, the summary court-martial rates are remarkably consistent, despite differences in mission, organization, and geographical distribution.

Q. 2. Of the number of summary courts-martial in recent years, how many represent trials resulting from refusal to accept Article 15 punishment?

In the first quarter of CY 1965, of the 509 summary courts-martial tried in the Air Force, 316, or 62.1%, resulted from refusal of Article 15 punishment. By the last quarter of 1965, this ratio had increased to 272 of 331 cases, or 82.2%. Present indications are that in the current, and in future, quarters, virtually all trials by summary court-martial in the Air Force will be cases in which Article 15 punishment has been refused by the accused.

a. Are there statistics on the number of Article 15 imposed or offered? In how many cases did the refusal to accept Article 15 punishment *not* result in summary courts-martial?

The Air Force does not have statistics on the number of Article 15 punishments offered, nor as to the total number of Article 15 punishments imposed. The Air Force does have statistics as to the number of the more serious Article 15 punishments imposed, which include: restriction for more than 14 days, extra duties for more than 14 days, forfeiture or detention of pay, correctional custody or arrest in quarters, or reduction in grade.

The Air Force does not keep statistics on the number of cases in which refusal to accept Article 15 punishment did *not* result in trial by summary court-martial. To assist the Subcommittee, we examined the records of trial of the 674 cases tried by special court-martial in 1965 in three large and active court-martial jurisdictions. These cases, almost exactly one-third of the cases tried in the Air Force, disclosed that seven, or 1.04%, resulted from refusal of Article 15 punishment.

As it is the established practice in the Air Force not to tender Article 15 punishment unless, in the opinion of the commander concerned, evidence exists that would warrant a trial by court-martial, it is believed that the number of Article 15 refusals in which trial by either a summary or special court-martial did not result is very small.

It may be noted in this connection that a demand for trial is not the only choice available to an alleged offender who is offered Article 15 punishment but believes himself innocent. He may elect to accede to his commander's Article 15 jurisdiction, submit his defense, and be bound (subject to appeal) by his commander's decision. Such cases are by no means rare, and the accused is not infrequently exonerated.

Q. 3. How many special courts-martial have there been in recent years?

The Air Force had the following numbers of trials by special courts-martial in the calendar years indicated: 1963, 2,656; 1964, 2,591; 1965, 2,057.

a. Of this number, how many resulted from refusal to accept summary court-martial?

The Air Force does not maintain such statistics. However, the special examination of CY 1965 cases mentioned in our reply to question 2 disclosed no cases of this kind.

b. Of the number given in (a), in how many special courts-martial did the accused request legally-qualified counsel and how often was this request granted?

In the Air Force, lawyers are appointed as counsel in all special court-martial cases.

Q. 4. What procedural protections for the accused are present in a special court-martial that are not present in summary court-martial (Transcript page 70)?

Procedural protections present in a special court-martial not present in a summary court are the right of the accused not to be tried until 3 days after personal service of the charges, the right to be represented by an appointed qualified attorney, the right to have enlisted men as members of the special court, the right to receive at least a summarized record of the testimony given.

a. From the standpoint of ensuring impartiality of adjudicatory procedures, including review, what advantages are there for the accused in a special court-martial that are not present in a summary court-martial?

In the Air Force the accused has the advantage of a record of trial in a special court, which includes recording of procedural requirements and, at the least, a summarized version of each witness' testimony. Also, the assignment of a qualified judge advocate to represent each accused before a special court-martial contributes to impartial consideration of his case. The record of a summary court-martial trial ordinarily consists essentially merely of a docket entry showing the charges, pleas, names of the witnesses who testified, findings, and sentence, so that it is not usually possible on review to consider the sufficiency of evidence.

b. What is the difference in review procedures after a summary court-martial conviction, and those available after special court-martial? Is there any difference when that special court-martial trial resulted from a refusal to accept a summary court-martial?

There is no difference in the review procedures of a summary court-martial and a special court-martial that did not result in a punitive discharge. Both types of cases are reviewed for legality and appropriateness of punishment by a judge advocate at both the special and general court-martial jurisdiction. If found correct in law and appropriate as to punishment, the review at the general court-martial jurisdiction level constitutes the final review. (In special courts-martial involving an approved BCD the case is reviewed by a Board of Review and may be reviewed by Court of Military Appeals). There is no difference in review procedure or treatment in special courts-martial cases where the accused has refused trial by summary court.

Q. 5. Considering the number of instances in which a summary court-martial is elected by a member in lieu of the offer of Article 15 punishment, and considering also the frequency in which special courts-martial are held because of a refusal to accept a summary trial, what is the estimate of times in which a special court-martial would be elected in lieu of an Article 15, if the summary court-martial were abolished?

In the circumstances enumerated in the question, and considering the Air Force's declining summary court-martial rate, it is our estimate that approximately one thousand additional special courts-martial trials per year would result if the summary court-martial were abolished.

Q. 6. What opportunities exist for the accused in a summary court-martial to review the record and note his objections or comments (Transcript page 63)?

After trial by summary court an accused is not given the opportunity to note objections on the charge sheet or place his comments thereon. He may, if he desires, appeal either formally or informally to the convening authority or the supervisory authority, or both.

a. What objection is there to allowing the accused to note his concurrence, or explain his non-concurrence, on the record sheet of a summary trial?

The Air Force has no objection to allowing an accused to concur with the findings and sentence or explain his non-concurrence on the summary court record of trial. However, we are aware of no system of criminal justice in which such a practice prevails, and we assume that an accused who has been found guilty despite a plea of not guilty would but rarely concur in the court's findings.

Q. 7. Are defendants permitted by official Defense Department or service policy or regulation to have counsel assist them in summary courts (Transcript pages 70 and 81)?

The Air Force permits accused persons to be assisted by counsel in trials by summary courts-martial.

a. May they have special assistance from non-legal personnel of their own choosing, whether in service or not?

The Air Force does not prohibit accused in summary court cases from obtaining assistance of their own choosing before or during trial and an accused may be represented by civilian counsel of his own choice at the trial.

b. If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

As we use the term, counsel cannot be "appointed" to a summary court. However, counsel may be made available to the accused upon his request, if reasonably available.

c. Are servicemen regularly informed prior to trial of their right to have counsel in summary courts?

The trial procedure prescribed by the President does not require such advice (par 79d, MCM 51), and such advice is not ordinarily given in connection with the trial. On the other hand, our experience indicates that members of the Air Force are fully aware that they may be represented by counsel before Air Force summary courts-martial.

d. In how many cases have counsel appeared to assist the accused in summary courts-martial, and how often have they been legally-trained or qualified?

The Air Force has no statistics available to the number of cases in which the airman is represented by counsel. In all cases of which we are aware, counsel who have appeared have been lawyers.

e. What is the comparison of acquittal rates when counsel is present in summary courts and when they are not?

The Air Force has no statistics.

Q. 8. What official guidelines are issued to commanders to assist them in the decision as to whether a minor offense warrants an offer of an Article 15 or a summary court-martial? Is the decision whether to offer an Article 15 or a summary court-martial essentially a matter of the officer's good judgment?

The guidelines are established by the President of the United States in paragraph 128b, Manual for Courts-Martial, as to what offenses should be disposed of as minor. The decision to use Article 15 or a summary court-martial is vested in the individual commander, who is encouraged to consult with the Staff Judge Advocate of the command. The Chief of Staff, USAF, has repeatedly stressed the view that through the judicious use of Article 15, the necessity of using the summary court can be virtually eliminated.

a. Is it true that the practical effect of the officer's initial decision to offer an Article 15 or a summary court-martial is to determine whether the serviceman has an election to trial by special court-martial?

Yes. If an accused is offered Article 15 punishment and refuses it, he cannot effectively object to trial by summary court-martial. If he is not offered Article 15, he may object to trial by summary court.

Q. 9. In view of the fact that the special court-martial contains certain procedural protections not afforded to summary courts-martial, why should not a man be permitted to elect a special court-martial, whether or not he has been offered and has refused an Article 15, if he believes he has a better chance thereby

of establishing his innocence, and is willing to risk the possible harsher punishment of a special court-martial?

The Air Force does not believe that the concepts of chance and risk are proper criteria for the disposition of a criminal case. A tender of Article 15 punishment is a determination by the responsible Government official that the alleged offense is so minor that even if the accused is found guilty, no permanent record of conviction should result. It is no more appropriate to permit an accused as a matter of right to force the Government to provide a "full dress" trial, involving a minimum of five persons other than the accused, in such petty cases than to afford a jury trial as a matter of right for overtime parking. ". . . charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment." (par 30f, MCM 51.)

a. Aside from the additional manpower requirements of a special court-martial, and that it is possible to impose harsher punishment, what factors militate against offering a special court-martial to any serviceman who requests it?

The Air Force believes that the increased manpower requirement is significant. Additionally, the Government has rights in a criminal prosecution no less important than those of the accused, and we believe the well-established doctrine that reserves to the Government the choice of an appropriate forum, rather than allowing the accused to chose the court in which he would like to be tried, to be a sound one.

b. What is your estimate of the influence that the creation of a single law officer special court-martial would have on the manpower demands involved in giving an election of a special court-martial to every serviceman who requests one?

It is assumed the question does not suggest an accused might be permitted to elect a special in preference to a general court-martial, but is limited to Article 15 punishment and summary court-martial cases. It is probable that in the Air Force, creation of such a court would somewhat reduce the trial manpower requirement. We anticipate that a substantial number of accused persons who refused Article 15 or summary court-martial would excuse the members of such a special court-martial.

c. Would the objections to abolishing summary courts-martial because of the manpower requirements be met by permitting only trial by a single law officer special court-martial when an Article 15 is refused?

If the Government were permitted, as a matter of right, to try an accused who refused Article 15 punishment before such a court-martial, the Air Force would not object to the abolition of the summary court-martial. We believe, however, that the differing requirements of the other services should be fully considered before such a determination is reached.

IV. Changes in Special Courts-Martial (S. 752)

Q. 1. In how many special courts-martial has there been legally-qualified counsel present for the accused?

a. How often has legal counsel been requested, and how often has it not been made available?

b. What is the comparative acquittal, appeal, and successful appeal rates for special courts-martial in which counsel has and has not been made available?

c. How often has there been legally-qualified counsel on the defense side but not the other?

d. Are any trends evident, and are any conclusions suggested by this experience?

The Air Force appoints qualified lawyers as counsel in all special court cases. We therefore have no information upon which to base answers to this series of questions.

Q. 2. In how many cases has there been a lawyer present on the special court-martial (Transcript page 137)?

There are no figures available. However, it is the usual practice in the Air Force not to appoint lawyers as members of a special court-martial. In the few cases of which we have knowledge, the lawyer Defense Counsel peremptorily challenged the lawyer member at the outset of the trial, thus removing him from the court.

a. In how many cases has the lawyer been a member, but not the President?

b. In how many cases has there been legal counsel for the defense but no lawyer present on the court?

c. How often has a lawyer been assigned to the court because of the presence of legally-qualified defense counsel?

d. In how many cases has a lawyer been challenged from a special court-martial and how does this compare with challenges of non-legally trained personnel?

e. What is the comparative rate of successful appeal, on any grounds, to Court of Military Appeals when the President is legally-qualified and when he is not?

f. Similarly, what is the comparison of results when these two classes of cases are reviewed under Articles 65–67?

g. Are the above answers (e) and (f) affected where the defense counsel is legally qualified?

In view of our reply to Q. 2, the Air Force has no experience upon which to base replies to these sub-questions.

Q. 3. When issues such as the admissibility of evidence, voluntariness of confessions, sufficiency of proof, form of instructions, etc., are raised by legal counsel, what guidance is available to the non-legally trained Court President and members in deciding them? May they seek the advice of Judge Advocate General personnel (Transcript page 136)?

The Air Force appoints qualified lawyers as counsel for special courts. The trial counsel, by law, is charged with the responsibility of providing the President of the court advice on the law as it relates to the legal issues raised during trial. Such advice is a matter of record and is reviewed as to correctness as is the rest of the record of trial.

Q. 4. Assuming that the law is changed to require the appointment of a law officer before a special court-martial can adjudge a BCD, to what degree is there a danger that the mere appointment of a law officer will suggest that a BCD is considered appropriate by the Convening Authority?

There is a danger that the discretionary appointment of a law officer would be interpreted by the court members as a suggestion as to appropriate punishment.

a. Would the mandatory assignment of a law officer in every case in which the possible penalty is a BCD completely eliminate the problem or at least mitigate it sufficiently? What objections, if any, would there be to such a provision?

The Air Force favors the mandatory assignment of law officers in all special court cases where the maximum punishment for the offenses charged includes a punitive discharge.

b. What suggestions can be made for avoiding this danger?

If the statute were discretionary, the Air Force would probably require by regulations that a Law Officer be appointed in every case in which the maximum punishment extended to bad conduct discharge, just as we currently require use of a reporter in the light of the last sentence of Article 19 (10 U.S.C. 819).

V. Administrative Discharges

Q. 1. What is the number of undesirable, general, and honorable discharges given, both with and without an administrative hearing, on grounds of misconduct, unfitness, and unsuitability? Please break these figures down for the specific charges upon which the action was based; for instance, homosexuality, conviction by civil authorities, failure to pay debts, involvement with drugs, extended absence, defective moral habits, etc.

Statistics are not available as to the number of administrative board hearings which resulted in discharges. The number of administrative discharges for the years indicated follows:

Discharges under AFR 39–16 (unsuitability)

Fiscal year	Honorable	General
1963	4,631	2,796
1964	5,044	1,824
1965	4,869	1,825

Discharges under AFR 39–17 (unfitness)

Fiscal year	Honorable	General	Undesirable
1963	955	2,606	843
1964	1,146	2,228	552
1965	1,044	1,914	287

Statistics relating the number of discharges to each category of specific reasons for separation are not available. However, the following information may be of assistance:

	Honorable	General	Undesirable
Fiscal year 1962:			
Fraudulent enlistment	72	172	35
Conviction by civil court	61	167	250
Desertion, trial barred	1	0	1
Desertion, trial inadvisable	1	0	1
A.w.o.l., trial inadvisable	1	0	4
Class II homosexual (board)	30	65	23
Class II homosexual (hearing waived)	75	156	245
Fiscal year 1963:			
Fraudulent enlistment	73	188	22
Conviction by civil court	67	146	242
Desertion, trial barred	0	0	2
Desertion, trial inadvisable	1	0	0
A.w.o.l., trial inadvisable	2	0	0
Class II homosexual (board)	31	63	47
Class II homosexual (hearing waived)	93	195	252
Fiscal year 1964:			
Fraudulent enlistment	90	52	4
Conviction by civil court	71	149	195
Desertion, trial barred	1	0	4
Desertion, trial inadvisable	1	0	0
A.w.o.l., trial inadvisable	0	1	3
Class II homosexual (board)	36	45	24
Class II homosexual (hearing waived)	98	180	211
Fiscal year 1965:			
Fraudulent enlistment	91	21	4
Conviction by civil court	66	150	171
Desertion, trial barred	0	0	0
Desertion, trial inadvisable	0	0	2
A.w.o.l., trial inadvisable	1	2	0
Class II homosexual (board)	24	51	39
Class II homosexual (hearing waived)	94	196	206

No statistics are kept on the number of discharges based upon drug involvement. However, an inquiry based upon the result of criminal investigations of drug traffic and use revealed the following:

Fiscal year	Honorable	General	Undesirable
1964	12	32	44
1965	22	13	64

a. Please indicate in how many instances the respondent asked for counsel, and in how many instances counsel appointed was legally qualified.

Historical statistics are not available to indicate instances in which respondents formerly asked for legal counsel.

In November 1964, the Air Force amended the administrative separation regulations to provide that a military lawyer will be provided as counsel to represent an airman at the time he is furnished a letter of notification of proposed discharge action, except in Air Force Regulation 39–16B cases. For this purpose, a military lawyer is defined as an officer who is a member in good standing of the bar of one of the States or the District of Columbia. Such lawyer counsel is now provided to respondents subject to discharge as unsuitable or unfit, or upon allegations involving homosexuality, fraudulent enlistment, civil conviction, or desertion.

b. If available, set forth separately the number of instances in which the recommendation of the discharge board was disapproved, upgraded, and increased in harshness by higher authority, and indicate the final action taken.

Recommendations of an airman administrative discharge board may not be increased in harshness by higher authority. In fact, the trend is to consider probation and rehabilitation status in worthwhile airmen cases. Airman cases are guided by the policy expressed in DOD Directive 1332.14 (V.A. 3.) "The discharge authority may direct issuance of the type of discharge recommended by an administrative discharge board or a more favorable discharge but shall not direct a discharge less favorable than that recommended." In officer cases, a sampling taken since 1961 indicates that the Air Force conformed to the recommendation of the board of inquiry, or afforded a more favorable action to the respondent, in 95 percent of the cases processed.

Q. 2. What is the number of instances in which administrative discharge action was instituted upon the same or similar grounds as that which had been the basis of a previous court-martial?

Air Force policy prohibits resort to administrative discharge procedures based on the same facts as prior legally sufficient punitive action under Uniform Code of Military Justice.

In some cases, recurrent misconduct may be a basis for administrative separation action. In determining whether a member should retain his current military status or be administratively separated, his entire military records, including records of nonjudicial punishment imposed during a prior enlistment or period of service, all records of conviction by courts-martial, and any other factors which are material and relevant, may be evaluated. However, since the discharge characterizes the period of service to which it relates, it is based entirely on the member's military record during the current enlistment and extensions authorized by the law, the Secretary, or with consent of the member.

a. Set forth separately the number of instances in which such administrative action was taken because the acquittal was based upon technical legal rules not going to the merits, because the sentence did not include a discharge, or because of some other reason.

The Air Force does not have statistics as to the number of such instances.

Q. 3. What is the number of instances in which a second or subsequent administrative discharge proceeding was instituted upon the same or similar grounds as that which had been the basis of a previous discharge board proceeding?

No member of the Air Force may be subjected to administrative discharge action based upon conduct which has previously been the subject of administrative discharge board proceedings, when the evidence would be the same as introduced before the previous board, unless a jurisdictional error occurred at the prior board or an error which prejudiced the substantial rights of the respondent occurred (paragraph 15e, Air Force Regulation 39–17B, 19 July 1963).

a. Please classify these cases separately according to the various reasons for deciding on a second proceeding and the comparative recommendations of the two procedures. If there were any cases in which more than two boards were held, give this information for all boards held in those cases.

The Air Force has no information as to the small number of cases that may come within the exception stated above. However, even in such cases, the action taken as a result of a second board may not be less favorable to the respondent than the recommendation of the first board.

Q. What is the number of administrative discharge proceedings instituted upon charges based upon a single act of misconduct, such as homosexuality, failure to pay just debts, extended absence, involvement with or possession of drugs, etc.?

With the exception noted below, we have no figures concerning nor any means of ascertaining, the number of administrative discharges based upon single acts. Proof by convincing evidence that a service member is unsuitable or unfit for further military service, rather than the number of acts involved, is the standard for administrative discharge required by the Air Force in cases of these kinds.

Discharge for protracted unauthorized absence is, as a practical matter, usually based upon a single absence. Twenty-nine persons were administratively discharged from the Air Force for AWOL or desertion during fiscal years 1962 thru 1965.

A single act of failure to pay just debts is not a ground for administrative discharge. By definition, such conduct may result in administrative discharge only when an "established pattern" exists (paragraph 4e, Air Force Regulation 39–17A, 21 February 1962).

Q. 5. Is it the policy of the service to process for discharge administratively members who are accused of a single act of homosexuality (Transcript pages 197 and 198)? If this was ever the policy, please state when it was, when it was changed and the reasons for the change.

The discharge of homosexuals does not depend upon the number of acts alleged, but depends upon the reliability and quantum of evidence. Therefore, discharge processing is not precluded in a case involving a single act of homosexuality. Air Force procedure requires the evidence to be reviewed by the commander exercising special court-martial jurisdiction, and forwarded to the commander who exercises general court-martial jurisdiction, who must review the evidence and determine whether to refer the case to a board of officers. It is Air Force policy that in cases involving one or more homosexual acts accompanied by assault or coercion, or where the act was committed with a minor, court-martial action will be considered prior to initiation of administration of administrative proceedings (Air Force Regulation 35–66).

a. In how many cases were administrative discharge proceedings instituted in these circumstances?

b. Of these, in how many cases did the member request a court-martial?

c. What were the final dispositions of these cases?

d. In how many cases was pre-service homosexuality a factor in these instances? Associating with known homosexuals?

e. Of the administrative discharge cases based upon grounds of homosexuality, in how many cases did the member admit his participation, and in how many cases was the accusation denied by the member, but supported by evidence of other participants or individuals?

f. Of the cases in which evidence was given by other persons, how often did the board: (1) have these persons testify in person, (2) receive their evidence in sworn statements, (3) accept statements orally testified to by an investigating officer, and (4) accept a written report or summary prepared by an investigating officer?

Statistical information necessary to answer these questions is not kept by the Air Force. However, a survey of investigative reports of homosexual cases revealed that in 41% of these cases the subjects had pre-service homosexual histories. Also, available statistics show that 81% of those persons discharged for homosexuality during the period July 1962–June 1965 waived board proceedings after being afforded the right to consult with an attorney.

Q. 6. Is it the practice or policy of the service not to process administratively for discharge for an offense cognizable by the Uniform Code of Military Justice, except in cases of homosexuality (Transcript page 184)? Is this policy expressed in formal regultions or directives?

The basic Air Force policy is that administrative discharge procedures will not be used in lieu of punitive action under the Uniform Code of Military Justice. Each case of misconduct is, as it must be, evaluated on its own merits. Therefore, cases of offenses of many kinds are sometimes disposed of by administrative procedures, if the evaluation reveals that trial would not be warranted. This principle includes, but is not limited to, homosexual cases (paragraph 1, Air Force Regulation 39–17, 17 March 1959).

Q. 7. Is it the policy of the service not to court-martial members previously convicted of the same or similar offense by a civilian court? In how many cases was a member nonetheless court-martialed and what were the dispositions (Transcript page 179)?

Air Force policy is that no member will be brought to trial by court-martial, or punished pursuant to Article 15, for substantially the same act or omission for which he has been tried in a State court for violation of State law. Exceptions to this policy may be made only by Headquarters, United States Air Force, and no exceptions have been granted to this policy since it was promulgated (paragraph 7c, Air Force Manual 110–8, 8 February 1965).

a. When administrative discharge proceedings are contemplated because of a civil conviction, what procedures are followed to determine the type of offense committed?

The Air Force practice is to obtain a copy of the court order or judgment. If the State offense is also a crime under the Uniform Code of Military Justice, for which the maximum penalty extends to death or confinement for more than one year, or which involves moral turpitude, or is punishable by confinement for more than one year by the United States Code or District of Columbia Code (if not listed in the Manual for Courts-Martial) the airman is subject to discharge.

b. When an administrative discharge is ordered on these grounds, is the discharge based upon the type of offense committed, and what the equivalent disposition would be if guilt had been established in a military tribunal, or is it based merely on the fact of civil conviction?

The fact of conviction by a civil court, of an offense meeting the requirements set out above, is the basis for discharge, if discharge is found to be warranted. However, the character of discharge is based on the conviction and the overall character of the airman's service.

Q. 8. Are there procedures in the Uniform Code of Military Justice for court-martial and discharge of members who are habitual offenders?

There is no authority in the Uniform Code of Military Justice for the court-martial and discharge of habitual offenders solely because they are recidivists. Paragraph 127c, Section B, MCM, does provide that upon conviction of minor offenses not ordinarily punishable by punitive discharge, the accused may be sentenced to a punitive discharge if he has a record of prior convictions by courts-martial.

a. What is the policy of utilizing the authority set forth in section 127c (B) of the Manual? Is this authority utilized to its maximum?

The determination of an appropriate sentence in each court-martial case is vested by the Uniform Code of Military Justice entirely in the sound discretion of the court members. In accordance with the procedure established by the President, the court members are advised of the maximum punishment they may adjudge in each case. Within such limits, they are entirely free to use their own judgment, and no effort to influence them, as a matter of policy, to impose the severe punishment of punitive discharge could be countenanced under Article 37 (10 U.S.C. 837).

b. Please set forth the number of courts-martial based on section 127c (B), and compare this to the number of administrative separations of various types given for similar reasons.

The number of bad conduct discharges adjudged and approved since 1961 under the authority of paragraph 127c, Section B, MCM, is as follows:

	1961	1962	1963	1964	1965	Total
General court-martial	1	0	3	3	3	10
Special court-martial	58	48	35	16	19	176

Except as to the total number of administrative discharges, as reflected in answer to previous question, the Air Force has no way of comparing these with administrative discharges.

Q. 9. What other kinds of cases, besides child-molestation, would be included in that category of instances in which trial by court-martial would not be ordered because of the sensibilities of the victim (Transcript page 180)?

We do not believe that ordinary embarrassment or general reluctance to testify is a sufficient ground for refraining from trial. Accordingly, there are in general only two circumstances in which trial would not be ordered "because of the sensibilities of the victim." The first is the situation in which the parents of extremely young children adamantly "refuse" to permit the children to testify. Although the children could be subpoenaed, in these circumstances they do not make satisfactory witnesses. The second situation is that in which the best available medical opinion is that to appear in court would have a lasting, seriously deleterious, effect upon the witness. Such witnesses usually are children who have been the victims of sexual offenses, but the principle is applicable to any offense, and, indeed, to any witness, although we are not aware of any case in which it has been applied to an adult male.

a. How many administrative discharge cases have there been for each type of case given above?

The Air Force has no statistics concerning this matter.

Q. 10. Assuming that it is considered advisable to enact S. 758 to give an election of a court-martial in some instances to members accused of offenses under the Uniform Code of Military Justice when the service contemplates instituting administrative discharge proceedings, in what classes of cases should this election not be available (Transcript pages 184–194)?

No election should be permitted where the true underlying ground for discharge is the existence of unacceptable character or habits. For example, we

must, generally speaking, be able to discharge drug addicts. Drug addiction is not of itself a crime, thought use or possession of narcotics may be. If the Air Force has competent and compelling evidence of addiction, we should not be compelled to retain the wayward service member until he commits a crime for which he can be tried and punished. Similar consideration apply to homosexuality and other forms of sexual perversion, which of themselves are not crimes, though certain overt acts are.

Convictions by civil courts, and equivalent adjudications of juvenile delinquency, should be excepted, since a trial by court-marital would constitute double jeopardy, either in the Constitutional sense if a Federal court were involved, or in a practical sense if the civil determination were made by a State court.

The Air Force should also be able to terminate the services of persons serving under fraudulent enlistments, and those who have been absent without authority for very prolonged periods, without the intervention of courts-martial.

Q. 11. Assuming that it is considered necessary to make legislative changes in the administrative discharge system in order to guarantee certain minimum elements of due process, what is the order of preference of the following alternatives or groups of alternatives from the standpoint of the service:

a. Incorporate certain procedural safeguards in the administrative procedure itself; that is, those contained in various of the bills now before the Subcommittees.

b. Give an unqualified election of a court-martial to the member.

c. Afford pre-discharge review before a judicial tribunal with an adversary type of procedure of legal issues arising from a board hearing.

d. Grant post-discharge review of legal issues to Court of Military Appeals.

e. Some other legislative change (please specify) desired by the service.

The Air Force would prefer the incorporation of proper safeguards in the administrative procedures itself, as set forth in the bills, with those modifications recommended by the DOD (Alternative a). Our second choice would be additional pre-discharge review (Alternative c), which would appear to be a supplement rather than a substitute for "a". We believe that an unqualified right to elect trial by court-martial (Alternative b) is completely inappropriate, as most cases do not involve specific prosecutable crimes: and that review by the Court of Military Appeals (Alternative d) would unduly burden that Court in its disposition of criminal cases, and would afford the petitioner no relief not already more conveniently available to him in the ordinary civil courts.

VI. Review of Administrative Discharges by Court of Military Appeals (S. 753)

Q. 1. Does the number of cases referred to in General Hodson's statement (Transcript page 54) represent the number of discharge cases reviewed by Discharge Review Boards? How was this figure computed?

No. It is the total number of cases considered by the Discharge Review Board and the Correction Board that would be subject to review under S. 753.

a. What is the number of administrative discharges reviewed by DRB for prior years?

The records do not reflect how many administrative and how many punitive discharges were considered. The total number of discharge cases considered by the DRB was:

Fiscal year 1961	2,629	Fiscal year 1964	1,576
Fiscal year 1962	3,145	Fiscal year 1965	1,325
Fiscal year 1963	2,178		

b. How many administrative discharge cases are there annually for unfitness, unsuitability, or misconduct in each service?

The total number of administrative discharges in the Air Force for the years indicated were:

	1963	1964	1965
Unfitness (AFR 39-17)	4,404	3,926	3,245
Unsuitability (AFR 39-16)	7,427	6,868	6,694
Misconduct (civil court convictions, a.w.o.l., desertion, and homosexuality)	1,141	1,019	1,002

c. What is the breakdown of these cases in terms of type of discharge, and of these, which are the result of board hearings?

The types of discharges for the categories listed in the answer to 1b are:

	1963	1964	1965
Unfitness (AFR 39-17):			
1. Honorable	955	1,146	1,044
2. General	2,606	2,228	1,914
3. Undesirable	843	552	287
Unsuitability (AFR 39-16):			
1. Honorable	4,631	5,044	4,869
2. General	2,796	1,824	1,825
Misconduct of all types (AFR 39-22, AFR 39-23, AFR 35-66):			
1. Honorable	194	207	165
2. General	404	375	399
3. Undesirable	543	437	418

Our records do not show whether hearings were held, or waived by the respondent after consultation with counsel, in these cases.

d. Of the number of discharge cases reaching Discharge Review Board and Board for the Correction of Military Records, what is the breakdown in terms of type of discharge?

Statistics that reflect the types of discharges involved in the cases considered by the Discharge Review Board and the Board for the Correction of Military Records are not available.

e. For each of these types of discharge, in how many cases have the Discharge Review Board and the Board for the Correction of Military Records changed the character of discharge, and to what have they been changed?

The following action was taken by the Discharge Review Board on cases considered:

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Findings modified, no change type discharge	9	14	24	30
Findings reversed and applicant awarded:				
1. Honorable from general	173	100	95	98
2. Honorable from undesirable	17	15	14	26
3. Honorable from BCD	1	1	0	0
4. General from undesirable	71	75	115	145
5. General from BCD	4	4	15	16
6. Undesirable from BCD	0	0	0	0
Relief denied:				
1. Honorable	(1)	(1)	247	179
2. General	(1)	(1)	480	376
3. Undesirable	(1)	(1)	478	364
4. BCD	(1)	(1)	98	83
5. Other than honorable (officers)	(1)	(1)	10	8

[1] Reliable statistics unavailable.

The Board for the Correction of Military Records considered cases and took action as follows:

	1962	1963	1964	1965
Application for relief received	2,114	2,553	2,402	2,739
Applications involving review of discharges	770	620	532	458

During calendar year 1965 the Board for the Correction of Military Records changed 6 Undesirable Discharges to Honorable Discharges, 17 Undesirable Discharges to General Discharges, and (in Officer cases) 8 Other Than Honorable Discharges to Honorable and 1 Other Than Honorable Discharge to General Discharge. Detailed statistics are not available for the years prior to 30 June 1965, but the BCMR granted relief in 104 cases which had been previously considered by the Discharge Review Board.

Q. 2. Of the cases reaching review, how many of them involve determination of legal questions, and what are the usual kinds of legal questions raised?

a. Does this answer include as a "legal" question, issues concerning "suffciency of proof" and "application of facts to the standards set forth in the applicable regulation"?

b. What types of legal issues (if different from above) would be likely to reach Court of Military Appeals if S. 753 were law?

Of the cases reviewed by the Discharge Review Board and the Board for the Correction of Military Records very few (estimated to be less than 1%) involve determination of legal questions. Such questions may relate to procedural matters under applicable regulations or the application of court decisions to particular case situations. Most cases are in the nature of confession and avoidance, rather than sufficiency of proof.

Q. 3. What factors would operate to dissuade a former serviceman from taking an appeal of an administrative discharge to Court of Military Appeals?

We can think of nothing to deter a person who had been administratively separated from appealing to Court of Military Appeals under S. 753. Our experience with with guilty-plea court-martial cases indicates that, if counsel were provided by the Government, a very high percentage of cases would be so appealed.

Q. 4. On the basis of the total of administrative discharge cases, those reaching review boards, and the answers given above, what is the estimate of the cases of previous years which would have been appealed to CMA if S. 753 had been effective?

It is estimated that appeals to CMA would have been taken in approximately 10,000 cases between 1961 and 1965, had S. 753 been the law.

Q. 5. In view of the testimony that the number of legal issues in administrative discharges is few (Transcript page 53), what burdens upon CMA would arise from granting this review authority (Transcript page 211)?

Even though an appeal be entirely lacking in merit, or even frivolous, the court would have to examine each case carefully in order to determine that no legal issue was presented before it could deny review. Though the court would probably accept very few cases for formal decision, it would have to consider, and deny review to, many thousands.

Q. 6. Are cases brought before the DRB and BCMR now reviewed by the respective Judge Advocate General's offices? Do JAG personnel as a matter of practice review some or all discharge cases? What standards determine the cases reviewed by the Judge Advocate?

Board for the Correction of Military Records cases involving military justice questions are routinely referred to The Judge Advocate General. Other BCMR cases, and DRB cases, are referred to The Judge Advocate General only when, in the opinion of the members of the Board, a substantial legal question exists concerning which the opinion of TJAG is desirable. (See also our answers to Q. 3., Section IX).

Q. 7. What additional burden is involved on JAG personnel in reviewing cases which would be susceptible of review by CMA under S. 753 (Transcript pages 53 and 54)?

S. 753 would authorize The Judge Advocate General to send to CMA, for further review, cases decided by the DRB and the BCMR. The bill does not limit this responsibility to discharge cases. To fulfill this responsibility, it would be necessary for TJAG to review everyone of the approximately 5500 cases decided annually by these boards, to determine which merited certification to the court. In addition, S. 753 would require TJAG to provide qualified legal counsel to all applicants whose cases were heard in the CMA.

VII. Extraterritorial Criminal Jurisdiction (S. 761 & S. 762)

The Air Force is advised that the questions in this Section will be answered by the Department of Defense.

VIII. Command Influence (S. 749)

Q. 1. Assuming that "command influence" may be present when members of a court, or a counsel, imagine that a certain result is desired by higher authority, even though this authority has in no way expressed or indicated his judgment of the case, could any form of legislation counteract this type of "command influence"?

No legislation can restrain the imagination. We believe however, that the Air Force has in general quite effectively curbed such flights of fancy, and that our court members realize that what the commander really wants is that each member use his very best judgment in accordance with the law.

Q. 2. What would be your opinion of a proposed amendment to the UCMJ which would specify that the exercise of command influence is a court-martial offense?

UCMJ, Article 98 (10 U.S.C.) already is such a statute. It was one of the principal purposes of Article 98 that it be the "teeth" of Articles 31, 32, and 37 (page 1228, House Armed Services Committee Hearings on H.R. 2498 (UCMJ), 81st Congress).

a. Because of the circumstances necessarily attendant to a case under such a proposed article, how likely would prosecution be?

The Air Force believes actual prosecutions would be rare, as they have been in the past. Practically all violations of Article 37 have been inadvertent rather than malicious, and as the courts have drawn the guidelines more clearly, and education has progressed, even inadvertent transgressions have largely disappeared.

b. Would this proposal nonetheless have value as an expression of the seriousness with which such activity is viewed, thereby greatly assisting the services in their efforts to educate officers to their responsibilities in this area (Transcript page 131), and to the need for careful judgment in these situations? If so, would this justify, in your judgment, such an amendment?

Except for amendment of the present Article 37 as recommended by the DOD, the Air Force believes that sufficient tools are available to deal with improper command influence, and that no other legislation is necessary.

Q. 3. The Subcommittee has received information to the effect that, subsequent to *U.S.* v. *Kitchens*, allegations of command influence were made in the case of *U.S.* v. *Perry and Sparks* in which review was requested by the Court of Military Appeals. The command influence had allegedly been exercised over the two defense counsel who originally defended the accused in their trial at Fort Bragg and over the defense counsel who defended the accused at their retrial at Fort Jackson. What investigation was made of the allegations in that case, what conclusions were reached, and what, if any, disciplinary action was taken?

The Air Force does not know.

Q. 4. The Subcommittee has been informed that there are currently pending two cases in the Court of Military Appeals which involve allegations of an improper lecture to members of the court-martial in connection with trials at Fort Devens, Mass. One of the cases is *U.S.* v. *Albert* (18,960). What were the contentions made by the accused in those cases? In how many cases which reached the Boards of Review have there been contentions of command influence in recent years?

The Air Force does not have detailed information about the Albert case and the related cases, which arose in the Army. Since 1 January 1961, one Air Force case has been reversed as a result of possible improper command influence. In several cases, the Court of Military Appeals and the Board of Review have determined that an accused's allegation of improper command influence were unfounded, and have decided the cases adversely to the accused.

IX. Miscellaneous

Q. 1. In the Navy and the Army, it is current practice not to have senior board members rate the performance of junior members. The reasons given during the hearings (Transcript pages 101–109) may be summarized as follows:

a. In establishing an independent judicial organization it was considered desirable to make the system free from improper influences in form as well as substance.

b. Since the members of the boards are personally known to some extent by the nonboard rating officer, the board member is not prejudiced by being evaluated by persons ignorant of his performance.

c. The opinions and knowledge of other board members may be solicited by the rating officer; as a consequence there is insulation from conscious or unconscious prejudice on the part of the senior board members, without the danger of a member being rated by persons ignorant of the true nature of his performance.

General Manss, what personal comments do you have on each of these observations? If you consider these observations are valid, what additional reasons, in your opinion, outweigh them so as to warrant continuation of the Air Force's present policy?

My comments concerning the enumerated reasons apply only to their application in the Air Force, and should not be construed as suggesting they may not be wholly valid in the differing circumstances of the other services. For example, if, as Admiral Hearn testified the rule to be in the Navy, each Air Force officer were evaluated by his commander, wholly different considerations might apply.

In the Air Force, every officer is evaluated, and his effectiveness report rendered by his immediate supervisor. General Hodson testified that in the Army, the system for rating Board of Review members was changed entirely for the sake of appearances. This alone, the gist of reason "a" above, seems an entirely inadequate basis for depriving Board of Review members of an advantage enjoyed by every other officer in the Air Force.

In the Air Force, reason "b" would re-introduce the "halo effect" now strictly prohibited by Air Force rating directives. An Air Force officer must be evaluated entirely on the basis of his performance during the rating period, in each of several distinct rating categories. A high or low rating in one category should not be permitted to influence the ratings in others, yet this result, as well as improper considerations of past performance and general reputation, would be inevitable if an officer were rated by one not intimately familiar with his day-to-day performance.

With respect to reason "c", there simply is no one outside the Board of Review who is sufficiently knowledgeable of the detailed performance of a junior Board member to rate him in the same manner and on the same basis as all other Air Force officers are rated.

The reasons warranting continuation of the Air Force practice are, I believe fully listed and explained in my testimony before the Subcommittee.

Q. 2. In view of the fact that during war or national emergency the supply of legally-trained officers is likely to increase as the number of men in uniform increases (Transcript page 110), to what extent is it necessary to have "time of war" exceptions for those proposals (such as S. 750, S. 752, S. 754 and S. 758) which require expanded use of legally-trained personnel? Why is this exception required for section 35, UCMJ and S. 745?

Although other considerations may apply in the other services, in any reasonably forseeable situation the "time of war" exception would probably not be required by the Air Force.

The exception in the Uniform Code of Military Justice, Article 35 (10 U.S.C. 835) is not based upon basic availability of personnel, but upon the practical need to be able to function in rapidly changing wartime conditions. Somewhat similarly, the exception in S. 745 is desirable so that a "Military Judge" would not be forced to stand idly by when his services in other capacities were urgently required by the exigencies of war.

Q. 3. To what extent is the file on cases presented to BCMR or DRB sent to the JAG office for its opinion (Transcript page 91)?

a. How often is this done, and in what kinds of cases?

In the Air Force, virtually all Correction Board cases involving military justice questions are referred to The Judge Advocate General for advice, unless the Board recognizes a clear injustice and takes corrective action without seeking such advice. In cases that do not involve military justice questions, the Correction Board requests the opinion of TJAG only when, in the Board's opinion, such advice is deemed appropriate on an individual case basis. The DRB follows this latter (selective) procedure in all types of cases that come before it.

b. In what percentage of cases is the opinion of the JAG followed by the respective boards? How often is more extensive corrective action taken than that recommended or suggested by JAG?

We are not aware of any case in which relief recommended by TJAG has been denied by the Board. In general, the action taken by the Board conforms very closely to that recommended by TJAG. Occasionally, when the Board's decision is based on non-legal considerations not fully presented to, or not properly cognizable by, TJAG are involved, the Board takes action more favorable to the petitioner than that recommended by TJAG. No statistics are available, but the number of such cases is very small.

Q. 4. It is currently the practice of the service, by regulation or otherwise, to inform the parents or guardians of members under 21 years, or those whose par-

ents' permission was necessary for enlistment, of the fact that steps to court-martial or administratively process these members are being instituted?

There is no Air Force Regulation which requires, in general, that the parents or guardians of members whose parent's permission was necessary for enlistment be informed of the fact that steps to court-martial or administratively discharge these members are being instituted. In cases of an enlisted person charged with a criminal offense before a foreign court, a chaplain normally counsels such individual to advise his parents or guardian of the circumstances, or to allow the chaplain to communicate with the parents. If the airman refuses to do either, then no action is taken unless the airman is under 21 years of age. In cases of airmen under 21 the chaplain normally informs the parent or guardian, unless there is a compelling reason not to do so. Whether or not the circumstances make it desirable to write to a parent in the case of administrative discharge action is left to the judgment of the commander, who is in the best position to weigh the circumstances in the light of each particular case. Based on the experience of day-to-day contact between the Air Force, family members of airmen, and members of Congress, there does not appear to be a problem of lack of communication between airmen in the service and the members of their families.

a. What provisions are made to afford disinterested counsel and advice to immature servicemen, or others not capable of making effective decisions, as to the factors to be weighed in making various elections or choosing between different courses of action in these cases?

An Air Force attorney is appointed for all airmen against whom administrative discharge or court-martial proceedings are initiated, except those cases involving summary court-martial trials and discharge cases for unsuitability for airmen having under 8 years service. In the latter instance, legal aid is available to the member upon request to the Staff Judge Advocate.

Q. 5. In view of the DOD position in opposition to the bills affecting administrative discharge procedures, what would be the position of the services on the legislative enactment of the provisions of DOD Discharge Directive 1332.14?

The Air Force would not object to enactment of a statute of DOD Directive 1332.14, 14 December 1965 as amended on 19 January 1966, provided the legislation were so drafted as to make it clear that these were minimum standards, and did not preclude practices and procedures which grant safeguards over and above those specified.

Q. 6. Are there any provisions for review of an administrative discharge in an adversary proceeding *prior* to the execution of the discharge?

All administrative discharge proceedings are reviewed for compliance with the procedural and due process rules before the discharge is executed. However, this review is not an "adversary review," i.e., no appellate counsel is assigned to act for the respondent or the Government. Appointed counsel for the hearing may submit factual and legal arguments by way of a brief, and the review is accomplished by a disinterested attorney having no prior disqualifying connection with the case.

a. What is your feeling with respect to the legislative establishment of an adversary review prior to discharge upon the grounds of failure of due process in the board proceeding?

It is the position of the Air Force that an adversary review procedure is not necessary or warranted under Air Force procedure, which includes furnishing each respondent before a board a qualified attorney, requiring a legal advisor who is a qualified attorney to sit on the board, and the requirement for a verbatim record that is reviewed by a qualified disinterested attorney prior to execution of the discharge.

Q. 7. What articles of the Code apply to cases of homosexuality presently handled administratively?

Sodomy is prohibited by Article 125 (10 U.S.C. 925). Homosexual assaults and other lewd acts are prohibited by Articles 128 and 134 (10 U.S.C. 928, 934). Except for consensual acts between adults, however, it must be pointed out that Air Force policy does not ordinarily permit resort to administrative discharge proceedings when trial is appropriate.

a. Of the cases handled administratively, what kinds of homosexual activity could not have been prosecuted as violations of Articles 125 or 134 of the Manual?

A person who is a homosexual must be separated from the Air Force, but cannot be tried unless he commits an offense. Where actual criminal acts have been committed by consenting partners, it is often impractical to get each offender to testify against the other in court, even though they may speak freely in other circumstances and may even have fully confessed.

b. What is your position on the suggestion that the Code be amended to contain an article expressly making these kinds of homosexuality a court-martial offense?

The Air Force does not believe additional legislation is desirable. The present range of acts prohibited is sufficiently broad. The mere possession of homosexual traits or characteristics, whether these be regarded as disease or immoral character, cannot be made criminal. Such prosecutive difficulties as presently exist stem from problems of evidence, not from insufficient proscription of antisocial behavior.

II. Subcommittee Questionnaire to Department of Defense on Administrative Discharge Directive No. 1332.14, December 20, 1965

[Letter transmitting April 5, 1966, questionnaire to DOD]

April 5, 1966.

Brig. Gen. William W. Berg,
Deputy Assistant Secretary of Defense (Military Personnel Policy), Department of Defense, Washington, D.C.

Dear General Berg: During the course of your testimony on March 2, 1966, at the hearings on military justice before the Constitutional Rights Subcommittee and a Special Subcommittee of the Armed Services Committee, there was an extended discussion of the new Defense Department Directive 1332.14, December 20, 1965, governing administrative discharges.

That discussion was very helpful in ascertaining the policy of the Department and the various services with regard to this troublesome area. The Subcommittee has studied the Directive in some detail and is pleased to note the advancement in procedures over the earlier Directive of 1959. In my opinion, the new Directive makes a notable and much needed improvement in the protections afforded individuals who face administrative discharge actions. Among the welcome improvements are the provisions for qualified legal counseling and a clearer statement of the procedures governing the administrative hearing.

The new Directive, however, does not go quite as far as it might in protecting the rights of individual servicemen. It is to be noted, for instance, that no board hearing is provided in cases where a general discharge may be issued and, in general, the Directive appears to make a distinction, unwarranted in the view of the Subcommittee, between the General Discharge and the Undesirable Discharge. In addition, there are other areas in which the Directive fails to incorporate some of the minimum protections expressed in the legislation before the Subcommittee.

Enclosed is a series of questions pertaining to the provisions of the new Directive. I should appreciate receiving the answers to this questionnaire as soon as it is convenient in order that they may be included in the transcript of the hearings recently concluded.

With all kind wishes, I am

Sincerely yours,

Sam J. Ervin, Jr., *Chairman.*

Questions Pertaining to Department of Defense Directive 1332.14, December 20, 1965, as Changed

I. The Directive by its terms applies only to enlisted personnel.

(a) Are any changes contemplated along the same lines for officers?

(b) If none, why is it considered inappropriate to afford similar protections for officers, at least as concerns separations other than Honorable?

IV(G). This section refers to "prior enlistment" or "prior periods of service" which resulted in a discharge or certificate.

(a) Are certificates given when a man's enlistment expires, even though he decides to re-enlist and continues serving without a break?

(b) Would activities extending over a period of time involving a voluntary or an involuntary) extension of service fall within or without this definition?

IV(K). What standards will govern "non-availability" of counsel?

(a) Will they be service-wide standards, or decided on a case-by-case basis by the convening authority?

V(A)(1). What procedures are now in effect for such counseling?

V(A)(2). See question on section VIII(D)(1)(c).

V(A)(4). See question on section IX(D)(6).

V(A)(6). Although the general policy is to defer discharges until an appeal has been finally determined, an exception may be made if a discharge "is considered appropriate."

(a) What standards govern the use of this exception, and by whom will they be set?

(b) What would be the result if a discharge less than Honorable were executed under this exception, and then was followed by a determination of the appeal in the respondent's favor?

(c) Would the man be fully reinstated as if the discharge—of any kind—had not been issued?

Under this section, what policy governs the decision as to discharge if the appeal is successful?

(a) Why is not section V(A)(7) made applicable as a minimum?

V(A)(7). What is meant by a "legal technicality not going to the merits"?

(a) What is the legal definition of this phrase, if any?

(b) If there is no standard definition, what authority will establish the definition, or will decisions be made on a case-by-case basis?

V(A)(8). In order for a second board to be held, there must be found legal prejudice to the rights of the respondent *or* that the favorable findings were obtained by fraud.

(a) Is it correct to interpret this section in the disjunctive, rather than in the conjunctive as written?

This section incorporates the concept of "administrative former jeopardy."

(a) At what point will jeopardy be considered to have attached?

V(B). See question on IV(G).

V (B) and (C). Although certain material may not be considered by the Board determining the type of discharges to be recommended, these very same factors may be considered in determining whether a discharge is appropriate.

(a) Although there may be a valid *technical* distinction between these provisions, what measures are available to insure that this information can, as a practical matter, be restricted to the one use and not the other?

(b) In criminal law, this distinction is made, although not without criticism, by many eminent jurists, and not without evident safeguards. What controls are proposed to insure that this distinction is workable in practice, and is not merely theoretical?

(c) How would these two subsections operate if the only evidence which might warrant discharge of any kind was that falling under B(2)? Does this mean that a man cannot be discharged at all, even though the pre-service activities might warrant a general discharge if other evidence were available to support any discharge?

V(C)(1)(b). Although isolated non-judicial punishment may not be considered, what provisions pertain to other isolated incidents, such as previous investigations, charges preferred and dropped, etc., which may be equally as irrelevant as the isolated non-judicial punishments?

V(D). Although failure to have had these procedures explained may not warrant a defense against a proceeding, why should not these factors be considered in mitigation by the board or deciding authority.

VII(G). To vary degrees, eminent authorities in the medical field explain each of the factors listed under this category, excepting only number 7, as products of physical or mental disabilities.

(a) In view of the provisions of 10 USC 1214, is it contemplated that medical examinations will be undertaken in each instance, and that a medical discharge will be granted if warranted in any particular case?

(b) Will the discharge under this section be recommended on the basis of the performance of the enlisted man as compared with the performance of those not suffering from these disabilities?

(c) If so, why is a less than fully honorable discharge warranted for an individual who has performed to the best of his abilities, but who is prevented, by matters beyond his control, from rendering fully adquate military service?

VII(I). Items 2, 3, 5, and 6 pertain to a class of offenses which fall under specified punitive articles of the UCMJ. Item 1 falls within the purview of Paragraph 127c, section B of the Manual for Courts-Martial (Exec. Order 10565, Sept. 28, 1954). Item 7 appears to involve conditions under VII(G)(1-3).

(a) What standards will govern the appropriate action to be taken in instances where a court-martial or other action may be alternatives?

(b) By whom will the standards be established and what procedures will assure uniform appliciation of them?

(c) Assuming that the individual requests that action be taken under another appropriate procedure, what weight will this request have on the final decision?

(d) Will this request be considered differently if the individual desires action, such as a court-martial, which might involve more serious consequences for him?

Is it contemplated that cases will be referred for administrative action instead of courts-martial when the offense alleged is not serious enough, or when the evidence is insufficient for conviction, or for other reasons? Please explain.

What is the essential differences between item 5 and item 6?

VII(J)(1). What is meant by action "tantamount to a finding of guilty"?

What is an offense involving "moral turpitude" and is there a uniform definition?

(a) Do the provisions of this subsection *all* require an element of moral turpitude, or is it also sufficient that the respondent merely be adjudged a juvenile delinquent, wayward minor, etc.?

(b) If the latter, what definition will be employed?

(c) How is it contemplated that consistency of treatment within the military can be maintained in view of the varying definitions employed by the states?

VII(J)(2). What are factors which "might" result in a refusal to enlist?

(a) Would they include misrepresentation or omission of relatively minor facts which would not necessarily have barred enlistment?

(b) What is the difference between those factors which "might" bar enlistment, and those which "affect" enlistment (V)(B)(2)?

Is it intended that lack of due diligence on the part of the service in discovering these omissions, etc., will serve as a defense?

(a) If so, should this not be specified?

(b) If not, after how many years will a man no longer be susceptible of action under this section for a violation—for instance, falsifying his age by a few months?

In view of the serious consequences possible under this section, what reasons caused the rejection of a stronger standard, i.e., material which *would have resulted* in rejection?

VIII(D)(1)(c). Is this provision to be read as requiring that the member be informed of his right to consult with counsel *before* waiving these rights?

(a) Similarly, is the exception in section VA(A)(2) also to be understood as requiring that the member be informed of his right to consult with counsel prior to making a decision as a waiver?

This provision also omits any special rules for the case of minors, or persons who obviously are unable to make considered decisions respecting their rights.

(a) Are any special procedures contemplated for these situations?

(b) If none are contemplated, in what way will it be assured that the full intended benefit of the directive will be available to such persons in partial effect?

IX(C)(1). If counsel of the member's own choosing is not available, is this section to be read as requiring that the member have his choice of counsels who are available?

IX(C)(3). Is it correct to interpret this provision as *requiring* the board to make available those persons in service who have given information such as to make them "accusers" in the proceeding?

(a) What provision will be made to insure that such adverse witnesses will not be discharged, transferred, or otherwise become unavailable, pending the hearing?

(b) Is it contemplated that the respondent will receive upon demand, and well in advance of the hearing date, the names and last known addresses of all those persons, especially "accusers," who have submitted information available to the board?

What factors led to the decision not to require the procurement, at government expense, of those witnesses not in the service who have given adverse information which will be available to the board members?

(a) Upon what basis was it decided that information obtained from such persons should be admitted in documentary form, even though the

member did not have an opportunity at any stage to question or cross-examine these persons?

(b) In general, what objection is there for prohibiting the introduction, over objection, of *ex parte* information of any kind when the respondent has not had any opportunity to cross-examine the source. What procedures can be suggested by which a person, unable to appear at the hearing in person, can be cross-questioned in advance?

GENERAL QUESTIONS

A study of the Directive discloses a serious defect which is of great concern to the Constitutional Rights Subcommittee. It is apparent from the provisions taken as a whole that an unwarranted distinction is made between a general and an honorable discharge. Evidence secured by the Subcommittee over the past years has demonstrated that in practical effect, a general discharge is viewed in the civilian community as a type of discharge closely akin to an undesirable, bad conduct, or even a dishonorable discharge, and that it is not regarded as a slightly less advantageous honorable discharge. In the course of its study, the Subcommittee has been largely concerned with the procedures governing the issuance of undesirable discharges. However, the Subcommittee has received much criticism of the procedures hitherto governing general discharges, and of the procedures now set forth under the new Directive. This failure to differentiate between an honorable and a general discharge appears contrary to the views expressed in *Bland* v. *Connally*, 293 F. 2d 854, 858 (1961) and by the Court of Claims in *Murray* v. *U.S.*, Ct. Cl. No. 237–57, decided June 7, 1961. In this regard, a number of questions arise:

V(A)(2) and VII(B). Why is no board hearing provided for persons who are susceptible of a general discharge, and why are the procedures governing undesirable discharges not applicable?

VI (A) and (B). Why are the standards governing the distinction between a general and an honorable discharge so indefinite?

(a) What is meant by "not sufficiently meritorious"?

VIII(C). In view of the seriousness of a general discharge, what is the basis for making the right to a board hearing dependent upon an arbitrary period of service like eight years?

(a) If a general discharge is serious enough to warrant this right for members with over eight years' service, in what way is it less serious for those with less service?

IX(D) (2) and (6). What is the justification for allowing the discharge authority to disapprove a recommendation for retention and to order an honorable, much less a general discharge?

(a) Does this provision represent a repudiation and a disapproval of the policy of the Air Force illustrated by AFR 39–16 and AFR 39–17 and of the Army, by AR 635–208 and AR 635–209?

(b) What effect does this provision have on the analogous situation hitherto existing with regard to officers? (See AFR 36–2 and AFR 36–3).

Since a recommendation for retention reflects better upon a member, and amounts in practical effect to a more complete exoneration than does even a recommendation for an honorable discharge, why may a recommendation for an honorable discharge not be changed to a general discharge (subsection 2), whereas a recommendation for retention may be reduced to a discharge of only a general type (subsection 6)?

(a) What justification for this inconsistency exists?

(b) Does not this provision, in practical effect, effectively negate the substance of the protections secured by this Directive?

[Army Responses]

DEPARTMENT OF THE ARMY'S ANSWERS PERTAINING TO QUESTIONS ASKED BY THE CHAIRMAN OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS ON DOD DIRECTIVE 1332.14, DECEMBER 20, 1965, AS CHANGED

I. (a) Army regulations pertaining to the elimination of officers are based on statute; all safeguards contained therein are afforded to officers considered for elimination. Additionally, regulations were changed 3 August 1965 prohibiting an officer being considered for elimination by reason of substandard performance

of duty, moral or professional dereliction, or in interests of national security because of conduct which has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof except when substantial new evidence is discovered, subsequent conduct by the officer warrants considering him for discharge, or an express exception has been granted by Headquarters, Department of the Army, due to the unusual circumstances of the cases. With certain exceptions, no officer may be considered for elimination by reason of substandard performance of duty, moral or professional dereliction, or in interests of national security because of conduct which has been subject of administrative proceedings resulting in a final determination that the officer should be retained in the service.

(b) See above response.

IV(G). (a) A discharge certificate is given to every enlisted person at the time of discharge. Even though a man re-enlists and continues serving without a break in service, he must be discharged prior to re-enlistment. The Army does not issue certificates of service to enlisted persons.

(b) A voluntary or involuntary extension of service falls within this definition since service would be continuous until a discharge certificate were issued.

IV(K). The DOD Directive requires that legally qualified counsel be furnished in certain cases unless the appropriate authority certifies that a qualified lawyer is not available. Although Army troops are scattered to the far corners of the world, Judge Advocates and other legally qualified personnel are generally assigned to, or are available for use in, all units except certain small, geographically isolated detachments. While the workload of these legally qualified personnel will be increased significantly, it is anticipated that, almost without exception, the appropriate authority will furnish a qualified lawyer in those cases requiring the services of a lawyer.

(a) Standards will be determined on a case by case basis, following guidelines established by the Department of the Army, but the availability of legally qualified counsel, as noted above, is expected to result in a respondent being represented by qualified counsel in virtually all cases. As a practical matter, the appropriate authority will find it difficult to certify the non-availability of a qualified lawyer.

V(A)(1). Department of the Army policy on this matter is that the individual will be counseled by a responsible person or persons when an individual's behavior has been such that continued behavior of a similar nature may warrant action being taken against him for separation by reason of unfitness or unsuitability. Each counseling session will be recorded (to include data and by whom counseled). Counseling will include but not be limited to the following: reasons for counseling; the fact that continued behavior of a similar nature may result in initiating action for separation for unfitness or unsuitability, as appropriate; and that if elimination action is taken and separation is accomplished, the type discharge that may be issued and the effect of each type.

V(A)(2). See answer to VIII(D)(1)(c).

V(A)(4). See answer to IX(D)(6).

V(A)(6). It is Department of the Army policy that an individual shall be considered as having been convicted or adjudged a juvenile offender even though an appeal is pending or is subsequently filed. However, the discharge or recommendation for discharge will not be accomplished 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. If an appeal is acted upon favorably to the individual, discharge is prohibited by the double jeopardy provisions set forth in paragraph 8(e), AR 635–200.

(a) Not applicable in light of the Department of the Army policy cited above.

(b) Same as a.

(c) Same as a.

Unnumbered. Same as a, above.

(a) Department of the Army considers section V(A)(7) to be minimum requirements and imposes further restrictions. As a general policy, the Army prohibits an individual being considered for administrative discharge because of conduct which has been the subject of judicial proceedings resulting in an acquital or action having the effect thereof, or which was considered by a general

court martial if a sentence to a punitive discharged was authorized but was not adjudged, or was disapproved or suspended on review by the convening authority or any appellate agency, and remains suspended.

V(A)(7). It is the view of the Department of the Army that cited section does not preclude administrative action when the so-called acquittal does not result from a resolution of the merit of the allegation, before the court, but is based instead upon technical considerations such as incorrect instructions, the erroneous admission of evidence, or the statute of limitations. Requests for exceptions based upon such considerations are forwarded to Headquarters, Department of the Army, for individual consideration.

(a) See the foregoing response.

(b) See the foregoing response.

V(A)(8). The Department of the Army policy in regard of this provision is that no member will be considered for administrative discharge because of conduct which has been the subject od administratice proceedings resulting in a final determination that the member should be retained in the servece. A new board may be held if the first board committee error which materially prejudiced a substantial right of the respondent and the board recommended discharge, evidence of fraud or collusion is discovered, or if substantial new evidence is discovered, which was not known at the time of the original proceedings, despite the exercise of due diligence, and which will probably produce a result significantly less favorable for the member at a new hearing.

(a) The provisions are in the disjunctive, as illustrated by the Army policy cited above.

Unnumbered. No answer required.

(a) With the exceptions noted in the response to V(A)(8) above, jeopardy attaches upon the recommendation for retention by a board of officers.

V(B). See response to IV(G).

V(B) and (C). No response required.

(a) It is expected that th board members will follow the provisions of the directive in insuring that certain materials is used only in determining whether discharge is warranted, but will not use the material in determining the type discharge to be issued. Additionally, the board's action is subject to review by the convening authority, and, upon application by the individual, by the Army Discharge Review Board and the Army Board for Correction of Military Records.

(b) There is no guarantee that board members will disregard the material in determining the type discharge to be issued. In actual practice, faith is placed in the integrity of the board members to carry out their duties as prescribed. Since the first duty of the board is to determine whether an individual is to be discharged or retained, access to the material is made available to the board prior to the time it must determine the appropriate type discharge that should be issued. There are no known workable controls that could be instituted to insure that no error is made in actual practice by the board, prior to reviews mentioned in (a) above.

(c) The Department of the Army is aware of and follows *Harmon* v. *Brucker*. An individual's discharge may be based upon pre-service activities, but characterization of the discharge must be based solely upon his current military record.

V(C)(1)(b). Irrelevant matters such as the ones cited are precluded from consideration by the board under the provisions of V(C)(1) which states that only factors which are material and relevant may be evaluated. Additionally, AR 640–98, 19 July 1965, precluded from being filed in an individual's military personnel record jacket or official military personnel file unsupported or unacted-upon adverse suitability information which will prejudice the individual's reputation or future in the military service.

V(D). There is no prohibition against the board or convening authority considering in mitigation the fact that the proceedures my not have been explained to an individual. Also see response to V(A)(1).

VII(G). The Department of the Army does not consider that the factors listed necessarily result from physical or mental disabilities; accordingly, when it is determined that an individual is to be processed for separation by reason of unfitness VII(I) or unsuitability VII(G), he will be referred to a medical treatment facility for medical evaluation; a final type physical examination will be conducted, include a psychiatric examination. A written medical evaluation report is prepared and furnished the commander.

The report briefly but completely describes the essential points of the individual's mental and physical condition in relation to the reason for separation under consideration; states whether the individual was and is mentally responsible, able to distinguish right from wrong and to adhere to the right, has the mental capacity to understand and participate in board proceedings; states the probable effectiveness of further rehabilitative efforts; and states whether the individual meets or does not meet retention medical standards.

When the medical treatment facility commander determines that an individual being considered for elimination for unsuitability does not meet retention medical standards, he processes the individual for separation under medical procedures.

If it appears to the examining medical officer that an individual being considered for elimination for unfitness does not meet retention medical standards and the incapacitating medical condition is not the direct or contributing cause of his alleged unfitness, the unit commander determines whether the individual will be processed for separation under medical jurisdiction. When the medical board proceedings indicate that an incapacitating physical or mental illness was the direct or substantial contributing cause of the unfitness, board action will not be taken and the individual may be processed through medical channels.

(a) See response to VII(G).

(b) If an incapacitating medical condition referred to in VII(G) above, is not the direct or contributing cause of the individual's alleged unfitness, the individual would be issued a discharge based on his performance the same as an individual not suffering from the disabilities. If the medical condition was the direct or substantial contributing cause of the unfitness and the individual is processed through medical channels, his discharge would be characterized based upon his conduct and behavior during his current period of service excluding the incident that lead to separation action being taken.

(c) Not applicable in light of the Army policy given in response to VII(G), above.

VII(I). The Army does not authorize administrative discharge by reason of unsanitary habits. It is the view of the Department of the Army that Item 1 does not fall within the purview of Section B of the Manual for Courts-Martial. Civil convictions do not form the basis for a punitive discharge under the cited paragraph, and it is Army policy not to try an individual by court-martial for an offense which has resulted in a civil conviction. Furthermore, it is Army policy to dispose of petty offenses by non-judicial punishment. In many instances there is not a record of previous convictions by court-martial required for discharge action under the cited paragraph.

(a) Commanders have the discretion to initiate action to separate an individual for unfitness or intiate disciplinary action under the Uniform Code of Military Justice. The fact that administrative proceedings were initiated when disciplinary action could have been taken will not affect the validity of the administrative proceedings. However, administrative action will not be used in lieu of disciplinary action solely to spare an individual who may have committed serious misconduct the harsher penalties which may be imposed under the Uniform Code of Military Justice.

(b) See response to (a) above.

(c) Since the final decision as to what action will be taken is made by the commander, it is unknown what weight would be given to such a request. It is anticipated, however, that little, if any, weight would be given.

(d) Again, this is a matter to be determined by the commander. It is doubtful, however, that significant weight would be given to such a request.

Unnumbered. As indicated in response to VII(I)(a), above, it is discretionary with the commander whether judicial or administrative action is taken in a particular case. Normally, an individual will be processed for separation under administrative procedures rather than judicial procedures when he has committed a series of petty offenses. There are circumstances where trial by court-martial may not be feasible for reasons such as lack of process; consequently, separation through administrative procedures may be the only recourse left to the Government.

Unnumbered. The basic difference between Items 5 and 6 is that discharge under 5 may be accomplished only where there is an established pattern of one's failure to pay bad debts, which normally would involve several creditors. Failure to contribute adequate support to dependents, however, could take place when a soldier is separated from his spouse or is living with his spouse but fails

to carry out his obligations to support his dependents through such reasons as failure to provide funds from his pay for rent, clothing or food.

VII(J)(1). The phrase "tantamount to a finding of guilty" refers to proceedings in both domestic and foreign courts in which the judge suspends further action, places the defendent under some form of probation, or takes similar rehabilitative action without making a formal finding of guilty, but under circumstances in which such a finding is a necessary pre-requisite to, or implied in, the court's action.

Unnumbered. The Army defines moral turpitude when used as a basis for separation by reason of misconduct as applying only to individuals convicted by civil court or disposed of as juvenile offender whose offense involves narcotics violations, or sexual perversions, including, but not limited to lewd and lascivious acts; homosexual acts; sodomy, indecent exposure; indecent acts with or assault upon a child; or other offenses which are considered related acts of sexual perversion.

(a) Army policy authorizes discharge for misconduct when one of the following applies:

(1) Conviction by a civil court or action taken against him which is tantamount to a finding of guilty, or an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year.

(2) Conviction of an offense involving moral turpitude.

(3) Adjudication as a juvenile offender for an offense involving moral turpitude.

(b) Not applicable in light of the Army policy outlined above.

(c) Treatment within the Army is consistent insofar as determining what conduct will be used as the basis for discharge; however the law of the jurisdiction of the civil court concerned will be the determining factor whether a given proceeding constitutes an adjudication of guilt.

VII(J)(2). Army regulations authorize the administrative discharge for misconduct of members who deliberately conceal facts which, under applicable regulations, would either absolutely bar their enlistment or induction or require a waiver of the disqualification before they could be accepted. An omitted fact is considered to be material, and not minor, if it would disqualify an individual for enlistment or induction.

(a) See response above.

(b) It is the view of the Army that no pre-service activities may be considered in characterizing an individual's discharge. The Army does not consider there is any difference between factors which "might" cause an individual to be rejected for enlistment or induction, and those which "affect" enlistment or induction eligibility.

Unnumbered. No.

(a) Not applicable.

(b) Army regulations do not recognize any limitations. However, a misrepresentation in a prior enlistment cannot be considered in determining the character of the individual's discharge. Further, Army regulations permit the waiver of such misrepresentation and the retention of the member.

Unnumbered. Such a standard would not take into account the various disqualifications which may, under current regulations, be waived in appropriate circumstances.

VIII(D)(1)(c). Army policy in this matter is that the member will be given a reasonable time (not less than 48 hours) to consider waiver of board proceedings and shall have an opportunity to consult with counsel prior to waiving his rights. The individual will submit a signed statement indicating that he has been advised by counsel of the basis for the contemplated separation and its effect, and of his rights. The statement includes a request or a waiver by the individual of each right. The individual as well as the counsel sign the statement, with the counsel indicating that the individual has personally made request or waiver of each right. If the individual refuses to sign the statement, it is considered that he has not waived his right to a board hearing.

(a) Answer is contained in preceding response.

Unnumbered. No answer required.

(a) No.

(b) None are considered necessary in light of the safeguards noted above in response to VIII(D)(1)(c).

IX(C)(1). No. There is no intent that the individual be given a roster of counsels or be permitted to interview each counsel who is reasonably available. Instead, if the requested counsel is not reasonably available the convening authority will appoint one. If the individual is not satisfied with the appointed counsel, he may decline his services and employ civilian counsel at his own expense.

IX(C)(3). No. Army policy in this matter is that the respondent may request the appearance before the board of any witness whose testimony he believes to be pertinent to his case. He specifies in his request the type of information the witness can provide. The board will secure the attendance of a witness if it considers that he is reasonably available and that his testimony can add materially to the case. Military witnesses under the control of the convening authority are ordered to attend if reasonably available. The attendance of other military witnesses are requested through command channels. Witnesses not on active duty, however, must appear voluntarily at no expense to the Government.

(a) In order to guarantee the availability of essential military witnesses in board proceedings, the appropriate commander ascertains promptly the termination or transfer status of each witness. No witness is transferred or separated from the service prior to the beginning of a board hearing except where an enlistment or period of service fixed by law expires. In such cases an attempt is made to obtain the individual's consent to retention. If he does not consent, a deposition or affidavit is obtained as appropriate.

(b) Yes. An individual notified to appear before a board of officers to determine whether he should be discharged is notified of the names of witnesses expected to be called at the board hearing; the individual is informed that the recorder of the board will, upon request of the individual, endeavor to arrange for the presence of any available witnesses he desires to call. This written notification is sent to the individual a minimum of 15 days prior to the board hearing so that he or his counsel may prepare his case.

Unnumbered. The procurement at government expense of witnesses who are not in the service has not been considered necessary to a fair and equitable disposition of administrative proceedings. Traditionally, the strict rules of evidence applicable to criminal proceedings have never been applied in administrative proceedings. The lack of opportunity to cross-examine adverse witnesses in administrative board proceedings through the use of unsworn statements, affidavits and certificates does not bar the admissibility of such evidence. Rather, it goes to the weight such evidence should be given. The individual has the right at any time before the board convenes or during the proceedings to submit any answer, deposition, sworn or unsworn statement, affidavit, certificate, or stipulation. This includes but is not limited to depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily. Depositions are taken after due notice to all concerned and, if feasible, in the presence of all parties.

(a) See above response.

(b) See response above.

GENERAL QUESTIONS

V(A)(2) and VII (B). It is the position of the Army that an individual be issued either an Honorable or General Discharge, whichever reflects the individual's behavior and performance of duty. A General Discharge is separation under honorable conditions and entitles the person to full Federal rights and benefits. An individual is entitled to a board hearing only when he may receive an Undesirable Discharge or when some stigma attaches to the reasons for discharge. Consequently, all enlisted persons separated from the Army for cause by reason of misconduct, unfitness, unsuitability, homosexuality, or security are entitled to a board hearing regardless of the type of discharge ultimately issued. However, stigma is not attached when separation is for such reasons as convenience of the Government, convenience of the individual, or expiration of term of service. Since persons so discharged can be issued only an Honorable or General Discharge no board is considered necessary.

Where no board is authorized, a determination whether an Honorable or General Discharge will be issued is made by the responsible officer in accordance with his best judgment based upon all pertinent data authorized to be considered. Consequently, extreme care is exercised in determining whether a member's

behavior and performance of duty warrants issuance of a General Discharge instead of an Honorable Discharge. The individual's records are screened carefully for data which would have a bearing on the final decision as to the type of discharge to be awarded. When a member's service is characterized as General, except when discharged by reason of misconduct, unfitness, unsuitability, homosexuality, or security, a signed statement setting forth the specific reasons for such discharge is prepared and attached to the individual's military personnel record.

VI(A)(B). The Army has definite standards governing the issuance of an Honorable and General Discharge. An Honorable Discharge is a separation from the Army with honor, and its issuance 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. An Honorable Discharge will be furnished when the individual meets the following qualifications:

(1) Has conduct rating of at least "Good."
(2) Has efficiency rating of at least "Fair."
(3) Has not been convicted by a general court-martial.
(4) Has not been convicted more than once by a special court-martial.

Notwithstanding the above criteria, when disqualifying entries in the individual's service record are outweighed by subsequent honest and faithful service over a greater period of time, an Honorable Discharge may be issued. In addition, careful consideration is given to the nature of the offense and sentence adjudged by a court-martial and when, in the opinion of the officer effecting discharge these have not been too serious and severe, and the remainder of the service has been such that an Honorable Discharge would have been granted had the conviction not occurred, an Honorable Discharge may be awarded. When there is doubt as to whether an Honorable or General Discharge should be furnished, the doubt is resolved in favor of the individual.

An individual may, where otherwise ineligible, receive an Honorable Discharge if he has, during his current period of service, received a personal decoration or is separated as a result of a disability incurred in life of duty. In each of the foregoing situations the individual's military record is used as the basis for the action taken.

A former prisoner with a suspended sentence who was restored to duty to complete an existing enlistment or obligation to serve is furnished the type discharge to which his service subsequent to restoration entitles him.

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 a general court-martial or has been convicted by more than one special court-martial in his current period of service. The decision is discretionary with the officer effecting discharge and if there is evidence that the individual's military behavior has been proper over a reasonable period of time subsequent to the conviction, he may be considered for an Honorable Discharge.

(a) "Not sufficiently meritorious" means an individual has not met the standards outlined above.

VIII(C). Army policy in this matter is that any individual considered for discharge by reason of unsuitability is entitled to a board hearing regardless of the number of years service.

(a) Not applicable in light of Army policy expressed above.

IX(D) (2) and (6). It is Army policy that no convening authority may direct discharge if a board recommends retention, nor will he authorize the issuance of a discharge of less favorable character than that recommended by the board. However, a convening authority may direct retention when discharge is recommended, or he may issue a discharge of a more favorable character than that recommended.

(a) In view of the above, the answer is no.

(b) The Army policy with respect to officers is the same as that for enlisted persons reflected in response to IX(D) (2) and (6), above.

Unnumbered. Not applicable to the Army.

(a) Same as above.

(b) Same as above.

[Navy Responses]

QUESTIONS PERTAINING TO DEPARTMENT OF DEFENSE DIRECTIVE 1332.14, DECEMBER 20, 1965, AS CHANGED

1. The Directive by its terms applies only to enlisted personnel.

(a) Are any changes contemplated along the same lines for officers?

Answer: No.

(b) If none, why is it considered inappropriate to afford similar protections for officers, at least as concerns separations other than honorable?

Answer: The question assumes that the protections accorded to enlisted men by the DOD Directive before they may be administratively discharged are not now accorded to officers who are to be administratively discharged. This assumption is incorrect. The DOD Directive basically accords to the enlisted man subject to administrative discharge the protections accorded an officer in a similar case. An officer may be discharged under conditions other than honorable only upon the officer's resignation for the good of the service and, in the case of a reserve officer, after he has also waived his right to have his case considered by a board of officers, or under the approved sentence of a court-martial, or under the approved findings of a board of officers. Where discharge under conditions other than honorable is predicated upon the approved findings of a board of officers, the officer concerned is in practice accorded protections similar to those accorded to an enlisted person appearing before a board of officers by the DOD Directive.

IV(G). This section refers to "prior enlistment" or "prior periods of service" which resulted in discharge or certificate.

(a) Are certificates given when a man's enlistment expires, even though he decides to reenlist and continues serving without a break?

Answer: When a man's enlistment expires he is given a discharge certificate even though he is reenlisted and continues serving without a break.

(b) Would activities extending over a period of time involving a voluntary (or an involuntary) extension of service fall within or without this definition?

Answer: When a man's enlistment is extended either voluntarily or involuntarily he is not issued a discharge certificate. The originally contracted for portion of an extended enlistment is not considered a "prior enlistment" or "prior period of service."

IV(K). What standards will govern "non-availability" of counsel?

Answer: In connection with the answer hereunder see also the answer to the question asked with regard to IX(C)(1). Basically, the standards which govern the availability of lawyer counsel for the respondent before an administrative discharge board are precisely those which govern the availability of lawyer defense counsel requested by an accused before a court-martial. The decision as to the availability of counsel will be made by the convening authority of the administrative discharge board which initially hears the respondent's case. In the Marine Corps where such convening authority does not possess general court-martial jurisdiction over the respondent, he is required, before certifying the non-availability of lawyer counsel, to effect appropriate liaison with the officer next in the chain of command who exercises general court-martial jurisdiction over the respondent. The critical factors which will be involved in the decision regarding the availability of lawyer counsel will include the overall legal workload and operational commitments within the command exercising general court-martial jurisdiction over the respondent, the legal case load and other military commitments of individual military lawyers, and the physical proximity of military lawyers to the place where the administrative discharge board will be convened. For example, in the Navy it is not uncommon for detached units, particularly smaller ships operating independently to be without the services of lawyers for extended periods.

(a) Will they be service-wide standards, or decided on a case-by-case basis by the convening authority?

Answer: The specific decision, applying these standards, will be made in each instance by the convening authority of the administrative discharge board which initially hears the respondent's case. Should the convening authority determine that lawyer counsel is not reasonably available, he must not only certify this fact in the record of the case, but must also record the qualifications of the substitute non-lawyer counsel.

V(A)(1). What procedures are now in effect for such counseling?

Answer: The procedures for counseling (advising or cautioning) personnel are implicit in those traditional areas of leadership and supervision set forth in, among other sources, General Order 21, Navy Regulations, and other departmental directives. This counseling, inherently a responsibility of command, applies particularly to those personnel who are displaying a trend toward chronic misbehavior or a tendency to avoid payment of just debts. Further, a directive has recently been issued which reiterates the requirement that individuals be counseled relative to deficiencies and that they be given a reasonable time to overcome them before processing for discharge.

V(A)(2). See question on section VIII(D)(1)(c).

Answer: See answer to VIII(D)(1)(c).

V(A)(4). See question on section IX(D)(6).

Answer: See answer to IX(D)(6).

V(A)(6). Although the general policy is to defer discharges until an appeal has been finally determinde, an exception may be made if a discharge "is considered appropriate."

(a) What standards govern the use of this exception, and by whom will they be set?

Answer: Normally an exception will be made only in those cases wherein an individual's enlistment is about to expire and in all cases the final decision will be made by the Secretary of the Navy, based on a member's entire record. A member may not be held involuntarily beyond his active obligated service pending outcome of an appeal. However, if the appeal is based only upon a nonprejudicial procedural error or the appeal is directed only toward the sentencing aspect of the proceeding, consideration might be given to discharging the individual prior to resolution of the appeal.

(b) What would be the result if a discharge less than Honorable were executed under this exception, and then was followed by a determination of the appeal in the respondent's favor?

Answer: The individual's discharge may be changed to the type warranted by his military record provided that the appellate decision turns on the basic question of the individual's guilt or innocence and not the nature and amount of punishment.

(c) Would the man be fully reinstated as if the discharge—of any kind—had not been issued?

Answer: He may be reinstated if in all other respects qualified and if such action was directed by the Secretary of the Navy, after consideration by the Board for Correction of Naval Records. He may be reenlisted if in all other respects qualified, without referral to the Secretary of the Navy or consideration by the Board for Correction of Naval Records.

Under this section, what policy governs the decision as to discharge if the appeal is successful?

Answer: Subject to the considerations contained in the three previous answers, a discharge would not be directed based on the civil involvement.

(a) Why is not section V(A)(7) made applicable as a minimum?

Answer: Implementing directives in the Navy and Marine Corps will prohibit the administrative discharge of a member under conditions other than honorable if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by civil court resulting in acquittal or action having the effect thereof, except where such acquittal or equivalent disposition is based on a legal technicality not going to the merits.

V(A)(7). What is meant by a "legal technicality not going to the merits"?

Answer: Defer to DOD.

(a) What is the legal definition of this phrase, if any?

Answer: Defer to DOD.

(b) If there is no standard definition, what authority will establish the definition, or will decisions be made on a case-by-case basis?

Answer: Defer to DOD.

V(A)(8). In order for a second board to be held, there must be found legal prejudice to the rights of the respondent *or* that the favorable findings were obtained by fraud.

(a) Is it correct to interpret this section in the disjunctive, rather than in the conjunctive as written?

Answer: Affirmative (disjunctive). This section could be clarified by inserting "either" between "found" and "legal."

V(A)(8). This section incorporates the concept of "administrative former jeopardy."

(a) At what point will jeopardy be considered to have attached?

Answer: The point at which administrative former jeopardy attaches is assumed to be when the first boards' report of proceedings is actually submitted to the convening authority. A standard interpretation of this matter for all services use must necessarily be promulgated by DOD.

V(B). See question on IV(G).

Answer: Prior service activities include those conducted during a previous enlistment or induction. Pre-service activities include those conducted prior to any service affiliation.

V (B) and (C). Although certain material may not be considered by the board in determining the type of discharge to be recommended, these very same factors may be considered in determining whether a discharge is appropriate.

(a) Although there may be a valid *technical* distinction between these provisions, what measures are available to insure that this information can, as a practical matter, be restricted to the one use and not the other?

Answer: This is similar to a court proceeding wherein the court is instructed that certain evidence is entered only for a limited purpose. Just as in a court it is presumed that administrative discharge board members will follow the regulations prescribing this limited use. This is particularly so in a military society which is based on a rigid adherence to orders and regulations.

(b) In criminal law, this distinction is made, although not without criticism by many eminent jurists, and not without evident safeguards. What controls are proposed to insure that this distinction is workable in practice, and is not merely theoretical?

Answer: No controls are proposed nor are controls considered necessary. Review of all proceedings by the discharge authority is adequate to detect any deviations in this area.

(c) How would these two subsections operate if the only evidence which might warrant discharge of any kind was that falling under B(2)? Does this mean that a man cannot be discharged at all, even though the pre-service activities might warrant a general discharge if other evidence were available to support any discharge?

Answer: No. The purpose of V(B)(2) is to enable the services to appropriately categorize the type of discharge certificate issued to an individual whose enlistment or induction was authorized without knowledge that the individual had perpetrated a fraud against the government by misrepresentations and/or omission of facts in his enlistment application.

V(C)(1)(b). Although isolated non-judicial punishment may not be considered, what provisions pertain to other isolated incidents, such as previous investigations, charges preferred and dropped, etc., which may be equally as irrelevant as the isolated non-judicial punishment?

Answer: The same criteria is applied as in isolated non-judicial punishments. Charges that may have been preferred and dropped are quite obviously not considered relevant any more so than are acquittals.

V(D. Although failure to have had these procedures explained may not warrant a defense against a proceeding, why should not these factors be considered in mitigation by the board or deciding authority?

Answer: Such factors may be considered in mitigation by the discharge authority even though administrative proceedings do not result in a sentence. Section V(D) was undoubtedly included within the directive as a means of educating personnel in the premises. Failure to explain these provisions in no way abrogates the rights of the individual.

VII(G). To varying degrees, eminent authorities in the medical field explain each of the factors listed under this category, excepting only number 7, as products of physical or mental disabilities.

(a) In view of the provisions of 10 USC 1214, is it contemplated that medical examinations will be undertaken in each instance, and that a medical discharge will be granted if warranted in any particular case?

Answer: A medical or psychiatric evaluation will be conducted in cases considered under VII(G) 2, 3, 4, 5, and 6. Normally such personnel will be subject to separation by reason of unsuitability; however, if a medical discharge is warranted it will be issued.

(b) Will the discharge under this section be recommended on the basis of the performance of the enlisted man as compared with the performance of those not suffering from these disabilities?

Answer: Normally, behavior as distinguished from performance is the criteria. However, in 1, 2, 3, and 5, deterioration in performance is an indication of a character or behavior disorder.

(c) If so, why is a less than fully honorable discharge warranted for an individual who has performed to the best of his abilities, but who is prevented, by matters beyond his control, from rendering full adequate military service?

Answer: Such personnel are issued the type discharge as warranted by the military record. In the absence of a record of military offenses an honorable discharge is normally issued.

VII(I). Items 2, 3, 5, and 6 pertain to a class of offenses which fall under specified punitive articles of the UCMJ. Item 1 falls within the purview of Paragraph 127c, Section B of the Manual for Courts-Martial (Exec. Order 10565, Sept. 28, 1954). Item 7 appears to involve conditions under VII(G)(–3).

(a) What standards will govern the appropriate action to be taken in instances where a court-martial or other action may be alternatives?

Answer: In the absence of aggravated circumstances and where the member has admitted to his involvement, administrative action for items 2, 3, 5, and 6 is considered to be more appropriate. Item 1 is normally used for the habitual offender who fails to conform to standards. The Manual for Courts-Martial provisions are applicable only in a limited number of cases involving chronic military offenders. The typical administrative discharge action under which the service member may be issued a discharge under other than honorable conditions for misconduct is one where the member has a record of misconduct over a period of time and he has received Article 15 punishment and/or courts-martial convictions, none of which resulted in a punitive discharge. In most such cases punitive action has been taken on specific offenses and there remains no offense for which the respondent in an administrative discharge action may demand trial. The misconduct consists of the member's record of frequent involvement and the service is justified in concluding that he is not fit for further service and should be able to properly classify him as undesirable. Item 7 relates primarily to repeated contraction of veneral diseases.

(b) By whom will the standards be established and what procedures will insure uniform application of them?

Answer: Standards are established by DOD Directive 1332.14 and the procedures set forth therein and amplified by Departmental implementing directives. Uniform application of the standards is provided by the discharge authority.

(c) Assuming that the individual requests that action be taken under another appropriate procedure, what weight will this request have on the final decision?

Answer: All the requests of the individual are considered, however, whatever weight they might have depends upon the particular circumstances of the case. Determination of the appropriate procedure is the prerogative of the convening authority and not of the individual.

(d) Will this request be considered differently if the individual desires action, such as a court-martial, which might involve more serious consequences for him?

Answer: It may be, depending upon all the circumstances of the case and since all requests for court-martial are given very serious consideration.

VII(I). Is it contemplated that cases will be referred for administrative action instead of courts-martial when the offense alleged is not serious enough, or when the evidence is insufficient for conviction, or for other reasons? Please explain.

Answer: No. There is no indication that administrative discharge procedures are being used 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 Department 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.

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 misbehavor. 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 discharge of recruits, enlistment fraud may be cause for general discharge rather than honorable.

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 service men by his overt conduct, expeditious administrative discharge under other than honorable conditions is often appropriate.

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 services those individuals who have been convicted of serious crimes against the civilian community.

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.

In summary, it is felt that the Navy Department's procedures for administrative discharge are fair and equitable and that they do not bypass court-martial action.

VII(I). What is the essential difference between item 5 and item 6?

Answer: Although there is no significant difference in the two items, they are separated in order to distinguish between the member's obligations to the civilian community on the one hand and his obligations to his family responsibilities on the other.

VII(J)(1). What is meant by action "tantamount to a finding of guilty?"

Answer: Any action taken by the civil authorities which does not constitute acquittal or dismissal of the charges but results in some form of disposition which could not otherwise be taken against the individual except if guilty of the offense.

VII(J)(1). What is an offense involving "moral turpitude" and is there a uniform definition?

Answer: There is no uniform definition of "moral turpitude". One illuminative definition of moral turpitude is found in 39 Op. Atty. Gen. 95 (1937): "Any crime involving an act intrinsically or morally wrong and malum in se, or act done contrary to justice, honesty, principle or good morals, is a crime involving moral turpitude." In the Navy each case is decided by the discharge authority based on all the facts and circumstances surrounding the offense using Black's Law Dictionary as a guide and supported by decisions of the Court of Military Appeals and the U.S. Supreme Court rather than determinations of the individual states. Black's Law Dictionary defines moral turpitude as: "An act of baseness,

vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." This same definition is also found in *United States ex rel Manzella* v. *Zimmerman*, 71 F. Supp. 534 (D.G. Pa. 1947). Such offenses as larceny, robbery, morals offenses, assault with intent to kill, smuggling, etc., are offenses involving moral turpitude.

(a) Do the provisions of this subsection all require an element of moral turpitude, or is it also sufficient that the respondent merely be adjudged a juvenile delinquent, wayward minor, etc.?

Answer: In cases wherein the member has been adjudged a juvenile delinquent, wayward minor, or youthful offender, the offense must involve moral turpitude. In all other cases the offense must be one which involves moral turpitude or be punishable by death or confinement in excess of one year under the Uniform Code of Military Justice.

(b) If the latter, what definition will be employed?

Answer: Not applicable.

(c) How is it contemplated that consistency of treatment within the military can be maintained in view of the varying definitions employed by the states?

Answer: The varying definitions employed by the states are not utilized.

VII(J)(2). What are factors which "might" result in a refusal to enlist?

Answer: Homosexual involvement, conviction by civil authorities of felonies or offenses involving moral turpitude.

(a) Would they include misrepresentation or omission of relatively minor facts which would not necessarily have barred enlistment?

Answer: No.

ment, and those which "affect" enlistment (V)(B)(2)?

Answer: None.

VII(J)(2). Is it intended that lack of due diligence on the part of the service in discovering these omissions, etc., will serve as a defense?

Answer: No.

(a) If so, should this not be specified?

Answer: Not applicable.

(b) If not, after how many years will a man no longer be susceptible of action under this section for a violation—for instance, falsifying his age by a few months?

Answer: The individual may be processed at any time the fraud is discovered during the enlistment involved. Falsification of age is not considered to be a fraudulent enlistment. Discharge for minor omissions normally would not result. However, a discharge subject to a probationary period might be appropriate in some cases.

VII(J)(2). In view of the serious consequences possible under this section, what reasons caused the rejection of a stronger standard, i.e., material which *would have resulted* in rejection?

Answer: The majority of cases processed under this section are retained in the service. Present wording lends itself to deciding each case on an individual basis. There are cases wherein enlistment would have been barred had certain facts been known, but when discovered subsequent to enlistment a determination might be made to retain the member, depending upon observation of his performance and behavior while on active duty.

VIII(D)(1)(c). Is this provision to be read as requiring that the member be informed of his right to consult with counsel *before* waiving these rights?

Answer: Apparently not; however, implementing directives do require that the member be informed of his right to consult with counsel before waiving his rights.

(a) Similarly, is the exception in section V(A)(2) also to be understood as requiring that the member be informed of his right to consult with counsel prior to making a decision as to a waiver?

Answer: Yes, except for the prolonged unauthorized absentee whose whereabouts is unknown.

VIII(D)(1)(c). This provision also omits any special rules for the case of minors, or persons who obviously are unable to make considered decisions respecting their rights.

(a) Are any special procedures contemplated for these situations?

Answer: No special distinctions are made for minors in these situations.

Minors, per se, are not necessarily unable to make considered decisions respecting their rights. All members, minor or otherwise, who obviously are unable to make considered decisions are normally treated as medical cases.

(b) If none are contemplated, in what way will it be assured that the full intended benefit of the directive will be available to such person in practical effect?

Answer: Answered above.

IX(C)(1). If counsel of the member's own choosing is not available, is this section to be read as requiring that the member have his choice of counsels who are available?

Answer: Yes.

IX(C)(3). Is it correct to interpret this provision as requiring the board to make available those persons in service who have given information such as to make them "accusers" in the proceeding?

Answer: Yes, if the circumstances of the case warrant. Presence of the accuser is considered unnecessary in those cases in which the respondent has acknowledged the act.

(a) What provision will be made to insure that such adverse witnesses will not be discharged, transferred, or otherwise become unavailable, pending the hearing?

Answer: No provisions to this effect recommended. Promulgation of such provisions would unnecessarily hamper the administration and effectiveness of the armed forces. Witnesses may not be involuntarily retained beyond expiration of active obligated service for this purpose, nor is it expected that transfers will be delayed pending indications of the respondent's desires concerning the presence of a particular witness.

(b) Is it contemplated that the respondent will receive upon demand, and well in advance of the hearing date, the names and last known addresses of all those persons, especially "accusers," who have submitted information available to the board?

Answer: Yes.

IX(C)(3). What factors led to the decision not to require the procurement, at government expense, of those witnesses not in the service who have given adverse information which will be available to the board members?

Answer: In the absence of subpoena power there is no authority to require the appearance of civilian witnesses. However, subpoena power for administrative hearings is not considered necessary or desirable. In cases involving sexual deviation, witnesses may be reluctant to testify as to their involvement and should they be compelled to appear, the board would be faced with invocations of the Fifth Amendment and having no power to grant immunity from all prosecutions, would have no way to elicit pertinent testimony.

(a) Upon what basis was it decided that information obtained from such person should be admitted in documentary form, even though the member did not have an opportunity at any stage to question or cross-examine these persons?

(b) In general, what objection is there for prohibiting the introduction, over objection, of *ex parte* information of any kind when the respondent has not had any opportunity to cross-examine the source. What procedures can be suggested by which a person, unable to appear at the hearing in person, can be cross-questioned in advance?

Answer: The answers to question (a) and (b) above, are best combined. No member will ever be given an undesirable discharge based solely on the uncorroborated written statements or other allegations of absent witnesses. See the full discussion of this policy under VII(I) concerning the circumstances under which administrative discharge action will be taken in lieu of a court-martial.

In almost every case where the statement of an absent witness is considered by an administrative discharge board, it will be utilized solely to corroborate the member's admitted involvement in the conduct or offense for which his discharge is being considered. In every case where the statement of an absent witness is considered by an administrative discharge board, the member has the opportunity to, in essence, cross-examine the person giving the statement by the use of depositions or interrogations directed to that person or by eliciting further affidavits or written statements from the person. This latter procedure is precisely that utilized and approved by COMA when the statement of an absent witness is presented to an Article 32 pretrial investigation whose purpose is substantially similar to the administrative discharge board proceeding, i.e., to operate

as a discovery proceeding for the respondent so that he is aware of the basis of the allegations against him, to provide a protection to the member against baseless allegations, and to make recommendations to the convening authority as to appropriate disposition. See U.S. v. Samuels, 10 USCMA 206, 27 CMR 280. If this procedure is proper in a pretrial investigation, which COMA has characterized as judicial in nature, there is no valid reason why it is not equally proper in an administrative discharge proceeding. In addition to the proceduses outlined above, an additional procedure may be utilized when witnesses are available to the command prior to the hearing before an administrative discharge board when it is anticipated that these witnesses may not be later available for such hearing. In these latter cases provision may be made for the taking of an oral deposition of such witnesses and the recording of the witness' testimony for later use by the board. The respondent would be represented by counsel at the taking of such deposition and would thereafter have the right of confrontation as well as cross-examination.

GENERAL QUESTIONS

A study of the Directive discloses a serious defect which is of great concern to the Constitutional Rights Subcommittee. It is apparent from the provisions taken as a whole that an unwarranted distinction is made between a general and an honorable discharge. Evidence secured by the Subcommittee over the past years has demonstrated that in practical effect, a general discharge is viewed in the civilian community as a type of discharge closely akin to an undesirable, bad conduct, or even a dishonorable discharge, and that it is not regarded as a slightly less advantageous honorable discharge. In the course of its study, the Subcommittee has been largely concerned with the procedures governing the issuance of undesirable discharges. However, the Subcommittee has received much criticism of the procedures hitherto governing general discharges, and of the procedures now set forth under the new Directive. This failure to differentiate between an honorable and a general discharge appears contrary to the view expressed in *Bland* v. *Connally*, 293 F. 2d 854, 858 (1961) and by the Court of Claims in Murray v. U.S., Ct. Cl. No. 237–57, decided June 7, 1961. In this regard a number of questions arise:

V(A)(2) and VII(B). Why is no board hearing provided for persons who are susceptible of a general discharge, and why are the procedures governing undesirable discharge not applicable?

Answer: Relative to V(A)(2), personnel processed for discharge by reason of unfitness or misconduct (regardless of whether an undesirable or general discharge may be the final result) are offered board hearings. Relative to VII(B), personnel are issued the type discharge as warranted by their entire military record of behavior and performance for the current enlistment irrespective of the specific reason for the discharge action. Cases in which either an honorable or a general discharge *only* may be issued to a member, and those cases in which an honorable or a general may be issued *in lieu of* an undesirable discharge, must be distinguished. In all the latter cases, the respondent is accorded the opportunity for a board hearing (except where not available due to prolonged unauthorized absence) basically because the factor which provides the basis for the discharge, e.g., drug addiction or conviction of a civl offense involving moral turpitude, is also permitted to override the character of the other service which the member has previously rendered and, in essence, deprive him of a discharge under honorable conditions to which the character of that prior service would have entitled him at the normal expiration of his enlistement. In the former cases, this is not true since the factor which provides the basis for the discharge does not override the character of the respondent's previous service. To the contrary, the member discharged pursuant to VIIA–G, inclusive, receives precisely the same character of discharge to which he would have been entitled had his enlistment expired normally on the date of his separation. Accordingly, in the cases falling within the purview of VII A through G, the protections afforded by a board hearing are not required, except in the case of a member with eight or more years of continuous active duty. See discussion under question pertaining to section IX(D)(2) and (6) following.

VI (A) and (B). Why are the standards governing the distinction between a general and an honorable discharge so indefinite?

Answer: The standards are quite well defined in the promulgating directives. In the Navy, to obtain an honorable discharge the individual must have a final average of 3.0 in military behavior and an overall trait average of 2.7 (based upon a 0 to 4.0 scale). In the Marine Corps to obtain an honorable discharge the individual must have a final average mark of 4.0 in conduct and an overall duty proficiency average mark of 3.5 (based upon a 0 to 5.0 scale).

(a) What is meant by "not sufficiently meritorious"?

Answer: Taking into consideration the member's age, length of service, grade and general aptitude, an individual's professional performance and military behavior for the duration of his current enlistment has been deficient to the extent that he has not met the minimum standards prescribed in the previous answer. Good order and discipline dictate that there be a distinction between the individual who is conscientous in his duty performance and in his military behavior and the individual who is a mediocre performer. This distinction is made by the Navy and Marine Corps grading system.

VIII(C). In view of the seriousness of a general discharge, what is the basis for making the right to a board hearing dependent upon an arbitrary period of service like eight years?

(a) If a general discharge is serious enough to warrant this right for members with over eight years' service, in what way is it less serious for those with less service?

Answer: The type discharge directed for unsuitability may be either honorable or general, dependent upon the member's overall behavior and performance throughout his enlistment. The requirement for a board hearing for personnel being considered for unsuitability discharge with 8 or more years service is recognition of the fact that such a member is normally considered to have chosen the military service as a career. Furthermore, such a member having completed 2/5 of the 20 years required for retainer pay, quite obviously has a considerable period of time invested in the service. To terminate his military service without extra consideration would not be equitable. The same rationale is found in 10 U.S. Code 1201 and 1203 which provide that a member with more than 8 years service is entitled to a presumption that any of his physical disabilities have been aggravated by or are the proximate result of the performance of active duty.

IX(D) (2) and (6). What is the justification for allowing the discharge authority to disapprove a recommendation for retention and to order an honorable, much less a general discharge?

Answer: In this connection, it is necessary to understand that by law (10 U.S. Code 5947), all commanding officers of the Navy and Marine Corps are requires ". . . to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under, their command or charge." It is basic that the authority of a commanding officer is commensurate with his responsibility. As various witnesses before the Subcommittee have pointed out, the military commander must have available to him the means for ensuring that individuals who are clearly unqualified, unsuitable or unfit for military service can be eliminated from his organization. To retain such individuals within a military unit would have a detrimental effect on the morale, discipline, welfare and operational effectiveness of the unit. The commander must not be burdened with the unfit, the incompetent and the unqualified. Despite the recommendations of his subordinates, the discharge authority, who is always a general officer in command or higher authority, must be given the ultimate authority to determine when the morale, welfare and efficiency of his command is placed in jeopardy by the presence of an undesirable individual, for he alone has the responsibility therefor. There is no question but that in the exercise of this authority a member may not be deprived of any property right nor of his life or liberty without due process of law. However, no property right is affected where a member is separated from the service with the type of discharge, honorable or general, which he has, by his service, earned.

Based on the foregoing, it is submitted that the authority given by Sections V.A.4 and IX.D.6 of DOD Directive 1332.14, is not only justified but absolutely necessary if a commander is to properly administer his command.

(a) Does this provision represent a repudiation and a disapproval of the policy of the Air Force illustrated by AFR 39–16 and AFR 39–17 and of the Army, by AR 635–208 and AR 635–209?

Answer: Not applicable to the Navy and Marine Corps.

(b) What effect does this provision have on the analogous situation hitherto existing with regard to officers? (See AFR 36–2 and AFR 36–3.)

Answer: Not applicable to the Navy and Marine Corps.

IX(D) (2) and (6). Since a recommendation for retention reflects better upon a member, and amounts in practical effect to a more complete exoneration than does even a recommendation for an honorable discharge, why may a recommendation for an honorable discharge not be changed to a general discharge (subsection 2), whereas a recommendation for retention may be reduced to a discharge of only a general type (subsection 6)?

Answer: The Navy Department believes that it should be able to change a recommended Honorable Discharge to General if the member has not earned the former. This was a point in issue during the coordination of the Directive. The Navy position was stated in UNDERSECNAV memorandum of 15 December 1965 to ASD(M).

(a) What justification for this inconsistency exists?

Answer: There is no apparent justification, since the member should receive the discharge which is appropriate to his true performance.

(b) Does not this provision, in practical effect, effectively negate the substance of the protections secured by this Directive?

Answer: No.

[Air Force Responses]

PROPOSED ANSWERS TO ERVIN COMMITTEE QUESTIONS ON DOD DIRECTIVE 1332.14, DECEMBER 20, 1965, AS AMENDED

Question I: (a) The Air Force contemplates no similar overall directive concerning officers.

(b) The separation of Regular Air Force officers for substandard performance is governed by Chapter 859 of Title 10 (Sections 8781–8787) and for moral and professional dereliction by Chapter 860 (Sections 8791–8797). The rights and procedures are covered by Sections 8785 and 8795. By policy, the same procedures and rights have been extended to reserve officers. Section 1161, Title 10, U.S.C., places limitations on dismissal of commissioned officers. Section 1163 specifies limitations on separation of reserve officers, such as a requirement for a board hearing for those who have at least three years' service. Other statutes cover separation of officers on the basis of promotion passover and other specific causes. Existing legislation, implemented by specific Air Force directives, adequately covers the rights of officers without the need for an overall directive.

Question IV(G): (a) Yes. Discharge certificates are furnished to airmen who reenlist, whether or not there is a break in service.

(b) An extension is merely a continuation of of the term of the then-current enlistment. Accordingly, activities during an extension of enlistment, before discharge, would be considered as having occurred during that enlistment.

Question IV(K): Notwithstanding the apparently permissive language of some present Air Force regulations, the Air Force in 1964 directed that lawyer counsel be provided in all cases without exception. Air Force directives to be issued pursuant to the new DOD directive will continue this rule. The "nonavailability" exception has no application in the Air Force.

Question V(A)(1): Current Air Force regulations require that, before recommending separation action, commanders will make sure that every effort is made to counsel the airman and to vary his military assignment where duty deficiencies are involved; and to insure that reasonable efforts are made to rehabilitate the airman.

Question V(A)(2): Air Force directives require that the airman be made aware of his right to counsel before he considers waiver of hearing.

Question V(A)(4): In the Air Force, no authority below the level of the Secretary of the Air Force may take such action.

Question V(A)(6): (a) In the Air Force, no commander in the field has such authority. Such action is reserved to the Secretary, who acts on the recommendation and advice of the Air Force Personnel Council. Discharge pending appeal is not approved unless the offense is very serious, and it appears that the

appeal either is frivolous or would probably not result in exoneration even if successful.

(b) If an appeal resulted in exoneration after an airman had been discharged, he should apply to the DRB or BCMR, depending upon the nature of the relief desired. These Boards might also consider the case upon their own motion.

(c) Not necessarily. Full reinstatement, or discharge with a form of discharge appropriate to the member's service, would be determined by the Secretary of the Air Force acting through the BCMR.

If conviction is set aside on appeal, and the airman has not been discharged, he will not be discharged.

(a) Air Force implementation of Section V(A)(7) includes acquittal by civil court, or equivalent disposition, to the same extent as comparable action by court-martial.

Question V(A)(7): (a) The Air Force does not use this phrase. We construe it to relate to a decision that precludes, or vitiates, an actual trial on the merits to determine the guilt or innocence of the accused.

(b) The determination whether a bar to discharge action exists is made, upon established legal principles, by the Board upon the advice of its legal member or advisor, subject to review by the convening authority and discharge authority, who act upon the advice of their Staff Judge Advocates.

Question V(A)(8): (a) Either prejudice to the rights of the respondent, or fraud, will permit a new hearing.

(b) In our view, a completed hearing, including findings and recommendations, is contemplated.

Question V (B) and (C): (a) Responsible commanders and board members are directed to limit consideration of the evidence to the question to which it relates.

(b) The Air Force proposes no further controls in this area. The direction to limit consideration of such evidence is felt to be just as adequate a safeguard in the administrative field as it is in the field of criminal law.

(c) Section V(B) pertains only to character of discharge. Accordingly, if under Section (C) consideration of the man's entire record showed discharge to be warranted, he would be discharged. The character of discharge would be determined entirely by the character of his service in the current enlistment, without regard to his "pre-service activities," except to the extent authorized by Section V(B)(2), which relates essentially to facts amounting to fraudulent enlistment. Air Force directives make separate provision for the disposition of fraudulent enlistees, and specifically provide for full hearing and legal counsel.

Question V(C)(1)(b): Under the Air Force concept of administrative board proceedings, material of any kind that is irrelevant is to be excluded from the board's consideration (Par. 9, AFR 11–1).

Question V(D): We know of no reason why these matters should not be considered in mitigation, and our experience indicates that whenever appropriate they would be so raised. Counsel would be expected to do so in a proper case; but Air Force directives do not purport to regulate respondent's strategy or tactics in administrative proceedings.

Section VII(G): a. Yes.

b. Yes. In general, the performance of reasonably proficient airmen not suffering "these disabilities" reflects the required Air Force standard of performance. The Air Force must be able to terminate the service of one who is incapable of performing at that level, whatever the cause of such inability may be.

c. An Honorable Discharge is the normal discharge in this type of case. The fact that an airman is being discharged for unsuitability is not of itself grounds for issuance of a General Discharge (Par. 3, AFR 39–16).

Question VII(I): As previously explained in testimony before the Subcommittee, not all of the matters enumerated in Sections VII(I)(2), (3), (5) and (6) amount to crimes. For example, neither drug addiction nor sexual perversion, of themselves, are criminal offenses. Section B, Paragraph 127c, MCM, does not create any new or additional offense, but merely provides for increased punishment of certain minor offenses if there is a record of previous convictions. Item 7 extends beyond Section VII(G) (1–3) to those matters apparently within the member's control.

(a) The Air Force does not consider trial by court-martial and administrative discharge to be "alternatives" in any usual sense of that term. The Air

Force prohibits resort to administrative proceedings in lieu of disciplinary action.

(b) The standards for determining whether trial by court-martial is appropriate are established by the UCMJ. The standards for administrative action, when trial is not appropriate, are established by the Secretary of the Air Force and promulgated in Air Force directives. In both situations, the decisions are vested in commanders of substantial responsibility, and may be subject to review by higher authority.

(c) Air Force commanders ordinarily give sympathetic consideration to any reasonable request, but the fact such a request is made does not necessarily control the final decision. In the last analysis, such a request is simply an additional matter to be considered by the appropriate authority in the light of all the other circumstances.

(d) No.

As previously explained, the Air Force prohibits administrative action in lieu of disciplinary action. It is contemplated that a decision to take administrative action will not be made until disciplinary action has been considered.

Item 6 is merely a special application of item 5, and includes moral as well as legal obligations.

Question VII(J)(1): The Air Force understands this phrase to mean the practical equivalent of a finding of guilt, whether or not a formal finding is entered. Thus, the intentional forfeiture of collateral—though permitted in most jurisdictions only for minor offenses—is ordinarily regarded as tantamount to conviction, whether or not the local practice requires entry of formal judgment. In other instances, in some States and foreign countries the court, though "finding" the defendant guilty, may defer entry of formal judgment as a matter of probation or leniency.

Despite broader definitions existing elsewhere, for purposes of administrative discharge the Air Force defines offenses involving moral turpitude as *only* those involving sexual perversion, or the illegal use or possession of narcotics (Par. 1.b., AFR 39–22).

(a) and (b) In general, "moral turpitude" is not required if the offense of which a serviceman was convicted would have been punishable, under the UCMJ, by death or confinement for more than one year. However, if the serviceman is adjudged a wayward minor or juvenile delinquent by the civil court, he is not subject to discharge unless his misconduct involved "moral turpitude" as defined above.

(c) Consistency is obtained by measuring all convictions, without regard to the State law, against the UCMJ and the specific definition of "moral turpitude."

Question VII(J)(2): Facts that "might" result in refusal of enlistments are those which, if truthfully stated, would have required either further inquiry, or a waiver, before enlistment could have been accomplished.

(a) Irrevelant or immaterial misrepresentations are not grounds for discharge.

(b) Factors that "otherwise affect the member's eligibility for enlistment," although not grounds for rejection or delay, are those which affect collateral matters such as the member's grade on enlistment, or entitlement to transportation allowances.

(a) No. The burden of speaking the truth is upon the applicant, and the Air Force neither assumes nor routinely seeks to establish that he is a liar. We therefore do not think it proper to preclude separation merely because we have relied, even for a substantial period, upon an applicant's own sworn statement. Of course, once a fraud is discovered action must be taken promptly either to discharge the airman or to validate his enlistment, and failure to act within a reasonable time is a waiver of the disqualification (Par. 4, AFR 39–21).

(b) Action can be taken only during the course of the enlistment concerned. Misrepresentation of age is not a ground for discharge if, at the time of discovery, the service member is statutorily eligible for enlistment in the Air Force (see 10 U.S.C. 8256 & AFR 39–12).

It is believed that use of the word "would" might limit discharge to those cases in which the fraud extended to an absolute disqualification, and would not permit discharge in those cases in which the applicant, though basically disqualified, might have requested a waiver.

Question VIII(D)(1)(c): Yes.

(a) Yes.

(a) There are no special rules in the Air Force for minors, as such. Instead, special screening, counseling and guidance efforts are directed at all first term airmen. Persons unable to make considered decisions—the mentally incompetent—are processed through medical channels.

(b) In the Air Force, this section is not applicable to incompetents.

Question IX(C)(1): When more than one counsel is available the member may have his choice.

Question IX(C)(3): We believe this section includes those persons who might fairly be called "accusers" or complaining witnesses. It must be recognized, however, that we have no power to compel either the attendance or the testimony of persons who are not either members of the military service or Government employees.

(a) Air Force practice provides for the "administrative hold" of material witnesses. However, we have no authority to delay the discharge of a service member whose term of service has expired, merely because he is desired as a witness.

(b) The names of known witnesses are furnished the respondent when he is first notified of the hearing. As previously stated, we have no authority to compel either the attendance or the testimony of such witnesses. When such witnesses are willing to testify without compulsion and their presence is desired, they ordinarily do appear.

(a) Our primary concern must be to maintain the combat effectiveness and integrity of the Air Force. To that end, decisions must be made on the basis of the best information available. To the extent that any source of information is foreclosed, our ability to accomplish our mission is affected. In these circumstances, it is deemed more appropriate to rely upon the good sense and sound judgment of our boards and reviewing authorities, to evaluate properly "evidence" that might not be admissible in a criminal trial, than to close the door entirely to such information.

(b) The primary function of a hearing board is to ascertain facts, and no avenue of investigation should be closed to the board. If, as DOD has recommended, legislation granting the subpoena power and authority for depositions to the hearing boards be enacted, little occasion for resort to ex parte information would remain.

GENERAL QUESTIONS

Question V(A)(2) and VII(B): The Air Force does not share the view that a General Discharge is closely akin to an undesirable or punitive discharge. The effect of an undesirable or punitive discharge is to deprive the recipient of many rights and benefits enjoyed by all persons discharged under honorable conditions. There are no statutory distinctions whatever in the rights and privileges of persons discharged with either of the two forms of discharge with honor. The possible recipient of an undesirable discharge is afforded formal procedural protection because, if the decisions is adverse to him, he stands to lose a great deal. No such situation exists with respect to persons discharged with honor.

We are well aware that the status of the General Discharge is misapprehended by some portion of the public. We believe this to be a matter for education, not for change of the system. We note, too, the probability that persons disposed to indulge preconceived notions as to either the cause for, or the consequences of, a General Discharge would simply transfer their prejudices to any new form or system that might be adopted, as they have done in the past.

Question VI (A) and (B): We believe the standards governing the distinction between service warranting a general and an honorable discharge are clearly stated in paragraph 9, AFR 39–10, and in the regulations relating to separation for particular causes. To the extent these standards may be found "indefinite," the purpose is to permit an Honorable Discharge in cases where the application of a hard and fast rule would result in a General Discharge.

(a) We do not construe this phrase to have any special meaning other than its dictionary definition.

Question VIII(C): It is the fact of separation of a member with substantial service, rather than the character of discharge, that warrants a hearing in these cases.

In general, we believe that the longer a member has served, the greater are the consequences of a decision to separate him, both to the individual and to

the Air Force. Both parties have a substantial investment, not merely of money, in the member with long service, and the interests of both warrant the protection afforded by formal procedures. Under this concept, a cutoff point between the "short-timer" and the career service member must be established somewhere, and we have elected to follow the precedent established by the Congress. Eight years represents generally the completion of two normal enlistments, and is the time fixed by several statutes after which various benefits and privileges may or do accrue to a service member.

(a) A discharge of any kind deprives a member with over eight years' service of rights and benefits not available to persons with less than eight years' service.

Question IX(D) (2) and (6): The Air Force construes Section IX (D) to be permissive, and we do not permit action as outlined in Subsection (6). We do not construe Subsection (6) as any disapproval of the related portions of AFR 39–16 and AFR 39–17, and do not propose to change the substance of those directives.

III. 1966 Supplemental Answers to 1962 Questionnaire and Aide Memoire [1]

[Navy answers]

Navy and Marine Corps Supplemental Responses to 1962 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?

(Note: Statistics have been updated to include related aide memoire questions.)

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[1] The 1962 responses appear in *Hearings on Constitutional Rights of Military Personnel,* before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 20 and 21, March 1, 2, 6, 9, and 12, 1962, 87th Congress, 2d session, beginning at page 827.

Enlisted separations from active duty, U.S. Navy (includes retirements, discharges, and releases from active duty)

Fiscal year	Honorable		General		Undesirable		Bad conduct		Dishonorable		Total separations		Total U.S. Navy strength
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	
1950	129,100	38.9	5,095	1.5	1,647	0.5	5,178	1.6	791	0.2	141,811	42.7	331,860
1951	82,367	12.4	4,912	.7	1,398	.2	2,532	.4	370	.1	91,579	13.8	661,639
1952	130,829	17.8	5,663	.8	2,439	.3	1,893	.3	170	0	140,994	19.2	735,753
1953	148,355	21.0	3,270	.5	2,863	.4	3,112	.4	75	0	157,675	22.3	706,375
1954	143,123	22.3	4,986	.8	3,867	.6	4,013	.6	68	0	156,057	24.3	642,048
1955	214,035	36.9	12,126	2.1	3,529	.6	3,127	.5	76	0	232,093	40.2	579,864
1956	211,114	35.7	9,219	1.6	2,540	.4	1,846	.3	66	0	224,785	38.0	591,996
1957	142,329	23.8	5,431	.9	3,882	.7	2,220	.4	50	0	153,912	25.7	597,859
1958	178,414	31.7	6,901	1.2	4,259	.8	2,784	.5	40	0	192,398	34.1	563,506
1959	142,117	25.7	7,346	1.3	3,846	.7	1,971	.4	30	0	155,310	28.1	552,221
1960	143,165	26.3	6,342	1.1	2,697	.5	1,663	.3	30	0	153,897	28.3	544,040
1961	143,990	26.1	5,866	1.1	2,972	.5	1,521	.3	10	0	154,359	28.0	551,603
1962	154,138	26.4	6,809	1.2	2,474	.4	1,261	.2	11	0	164,693	28.2	584,071
1963	158,398	27.1	5,141	.9	2,535	.4	1,154	.2	2	0	167,230	28.6	583,596
1964	157,658	27.0	4,735	.8	3,142	.5	1,002	.2	2	0	166,539	28.5	584,700
1965	156,045	26.6	5,425	.9	2,854	.5	947	.2	5	0	165,276	28.2	587,183

U.S. Navy undesirable discharges (enlisted personnel)

Fiscal year	Unfitness		Misconduct		Total
	Homosexual	Other	Civil conviction	Fraudulent enlistment	
1950	483	621	543	0	1,647
1951	533	197	423	245	1,398
1952	1,352	338	669	80	2,439
1953	1,335	704	674	150	2,863
1954	1,020	2,105	645	97	3,867
1955	833	2,110	477	109	3,529
1956	933	992	525	90	2,540
1957	1,307	1,349	1,090	136	3,882
1958	1,244	1,562	1,349	104	4,259
1959	1,223	1,428	1,127	68	3,846
1960	958	888	814	37	2,697
1961	1,148	708	1,067	49	2,972
1962	1,175	563	709	27	2,474
1963	1,162	611	736	26	2,535
1964	1,321	941	861	19	3,142
1965	1,365	782	692	15	2,854

U.S. Navy general discharges (enlisted personnel)

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
1962	413	2,952		98	3,081	265	6,809
1963	317	2,715		47	1,817	245	5,141
1964	342	2,435		6	1,686	266	4,735
1965	970	2,738		4	1,366	347	5,425

U.S. Navy officer separations, fiscal years 1962–65

	1962	1963	1964	1965
Strength:				
Regular	48,837	48,724	48,931	49,303
Reserve (active duty)	26,465	26,825	27,469	28,563
Reserve (inactive duty)	166,288	168,898	170,839	175,186
Separations:				
Dismissal by general court-martial: Regular and Reserve (active duty)	3	4	3	1
Resignations under other than honorable conditions to escape trial by general court-martial:				
Regular	9	14	19	5
Reserve (active duty)	16	23	27	8
Revocations and discharges as result of board action:				
Regular: [1]				
Honorable	4	1	2	1
Under honorable conditions	1	2	1	0
Under other than honorable conditions	0	0	0	0
Reserve (active duty):				
Honorable	1	2	3	0
Under honorable conditions	2	1	2	4
Under other than honorable conditions	1	0	1	1
Reserve (inactive duty):				
Honorable	0	1	1	0
Under honorable conditions	6	5	2	1
Under other than honorable conditions	6	6	0	3
Resignations in lieu of board action:				
Regular: [1] [2]				
Honorable	9	20	18	3
Under honorable conditions	10	8	4	5
Under other than honorable conditions	4	11	1	1
Reserve (active duty): [2]				
Honorable	8	14	14	8
Under honorable conditions	19	25	19	5
Under other than honorable conditions	3	4	2	8
Reserve (inactive duty): [2]				
Honorable	1	5	3	1
Under honorable conditions	5	3	6	4
Under other than honorable conditions	21	10	6	6
Resignations by officers not subject to board:				
Regular: [3]				
Honorable	6	9	4	9
Under honorable conditions	2	1	5	5
Under other than honorable conditions	1	0	1	8
Character of separations:				
Honorable:				
Regular and Reserve (active duty)	4,942	7,517	5,717	6,508
Reserve (inactive duty) [4]	10,465	5,003	2,894	1,896
Under honorable conditions:				
Regular	13	11	10	10
Reserve (active duty)	21	26	21	9
Reserve (inactive duty)	11	8	8	5
Under other than honorable conditions				
Regular [5]	14	25	21	14
Reserve (active duty) [5]	20	27	30	17
Reserve (inactive duty)	27	16	6	9

[1] Includes officers with less than 3 years' service separated for medical unsuitability where no remuneration involved.

[2] Includes voluntary resignations submitted by officers subject to board action who had service obligations and desired separation because of reasons which impaired their capacity to serve beneficially.

[3] Includes possible court-martial cases settled by compromise not involving resignation to escape trial, cases where officers resigned to escape effects on career of adverse matter of record, and cases where officers with service obligations desired separation because of reasons not involving misconduct which impaired their capacity to serve beneficially.

[4] Includes routine resignations and discharges of Inactive Reserves separated because of nonparticipation, etc.

[5] Includes resignations under other than honorable conditions to escape trial by general court-martial and separations under other than honorable conditions for the good of the service.

Enlsted discharges, U.S. Marine Corps

	Discharges, honorable and general (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
1962	19,309	21,098	40,407	1,482	982	1,670	44,541
1963	20,498	29,671	50,169	1,310	821	1,584	53,884
1964	20,766	37,149	57,915	1,288	913	2,103	62,219
1965	18,419	33,402	51,821	1,003	766	1,957	55,547

U.S. Marine Corps general discharges (enlisted)

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Total general discharges	2,618	2,265	2,488	1,836
Total discharges for unsuitability	2,304	1,956	2,577	2,207

U.S. Marine Corps undesirable discharges (enlisted)

	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
Unfitness:				
Lewd acts	34	30	9	8
Homo acts	72	40	27	29
Sodomy	274	292	226	208
Indecent exposure	8	8	4	2
Indecent acts with child	14	5	11	6
Other indecent acts	2	4	3	3
Frequent involvement	196	220	267	205
Pattern for shirking	46	55	47	45
Drug addiction or possession	18	6	7	5
Failure to pay debts	44	53	31	23
Other good and sufficient reasons	10	11	17	3
Misconduct:				
Prolonged unauthorized absence	8	7	6	59
Fraudulent enlistment:				
Police record	26	13	17	16
Juvenile record	12	5	7	4
Previous service in another branch	26	14	19	10
Physical defects	0	1	2	0
Marriage or dependents	28	5	13	4
Preservice homosexual acts	46	42	53	55
Conviction by civil authorities	776	678	653	470

Enlisted separations, U.S. Marine Corps

Character of discharge or service	Retirement (all types)	Discharges and releases [1]	Service, USMC (aggregate)
Fiscal year 1962: Average enlisted strength			174,428
Honorable	1,670	37,789	39,459
General (under honorable conditions)		2,618	2,618
Undesirable		1,482	1,482
Bad conduct		963	963
Dishonorable		19	19
Total	1,670	42,871	44,541
Fiscal year 1963: Average enlisted strength			177,485
Honorable	1,584	47,904	49,488
General (under honorable conditions)		2,265	2,265
Undesirable		1,310	1,310
Bad conduct		811	811
Dishonorable		10	10
Total	1,584	52,300	53,884
Fiscal year 1964: Average enlisted strength			176,821
Honorable	2,103	55,427	57,530
General (under honorable conditions)		2,488	2,488
Undesirable		1,288	1,288
Bad conduct		903	903
Dishonorable		10	10
Total	2,103	60,116	62,219
Fiscal year 1965: Average enlisted strength			176,590
Honorable	1,957	49,985	51,942
General (under honorable conditions)		1,836	1,836
Undesirable		1,003	1,003
Bad conduct		763	763
Dishonorable		3	3
Total	1,957	53,590	55,547

[1] Includes discharged for immediate or reenlistment and discharged from enlisted status to accept commissions.

U.S. Marine Corps statistics of officer dismissals

	1962	1963	1964	1965
Strength:				
Regular (including temporary)	10,709	10,588	10,856	11,438
Reserve	5,489	6,257	6,236	5,737
Separations:				
Dismissals by court-martial:				
Regular	1	2		
Reserve	1		1	
Resignations in lieu of trial by court-martial:				
Regular	6	3	4	2
Reserve	4	1	4	1
Revocation of commissions:				
Regular	1	5		
Reserve		1	2	
Discharge for cause:				
Regular				1
Reserve	1			1
Discharge for unfitness, drunk, etc:				
Regular	1			1
Reserve			1	
Resignations in lieu of board action:				
Regular [1]				
Reserve [2]				
Character of separations:				
Honorable:				
Regular	850	1,088	889	574
Reserve	1,341	1,611	1,815	1,916
Under honorable conditions:				
Regular		2		
Reserve	1	5		
Under other than honorable conditions:				
Regular	9	12	4	4
Reserve	7	7	8	2

[1] Included in resignations in lieu of traial by court-martial, Regular.
[2] Included in resignations in lieu of trial by court-martial, Reserve.

Original question 2: Are trends evident with respect to different types of discharges and what are the explanations of those trends?

Navy answer:

1. In the past 15 years the number of punitive discharges steadily declined from about 6000 (1.8% of the active duty strength) in FY 1950 to about 950 (.2% of the active duty strength) in FY 1965. Over the same period the number of undesirable discharges issued has remained fairly constant and represents, on the average, about .5% of the active duty strength. For the past 6 years, all discharges punitive and administrative, have remained fairly constant.

2. The decrease in punitive discharges 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. The increased use of clemency and probation also has a bearing on this trend.

Marine Corps answer:

1. Since 1962, the enlisted strength has fluctuated between 174,000 and 177,000. During this period, undesirable, discharges moved from a high of 1,482 in 1962 to a low of 1,003 in 1965. In 1962, there were 8.5 such discharges per thousand persons and in 1965 there were 5.6 per thousand. 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 input of young men into the Marine Corps and the overall population of the Marine Corps. 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.

2. Punitive discharges during the period 1962 to 1965 have declined from 982 in 1962 to 766 in 1965. This is explained by increased 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 some of these people; but the chronic offender or homosexual and the men convicted by civil authority are beyond the reach of these restorative facilities.

Original 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?

Navy and Marine Corps answer:

1. There is no indication that administrative discharge procedures are being used 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 Department 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 discharge 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 service men by his overt conduct, expeditious administrative discharge under other than honorable conditions is often appropriate.

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 convictions 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.

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 Depatment's procedures for administrative discharge are fair and equitable and that they do not bypass court-martial action.

Orginal question 4: To what extent is there uniformity in the armed services with respect to discharge procedures?

Navy 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 20 December 1965.

Marine Corps answer:

1. Unsuitable, unfitness and misconduct procedures in the Marine Corps are basically the same as those in the Navy with the following exceptions:

(a) The Commandant of the Marine Corps or any commander exercising General Court-Martial jurisdiction can discharge for unsuitability, without a field board, if the member does not have 8 or more years continuous active service, however, the member must be afforded an opportunity to submit a statement prior eral Court-Martial jurisdiction can discharge for unsuitabiilty, without a field to discharge.

(b) The Commandant of the Marine Corps or any commander exercising Genfor unfitness or for misconduct; except that unfitness discharges fo 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, he may do so but only with a discharge under honorable conditions with a honorable or general discharge certificate as warranted.

Original question 5: What are the criteria in each armed service for issuance of a general discharge instead of an honorable discharge?

Navy and Marine Corps answer:

1. The issuance of a general discharge rather than honorable discharge to personnel in the service is for one of two reasons: overall deficiency in performance or 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 performance and/or behavior for honorable dis-

charge is not maintained during the period of enlistment, a general discharge rather than an honorable discharge is issued. Minimum 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 performance marks of 2.7, and an average of not less than 3 in the trait of military behavior. Performance and behavior 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.

(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 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 lacivious acts, homosexual acts, sodomy, indecent exposure, indecent acts with or assault upon a child or other indecent acts or offenses; drug addiction, habituation, or the unauthorized use or possession of narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and other similar known harmful or habit forming drugs and/or chemicals; an established pattern of shirking; an established pattern showing dishonorable failure to pay just debts; an established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents; and unsanitary habits.

(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 adaptability, 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; homosexual tendencies; and financial irresponsibility.

2. Enlisted persons 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. If not a lawyer, a certification as to his qualifications.

(d) To present evidence 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 at headquarters level to insure that action taken is not unduly harsh based upon the facts and circumstances of the individual cases, to insure consistency of action in similar cases, and to insure similar treatment of co-participants in the same act. Final action of the Chief of Naval Personnel may be to dismiss the case, retain in a probationary status, or direct administrative separation.

3. In addition to the above two broad reasons for general discharge (overall performance and specific unfitness, misconduct, or unsuitability) there 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.

4. Recruit training commands are authorized to discharge inapt recruits without reference to department review. General discharges are used in this group when there is evidence of fraudulent enlistment or where the recruits' performance is particularly bad.

5. 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 present evidence as in the Navy. In addition, person 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 commander exercising general court-martial judisdiction. The decision on such cases is normally made by the commander if he approves the recommendation. Should the commander disapprove a recommendation for discharge he may direct retention of the individual concerned. If retention is recommended, and the commander disapproves the recommendation, he may discharge the member with an honorable or general discharge. Likewise all cases involving sex perversion must be referred to the Commandant of the Marine Corps for decision.

6. The Marine Corps grading system is based on a scale of 5 as perfect. An individual, to qualify for an honorable discharge, must have made a final overall average in conduct of 4 and proficiency 3.

Original 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?

Navy and Marine Corps answer:

1. No attempt is made to persuade an individual to waive an administrative board hearing, nor is there any reason to believe an individual would receive a more favorable recommendation were he to waive such a board.

Original 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?

Navy and Marine Corps 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 per cent would represent a fair estimate. In direct answer to the question, it is estimated that in 90 per cent of officer cases, the action taken by the service generally conforms to the recommendations of a board of officers.

2. 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.

Original question 8: To what extent are lawyers made available to represent respondents in board hearings on discharge?

Navy answer:

1. Under Navy procedures when a member exercises his privileges 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. The respondent is privileged to retain civilian counsel at his own expense in all cases.

2. A survey conducted in December 1965 shows that in those cases where the respondent requested counsel, 60% were represented by counsel qualified under Article 27b, UCMJ.

Question 9: What is the workload of the discharge review boards and the boards for the correction of military (nor naval) records? What is the average or median time for review of cases by these boards?

Answer: The following are the workloads for the Navy Discharge Review Board and the Board for Correction of Naval Records from 1962 to date (calendar years):

	1962	1963	1964	1965
Navy Discharge Review Board	1,508	1,565	1,460	1,142
Board for Correction of Naval Records	868	1,074	1,091	1,345

The average or median time for review of cases by the Navy Discharge Review Board is six weeks if the review is on the record and three months if the case involved personal appearance of the petitioner; and of cases by the Board for Correction of Naval Records is 5½ 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: these boards granted relief to the applicant in the following percentage of cases:

	1962	1963	1964	1965
Navy Discharge Review Board	12.80	9.20	9.38	9.89
Board for Correction of Naval Records	50.00	44.00	40.00	58.00

The Board for Correction of Naval Records during calendar year 1965 granted relief in 19% of the cases previously reviewed and denied relief by the Navy Discharge Review Board.

Original 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?

Navy and Marine Corps 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 3 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 these procedures permits confrontation with adverse witnesses and an opportunity to cross-examine them. Occasions for utilizing these procedures are virtually 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. So long as this legislation 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.

Original 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 anticipated will be made the basis of proceedings leading to an undesirable discharge?

Navy and Marine Corps answer:

1. If the person steadfastly denies any misconduct and cooperates fully in the investigation, that person rarely will be involuntarily discharged except by sentence of court-martial and certainly will not be given an undesirable discharge. 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. Since the nature of this type offense is clandestine and secretive and the reluctance of co-participants to testify due to self incrimination, trials by courts-martial is often not feasible even though the respondent has submitted sworn statements attesting to his frequent involvement in perverted acts.

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:

a. *William E. Dresselhaus, Jr., Plaintiff* v. *Douglas H. Pugh, et al., Defendants*, United States District Court for the Northern District of California, Southern Division, Civil No. 43696

Plaintiff was an enlisted man in the United States Navy. He instituted this action in an effort to prevent his separation from naval service seeking a temporary injunction preventing his discharge and a declaratory judgment under 28 USC 2201, 2202, and 5 USC 1009. A temporary restraining order preventing plaintiff's discharge pending the decision in this case was ordered.

Plaintiff alleged that the defendants violated applicable regulations and acted in excess of the statutory authority granted by Congress. He further alleged that the action of the military discharge board was arbitrary and capricious and a denial of due process of law.

The defendants moved to dismiss the complaint, alleging that the plaintiff had failed to exhaust appropriate administrative remedies. Defendants pointed out that plaintiff was free to present his case, following his discharge, before a review board (10 USC 1553), and the Board for Correction of Naval Records (10 USC 1552). Defendants further alleged that plaintiff's discharge was consonant with due process of law, and that there was no basis for the court to prevent the Department of the Navy from enforcing its order.

The record before the Court indicates that plaintiff executed a detailed written statement admitting various homosexual activities. Those admissions resulted in processing under applicable naval regulations (Bureau of Naval Personnel Manual, Article C–10311; Secretary of the Navy Instruction 1900.9). Plaintiff refused to sign a request for discharge and asserted that it was in his best interest to be tried by court-marital. This request was denied, and under protest plaintiff elected to have his case heard before and administrative tribunal. 32 CFR 730.14, 730.15.

Plaintiff's major contention that the defendants violated applicable military regulations by denying his request for court-martial proceedings was resolved adversely to plaintiff in *Unglesby* v. *Zimmy*, Civil No. 43378 (N.D. Calif. 1965). See brief attached infra.

The court held that there was no basis upon which plaintiff could sustain the burden of establishing a likelihood of success on appeal to the District Court. Under those circumstances, judicial intervention prior to the final construction and application of the contested regulations by the administrative appellate boards was considered unwise and unwarranted.

Plaintiff also asserted that he was entitled to review of the discharge board's recommendation by 5 USC 1009. The Court held that this statute was not applicable to the pleadings in this case. See *Reed* v. *Franke*, 297 F. 2d 17, 21 (4 Cir. 1961). The court also held that final resolution of this point was not necessary, since a careful review of the proceedings before the discharge board established that they could not be characterized as either arbitrary or capricious.

The temporary restraining order was discharged, the motion to dismiss granted, the petition for injunctive and declarartory relief denied, and the complaint dismissed. Dated December 1, 1965. Alfonso J. Zirpoli, United States District Judge.

b. *Joan Mary Lewis, Plaintiff* v. *Oliver D. Finnigan, Jr., et al., Defendants,* District Court of the United States for the District of Rhode Island, Civil No. 3372 (February 1965)

In this action plaintiff, enlisted Wave in the United States Navy with the rank of seaman, sought a temporary and permanent injunction enjoining the defendants from proceeding further to discharge her administratively from the United States Navy. Subsequent to the filing of the complaint an order was entered assigning plaintiff's prayer for a temporary injunction to a date for hearing.

On some date prior to September 11, 1964, the plaintiff, following interviews with investigators of the Office of Naval Intelligence, was notified that she was to be given an "Undesirable Discharge by Reason of Unfitness" because of her alleged involvement in indecent conduct with one Catherine Dandeneau who was also a Wave in the United States Navy. By letter dated September 11, 1964, plaintiff through her counsel requested a court-martial hearing on said charge. On September 23, 1964, she was advised in writing by her Commanding Officer that in accordance with the provisions of Art. C–10311 of the Bureau of Naval Personnel Manual it had been determined that trial by court-martial would not be in the best interest of the naval service and that her discharge would be processed administratively. She was then also advised of the possible harmful effects of such a discharge and of her right to have her case heard by a field board composed of no less than three officers appointed pursuant to the provisions of Art. C–10313 of said Manual and that copies of statements made by the said Catherine Dandeneau and by herself concerning said alleged misconduct could be seen by her or her counsel. Subsequently, on September 28, 1964, while reiterating her request for a court-martial, she requested a field board hearing.

Plaintiff was represented by counsel at this hearing which was held on October 2, 1964, and testified in her own behalf. Subsequently, on October 19, 1964, the Chief of Naval Personnel, after a review of the proceedings before said field board, directed that the plaintiff should be separated from the United States Navy with an "Undesirable Discharge by Reason of Unfitness" but that the reason should not be shown in her service record. The instant action was filed on October 28, 1964 and the defendants did not issue said discharge to the plaintiff pending the outcome of the hearing on her prayer for a temporary injunction.

The defendants contended that plaintiff was not entitled to the relief she sought because she had not exhausted her administrative remedies. 10 USCA 1552, 1553.

The court held that a District Court, if it has any jurisdiction at all to review and revise final action by a duly constituted military board, cannot assume to exercise such jurisdiction until the plaintiff has exhausted the review processes which the statute provides for the military establishment. *Beard* v. *Stahr*, 1962, 370 US 41; *Reed* v. *Franke*, 1961, 4 Cir., 297 F.2d 17; *Michaelson* v. *Herren*, 1947, 2 Cir., 242 F.2d 693. Plaintiff therefore could not contend that she was excused from exhausting said military processes or review on the ground that since no discharge had been issued to her her rights of review had not matured, because this result had been brought about by her own act in instituting this action. *Michaelson* v. *Herren*, supra.

Therefore since it was clear that the plaintiff had not exhausted all her administrative remedies, it followed that the court was without jurisdiction to grant the relief sought by her.

Accordingly, the plaintiff's motion for a preliminary injunction was denied. Dated February 23, 1965. Judge Day, United States District Judge.

c. *Jerome Neiser, Plaintiff* v. *S. M. Zimney, et al., Defendants,* United States District Court for the Northern District of California, Southern Division, Civil No. 43107.

Plaintiff filed a Complaint for Injunction and Temporary Restraining Order. In August, 1964, plaintiff, while a member of the Naval Service and stationed at Subic Bay, Philippines, was said by two witnesses, also enlisted members of the Naval Service, to have performed a homosexual act upon a third enlisted member of the Naval Service; plaintiff was subsequently questioned by agents of the Office of Naval Intelligence and denied the said accusation, as well as denied committing any homosexual act during the period that he had been on active duty in the United States Naval Service. Plaintiff's then Commanding Officer, after securing a waiver of rights from plaintiff, recommended his separation from the United States Naval Service with an undesirable discharge. On March 4, 1965, United States District Judge Wollenberg granted an order to dismiss

this action without prejudice on stipulation that plaintiff's counsel would be given 10 days notice by the Navy of final administrative action being taken against plaintiff.

d. *James Alton Petry, Plaintiff* v. *United States, Defendant*, Civil Action, Temporary Restraining Order, United States District Court for the Northern District of California

Although the Judge Advocate General has not yet received a summons and complaint filed by the plaintiff in this case, it is understood that the temporary restraining order requested was predicted on the basis that the plaintiff was denied a fair hearing and misled by agents of the Office of Naval Intelligence in waiving his privilege to a hearing. An examination of his service record thoroughly reflects that he was afforded the privilege of a Field Board pursuant to Article C–10313, Bureau of Naval Personnel Manual after having subscribed to a two page written admission concerning homosexual behavior, but he elected to waive such privilege. Upon being transferred from Sasebo, Japan, where the alleged homosexual behavior occurred, to Naval Station, San Francisco, where he was to be discharged from the naval service, he then made such complaints as herebefore described. The Chief of Naval Personnel feels that under the circumstances of this case no further consideration should be given toward convening a Field Board for Petry since such request should have been made while he was stationed in Japan, at the situs of the alleged offenses. However, the Judge Advocate General interposed no objection to the United States Attorney advising the Federal District Judge that a Field Board will be convened for Petry's case if the Judge deems such action is indicated. Case on court calendar for early January.

e. *Donovan Edward Ruby* v. *Secretary of the Navy*, United States District Court for the Northern District of California, Southern Division, Civil No. 43638

Plaintiff had filed a complaint for order to show cause why a proper discharge should not be issued to him with back pay by Secretary of the Navy since he was issued an undesirable discharge in 1931 without benefit of a court-martial. In 1962, Plaintiff had filed a similar complaint in the same District Court which was dismissed as being barred by Statute of Limitation. *Ruby* v. *Korth*, USDC, N.D. of California, Civil No. 40984. Accordingly in the instant action the Judge Advocate General recommended to the Department of Justice that the defense of res judicata be asserted. On June 16, 1965, Judge Wollenberg granted the Government's motion to dismiss on the ground that the issues were res judicata. Ruby is now suing the Secretary of the Navy for $2,225,000 in propria personna for false arrest and imprisonment as a result of a collateral matter.

f. *David E. Small* v. *Captain T. E. L. McCabe, et al.*, United States District Court for the Northern District of California, Southern Division, Civil No. 43298

This action commencer by plaintiff obtaining a temporary restraining order and filing a complaint for declaratory relief and injunction to prevent his discharge from the naval service. The Chief of Naval Personnel had directed that Small be discharged with a General Discharge pursuant to Article C–10312, Bureau of Naval Personnel Manual. The Government moved to dismiss the complaint in that Plaintiff had not exhausted administrative remedies, 10 USC 1552–53. Plaintiff and Defendant stipulated in open court that action be dismissed without prejudice and Judge Zirpoli granted such order and vacated the temporary restraining order—May 26, 1965.

g. *William Ernest Unglesby, Plaintiff* v. *S. M. Zimmy, et al.*, United States District Court for the Northern District of California, Southern Division, Civil No. 3378

Plaintiff, an enlisted man in the United States Navy, instituted this action in an effort to prevent his separation from the naval service. He sought a temporary injunction preventing his discharge and a declaratory judgment under 28 USC 2201, 2202, and 5 USC 1009. A temporary restraining order preventing plaintiff's discharge pending the decision in this case was ordered.

Plaintiff alleged that the regulations applied by the administrative discharge board violated the fifth and sixth amendments of the United States Constitution. He further alleged that the defendants violated applicable regulations and acted in excess of the statutory authority granted by congress.

The defendants moved to dismiss the complaint, alleging that the plaintiff had failed to exhaust appropriate administrative remedies. Defendants pointed out that the plaintiff was free to present his case, following his discharge, before a

review board (10 USC 1553), and the Board for Correction of Naval Records (10 USC 1552). Defendants further alleged that the proceedings accorded the plaintiff were consistent with due process of law and that there was no basis for the court to set them aside or otherwise prevent the Department of the Navy from enforcing its order.

In November of 1964 the plaintiff was advised by his commanding officer that he had been accused of participating in homosexual acts. The plaintiff's case was processed according to applicable naval regulations (Bureau of Naval Personnel Manual, Article C–10311; Secretary of the Navy Instruction 1900.9). The plaintiff was then transferred to the United States Naval Receiving Station, San Francisco, California, to await action by the Chief of Naval Personnel. Plaintiff refused to sign a request for discharge and asserted that it was in his best interest to be tried by court-martial. The Commandant of the Twelfth Naval District denied the plaintiff's request and ordered that his case be processed administratively. Under protest the plaintiff elected to have his case heard before an administrative tribunal. 32 CFR 730.14, 730.15. Plaintiff requested that three witnesses be present at the hearing. His request was denied, and he was informed that there was no provision for compulsory process to insure the attendance of civilian witnesses, but that he might request their voluntary appearance.

The record before the Court alleged that the plaintiff appeared before the administrative tribunal; that statements of the three witnesses requested by the plaintiff, as well as his own, were introduced by the prosecution; that counsel objected to the introduction of these statements and also requested the board to refrain from considering these documents; that the board found that the plaintiff had participated in homosexual acts and recommended his discharge; and that if his confession were excluded, it was clear that the board could not have reached this conclusion without relying on the documents which had been received over the plaintiff's objection.

The Chief of Naval Personnel ordered that the plaintiff be separated from naval service with a General Discharge under Honorable Conditions by reason of unfitness.

The court held inter alia that the courts of this nation have indulged a traditional reluctance to consider questions presented by the actions of administrative agencies prior to the exhaustion of the authorized administrative procedures provided for their settlement; that judicial decisions dealing with the problems presented by the exhaustion doctrine do not provide any clear-cut guide for the resolution of these questions (3 Davis, Administrative Law Treatise 56, (1958)); that it is, however, quite clear that in certain circumstances the judicial policy which requires the exhaustion of administrative remedies before resort to the courts should not be applied in a rigid or inflexible manner. See *Bancroft* v. *Indemnity Ins. Co. of North America*, D.C. 203 F. Supp. 49. The court said that it was convinced that there are certain circumstances which would justify review in this type of case prior to review by the Discharge Review Board or the Board for Correction of Naval Records; that neither of these agencies for administrative review would consider the plaintiff's case until after completion of his discharge; that regulations of the Navy Discharge Review Board preclude review until after discharge; that the Board for Correction of Naval Records specifically refused to take jurisdiction before the plaintiff was discharged; that the test be applied by a court faced with a request for a stay of administrative action pending judicial review is well stated in *Covington* v. *Schwartz*, 230 F. Supp. 249, aff'd 341 F. 2d 537 (9th Cir. 1965); that that case sets forth a four point test for granting a stay of administrative action in military discharge cases; that the moving party must establish: (1) a likelihood of probable success on the merits of the appeal in the District Court; (2) irreparable injury to the petitioner unless the stay is granted; (3) an absence of substantial harm to other interested persons; (4) no harm to the public interest.

The Court further stated that the facts in this case indicated a situation substantially similiar to the *Covington* case; that the decision of the Court of Appeals compelled the conclusion that this plaintiff would indeed suffer irreparable damage if discharged; that it could not be said that his continued presence in the Navy pending review would pose a risk of substantial harm either to the public or other interested persons; and that the resolution of this case then turned on whether or not the plaintiff had demonstrated that there was a likelihood that he would prevail on the merits of his appeal to the court.

The court further stated that the court had reviewed the record that was presented to the administrative board in the instant case, and assuming there were no constitutional infirmities, it was satisfied that there was substantial admis-

sible evidence before the administrative board to sustain its recommendation. The court was also convinced that the plaintiff had not sustained the burden of demonstrating a substantial likelihood of success on appeal.

The plaintiff in this case alleged that the hearing accorded him by the administrative board denied him the opportunity to confront and cross-examine the witnesses against him, in violation of the fifth and sixth amendments to the United States Constitution. The Court concluded that under the administrative procedure applied in the instant case, that allegation did not present a substantial constitutional challenge which was sufficient to justify staying the plaintiff's discharge.

The court finally held that it was forced to the conclusion that the plaintiff's challenge to the constitutionality of the procedures applied in the administrative hearing of his case must fail. Since the plaintiff had not demonstrated a likelihood of success on appeal, the temporary restraining order was discharged, the stay denied, the motion to dismiss granted, and the complaint dismissed. Dated November 15, 1965. Alfonso J. Zirpoli, United States District Judge.

h. *Edsel D. Justus, Plaintiff* v. *S. M. Zimny, et al., Defendants*, United States District Court for the Northern District of California, Southern Division, Civil No. 43397

Plaintiff, an enlisted man in the United States Navy, instituted this action in an effort to prevent his separation from the naval service. He sought a temporary injunction preventing his discharge and a declaratory judgment under 28 USC 2201, 2202 and 5 USC 1009. A temporary restraining order preventing plaintiff's dicharge pending the decision in this case was ordered.

Plaintiff alleged that the defendants violated applicable regulations and therefore he is uncertain of the basis upon which the discharge rests. He further alleged that the regulations applied in his case are repugnant to the United States Constitution.

The defendants moved to dismiss the complaint, alleging that the plaintiff had failed to exhaust appropriate administrative remedies. Defendants pointed out that the plaintiff was free to present his case, following his discharge, before a review board (10 USC 1553), and the Board for Correction of Naval Records (10 USC 1552). Defendants further alleged that the plaintiff's discharge was consonant with due process of law, and that there was no basis for the Court to prevent the Department of the Navy from enforcing its order.

The plaintiff was advised that he was being considered for discharge and that he signed a waiver stating that he did not desire to make a statement in this regard. Subsequently, plaintiff retracted this waiver and requested a trial by court-martial. The Department of the Navy informed plaintiff that he would be honorably discharged with the type of discharge warranted by his service record. This discharge had been ordered pursuant to 32 CFR 730.10. The plaintiff had also been informed that the applicable regulations did not require a hearing prior to discharge and that he had waived the privilege of submitting a statement in his own behalf.

The court held that the problem presented by this case could be distinguished from the situation in *Unglesby* v. *Zimny*, Civil No. 43378, since in this case the plaintiff would be separated from the Navy with an honorable discharge by reason of unsuitability; that the test to be applied by a court faced with a request for a stay of administrative action pending judicial review is well stated in *Covington* v. *Schwartz*, 230 Supp. 249, aff'd. 341 F. 2d 537 (9th Cir. 1965); that a threshold requisite for such a stay is a showing of irreparable injury if the stay is not granted; that in discussing the problem presented in that case, the Court of Appeals noted the importance of the injury and stigma attached to an undesirable discharge; that the same injury and stigma are not present when an honorable discharge is involved; that even if the Court were to conclude that the discharge in this case did constitute irreparable injury, the plaintiff had failed to sustain the burden of demonstrating a likelihood of probable success on appeal to the District Court; that the constitutionality of the discharge procedure pursuant to 32 CFR 730.10 was fully discused in *Reed* v. *Franke*, 297 F.2d 17 (4th Cir. 1961); that the Court was in full accord with the view expressed in that opinion, that due process is satisfied if the individual is given a hearing at some point in the administrative process; that the record in the instant case reflected that such a hearing in the administrative process was available to this petitioner; that the Court would not speculate as to the procedural challenges which might be advanced after that hearing had been held.

The temporary restraining order was discharged, the motion to dismiss granted, the petition for injunction and declaratory relief denied, and the complaint dismissed. Dated November 15, 1965. Alfonso J. Zirpoli, United States District Judge.

i. *Mitchell Van Bourg, Plaintiff* v. *Secretary of the Navy, Defendant*, United States District Court for the District of Columbia, Civil No. 2920–65

On February 7, 1942 plaintiff enlisted in the United States Naval Reserve. Plaintiff attended Midshipman's School at Notre Dame, Indiana, and on May 31, 1944, was commissioned as a Ensign in the United States Navy. On January 18, 1946, plaintiff was released from active duty and transferred to the inactive Naval Reserve.

On or about August 10, 1951, plaintiff received from the Commandant, Twelfth Naval District, a communication charging him with alleged conduct or associations casting doubt upon his loyalty. This communication stated that the procedure to be followed was set forth in Secretary of the Navy letter Pl–6 of 10 January 1949, NDB 49–15 and Bureau of Naval Personnel Circular Letter No. 4–49, Pers. 32, Pl–6 of 10 January 1949, NDB 49–27.

On September 11, 1951 plaintiff submitted a resignation "for the good of the Service." On October 19, 1951 the Secretary of the Navy accepted the resignation and issued to plaintiff a discharge under other than honorable conditions from the United State Naval Reserve.

On April 12, 1963 plaintiff filed an application for review with the Navy Discharge Review Board. On September 3, 1963 a hearing was held on this application at which plaintiff appeared in person and testified fully on all charges contained in the August 10, 1951 letter of charges.

On September 26, 1963, the Navy Discharge Review Board entered a decision that "no change, correction or modification is warranted". On June 3, 1964, an application for review was filed with the Board for Correction of Naval Records. The record of proceedings before the Navy Discharge Review Board was made a part of this application. On September 29, 1965, the Board for Correction of Naval Records denied the application.

A compliant was filed by plaintiff for declaratory judgment directing defendant to rescind plaintiff's discharge under conditions other than honorable and changed the discharge to honorable.

The Judge Advocate General has submitted views and suggested defenses to this action to the Department of Justice. The primary defense indicated is that there is no merit to plaintiff's complaint on which relief may be granted since all procedural due process pursuant to pertinent regulations was observed. An additional suggested defense is laches since the plaintiff delayed almost 12 years before initiating any action in this matter. The date for hearing on the court calendar is not known at this time.

j. *Thomas Francis Walsh* v. *Douglas H. Pugh, et al.*, United States District Court for the Northern District of California, Southern Division, Civil No. 43674

Walsh, a Seaman, United States Navy, assigned to USS HANCOCK (CVA–19) was alleged to have been involved in homosexual activities and upon interrogation by Special Agents of the Office of Naval Intelligence, he admitted to a behavior pattern clearly within the purview of the Bureau of Naval Personnel Manual, Article C–10311 which authorizes the discharge of enlisted personnel by reason of unfitness with an undesirable discharge. The Article provides that such personnel are entitled to have their case heard by a board of not less than three officers, that they may appear before such board, that they may be represented by counsel and may submit statements in their own behalf. Walsh waived, in writing, the foregoing privileges and was transferred to the U. S. Naval Station, Subic Bay, Philippines, on April 13, 1965 for completion of administrative processing and he was subsequently transferred to the U. S. Naval Receiving Station, Treasure Island, California to await action of the Chief of Naval Personnel upon the recommendation of the Commanding Officer, U. S. Naval Station, Subic Bay, that Walsh be discharged with an undesirable discharge by reason of unfitness.

Walsh's record of proceedings was in accordance with naval regulations relative to the facts of his case; however, he asserted that, notwithstanding a showing of regularity on the face of the record, he was coerced into signing admissions of the improper behavior.

He brought the usual complaint for declaratory judgment and for a temporary restraining order. However, inasmuch as plaintiff had not exhausted his administrative remedies, Judge W. T. Sweigert, United States District Judge, on July 29, 1965 dismissed the instant complaint and action without prejudice so that such remedies might be invoked.

k. *Michael Anthony Vitelli* v. *H. D. Warden, Commanding Officer, U.S. Naval Hospital Corps School, San Diego, et al.*, United States District Court for the Southern District of California, Civil No. 3323-SD-C

The plaintiff, Vitelli, made a sworn statement on April 5, 1965 to the Office of Naval Intelligence, Eleventh Naval District, admitting homosexual acts prior to and after entering the Naval Service. On April 12, 1965, Vitelli requested that his case be heard by a Field Board of Officers pursuant to the Bureau of Naval Personnel Manual. Vitelli through his appointed Navy Defense Counsel and individual civilian counsel subsequently requested a general court-martial vice and Field Board; however, because of Vitelli's sworn statement and three other corroborating sworn statements from other persons, the request for a general court-martial was denied since it was determined that administrative action was appropriate under the circumstances of the case.

Because of the instant complaint for declaratory judgment, injunction and temporary restraining order, the Field Board has been held in abeyance pending the disposition of the complaint. The government filed a motion to dismiss on the usual ground of failure to exhaust administrative remedies.

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 and Marine Corps answer:

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.

2. 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. 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.

3. 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.

4. 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.

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) *Calendar year 1964*

	Navy	Marine Corps
Total SPCM's	8,458	4,964
Total SPCM's which resulted in an approved BCD	1,142	1,032
Number in which DC was a lawyer	517	100
Percentage of total BCD-SPCM	45.27	9.68
Number in which TC or president was a lawyer	312	97
Percentage of total BCD-SPCM	27.32	9.39
Total SPCM's which did not result in an approved BCD	7,316	3,932
Number in which DC was a lawyer	2,971	274
Percentage of total non-BCD-SPCM	40.60	6.96
Number in which TC or president was a lawyer	1,509	288
Percentage of total non-BCD-SPCM	20.62	7.32
Percentage of total SPCM in which DC was a lawyer	41.23	7.53
Percentage of total SPCM in which TC or president was a lawyer	21.52	7.75

(2) *Calendar year 1965 (to approximately Dec. 1)*

	Navy	Marine Corps
Total SPCM's	8,460	4,400
Total SPCM's which resulted in an approved BCD	783	747
Number in which DC was a lawyer	397	91
Percentage of total BCD-SPCM	50.70	12.18
Number in which TC or president was a lawyer	202	93
Percentage of total BCD-SPCM	25.79	12.44
Total SPCM's which did not result in an approved BCD	7,677	3,653
Number in which DC was a lawyer	3,159	356
Percentage of total non-BCD-SPCM	41.14	9.74
Number in which TC or president was a lawyer	1,975	362
Percentage of total non-BCD-SPCM	25.72	9.90
Percentage of total SPCM in which DC was a lawyer	42.03	10.15
Percentage of total SPCM in which TC or president was a lawyer	25.73	10.34

(3) Data as to the extent legally trained counsel were made available to accused before summary courts-martial is not available.

Question 16: What are the effects on a serviceman's career of conviction by summary or special courts-martial?

Navy 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 behavior 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. 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 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 4 years and the individual must have no mark below 3.0 in any trait.

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, asignments must be on a very selective basis, which normally eliminated an individual with a substandard conduct record.

Marine Corps answer:

1. Same as Navy answer, except the Corps uses 5.0 as a top grade whereas the Navy uses 4.0 as its top grade.

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: For the past several years, the Navy has conducted a vigorous campaign to assure that commands having lawyers attached, will make these lawyers available to act as counsel for special courts-martial. As a result, practically

every general court-martial authority and other commands with lawyers attached to the staff, have instituted a program for providing counsel for special courts-martial. These programs vary depending upon the individual circumstances and the number of lawyers available. As a result of these programs, lawyers were provided as defense counsel in more than 3,700 special courts-martial in 1964. In over 2,200 of these cases a lawyer also served as trial counsel and/or as president.

Question 18: Has the specialized law officer plan been successful? If so, to what extent has it been adopted?

Answer: Subsequent to a successful Pilot Judiciary Program the U.S. Navy-Marine Corps Judiciary Activity was established on 9 May 1962 on a world-wide basis to cover all general courts-martial convened within the Navy and Marine Corps. It was activated on 1 July 1962 and eight branch offices were in operation on 15 September 1962. At the present time the Judiciary Activity is functioning with seven branch offices instead of eight as originally established and is manned by a complement of twelve officers (7 Navy and 5 Marines, including the Director).

Prior to the initial establishment of the Pilot Judiciary Program, a study showed that about 1 out of 12 general court-martial cases required corrective action due to law officer error. The ratio of error to cases reviewed since 1 July 1962 up to 30 November 1965 has been reduced to about 1 out of 39 or 2.6%.

With the benefit of three years experience under the Judiciary Program, the objective that led to its adoption is being realized. That is, to improve the quality of judicial proceedings through increased competency of law officers.

Question 19: Under the 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 officers assigned to the Judiciary Activity are assigned directly to the Judiciary Activity, which is independent of any of the commands serviced. The Judge Advocate General is the regular reporting senior for the officers so assigned. As such, the Judiciary Officer is completely independent to any convening authority and under the command of the Judge Advocate General.

Question 20: Under the 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: Article 26a, of the Code, and paragraph 4e 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:

a. 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. Appointment of a civilian as a judge of a military court would not only be new but it would be an abrupt departure from our military tradition.

b. 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.

c. 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.

d. 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. Particularly is the true in areas of extended military engagements involving hostilities such as is being currently experienced in Viet Nam.

The experience under the present judiciary program and the judicial experience of military judges as a result of devoting their full time to this duty shows that the present system is functioning in keeping with the highest traditions of military justice.

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: 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 several instances in past few years in which the U.S. Court of Military Appeals and Navy Boards of Review have 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 instance, most of these cases arose in one command where a pamphlet of orientation instructions for court members contained a section which was regarded by appellate authorities as possibly improperly influencing court members in adjudging the sentence.

Question 22: Has the practice of negotiated pleas used by the Army and Navy been successful? If so, why is it not used by the Air Force?

Answer: The practice of negotiating guility 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. Although the number of negotiated pleas in relation to total guilty pleas is modest, experience indicates that it has definitely resulted in substantial savings of time and expense of trail without impinging upon substantial justice. The following figures for Navy and Marine Corps for Fiscal Year 1964 and 1965 set forth the number of negotiated pleas in relation to total number of guilty pleas.

	1964	1965
General courts-martial:		
Number of guilty pleas	240	181
Number negotiated	88	73
Special courts-martial resulting in BCD's:		
Number of guilty pleas	2,154	1,947
Number negotiated	65	64
Non-BCD specials:		
Number of guilty pleas	9,499	9,433
Number negotiated	668	518

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 1961?

Answer:

NOTE: No summary court-martial figures are available.

Fiscal year	Percentage of guilty pleas, GCM	Percentage of guilty pleas, BCD-SPCM
1962	64	82
1963	47	83
1964	55	84
1965	53	86

Question 24: What are the percentages of convictions for each type of court-martial—summary, special, and general—for each year since 1961?

Answer:

Fiscal year	Percentage of GCM convictions	Percentage of SPCM convictions	Percentage of SCM convictions
1962	95	95	97
1963	94	96	97
1964	93	96	96
1965	94	97	96

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 approximately 100 cases selected at random in each of the following categories. The following were found to be typical sentences:

Unauthorized absence:	
1st offense:	
1 to 15 days	Confinement 20 days, forfeiture of $45.
15 to 30 days	Confinement 48 days, forfeiture of $85.
30 to 60 days	Confinement 123 days, forfeiture of $202.
2d offense:	
1 to 15 days	Confinement 38 days, forfeiture of $120.
15 to 30 days	Confinement 65 days, forfeiture of $185.
30 to 60 days	Confinement 152 days, forfeiture of $260.
3d offense:	
1 to 15 days	Confinement 92 days, forfeiture of $226.
15 to 30 days	Confinement 180 days, forfeiture of $265.
30 to 60 days	Confinement 180 days, forfeiture of $265, BCD.
Failure to obey offenses:	
1st offense	Confinement 26 days, forfeiture of $52.
2d offense	Confinement 38 days, forfeiture of $90.
Larceny:	
1st offense	Confinement 68 days, forfeiture of $102.
2d offense	Confinement 162 days, forfeiture of $227, BCD.
Assault:	
1st offense	Confinement 26 days, forfeiture of $70.
2d offense	Confinement 82 days, forfeiture of $180.

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 boards of review operating under the Uniform Code of Military Justice?

Answer: At the present time, the Navy has three boards of review each consisting of three members. Also two alternate members are provided to assist as the need arises. Of the eleven board members, four are civilians. Each board of review has one civilian member and two military members (one naval officer and one Marine Corps officer). The alternates consist of one civilian member and one military member.

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: Civilian board of review members are not rotated. Military board of review members are assigned normal tours of duty, three to four years.

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:

Fiscal year	Percentage of board of review disapproval of findings		Percentage of board of review reduction of sentence	
	GCM	BCD-SPCM	GCM	BCD-SPCM
1962	4	4	19	11
1963	5	3	23	10
1964	5	3	29	13
1965	4	2	28	11

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: No summary or non-BCD special court-martial figures are available.

Fiscal year	Percentage of convening and supervisory authority disapproval findings		Percentage of convening and supervisory authority reduction sentence	
	GCM	BCD-SPCM	GCM	BCD-SPCM
1962	1.0	3	48	66
1963	1.0	3	42	59
1964	.4	3	44	68
1965	1.0	2	47	62

Original 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?

Navy and Marine Corps 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 numberous 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 indicates that it is effective in the majority of cases. Although statistical analysis of restoration success has not been compiled, 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.

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: For many years the Navy has had in operation an active policy to cope with the unavailability of bail in the court-martial system. An attempt to reduce pretrial confinement to a minimum was undertaken by enforcement of a policy of confining only when considered necessary to insure presence for trial, and vigorous efforts to expedite trial of those persons confined. Decisions of the U.S. Court of Military Appeals which had the effect of enforcing strict compliance with UCMJ Articles 10 and 33 have impressed upon each command the obligation to strictly limit 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. In general the criteria used in determining whether jurisdiction should be exercised by military tribunals or Federal civil tribunals is as follows: Whether the offense was committed on or off a military reservation, whether the offense involves special factors relating to the administration and discipline of the Naval Establishment; whether or not all suspects are subject to the Uniform Code of Military Justice; whether or not all victims are military personnel or dependents of military personnel residing on a military installation.

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.

3. By Secretary of Navy approval four persons have been tried by general or special courts-martial in past two years for offenses previously tried in state courts. By approval of the cognizant general courts-martial authorities, five persons have been tried by summary courts-martial and 19 persons awarded nonjudicial punishment in past two years for offenses previously tried in State courts.

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 Federal district courts jurisdiction over misconduct overseas by civilian dependents and employees accompanying the armed services in peace time?

Answer: Accompanying the armed forces of the United States in foreign countries are large numbers of civilians, principally technicians and dependents, whose presence abroad is essential to the effective defense of the free world. These civilians have an intimate and direct relationship with the military forces and are for all practical purposes members of the military establishment. Most status of forces agreements, recognizing the unique position which these civilians occupy in receiving states, place upon United States military authorities a general responsibility for their behavior.

Until 1960 United States responsibilities under these agreements were discharged by exercising court-martial jurisdiction over civilians serving with, employed by, or accompanying the armed forces outside the United States. In that year decisions of the Supreme Court (*Kinsella* v. *Singleton*, 361 U.S. 234; *Grisham* v. *Hagan*, 361 U.S. 278; *McElroy* v. *Guagliardo*, 361 U.S. 281) declared this exercise of jurisdiction unconstitutional in peacetime for crimes.

The exercise of jurisdiction by foreign courts over offenses committed by United States Civilians overseas is not a wholly adequate substitute for United States jurisdiction. This is so because (1) the prospect of trial by foreign tribunals utilizing foreign procedures is not conducive to good morale; (2) foreign tribunals occasionally do not wish to accept jurisdiction of cases involving offenses in which the other parties involved are exclusively members of the American military establishment in the foreign country; (3) the punishment which is authorized or imposed by some foreign tribunals for certain offenses may be inadequate by United States standards to deter the commission of those offenses; and (4) there are petty offenses which are and should be punishable by some public authority according to the standards of the United States but which are not offenses at all against any foreign law, and therefore beyond the reach of any tribunal if courts-martial not be empowered to exercise jurisdiction over them.

Congressional action is needed to fill the jurisdictional gap which now exists for misconduct overseas by civilians.

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: A sufficient need has not been found which would justify the enactment of legislation to give district courts such jurisdiction in the light of the difficult and burdensome administrative problems that would ensue.

NAVY AND MARINE CORPS SUPPLEMENTAL RESPONSES TO 1962 AIDE MEMOIRE

Original question 1: 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?

Navy 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.

3. 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.

Marine Corps answer:

1. Decline in general courts-martial.

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 1: 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; a fairly constant caliber of personnel input; and the Navy's centralized system of personnel administration.

Original question 3: 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?

Navy and Marine Corps 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 type and character of the discharge issued would be that recommended by the administrative board, or a higher type if deemed appropriate by the discharge authority.

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?

Navy and Marine Corps answer:

1. The code is complex, but perhaps it has to be. We certainly agree that all constitutional rights of service men 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.

Original question 3: 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?

Navy and Marine Corps 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. (Usually an accused whose record includes prior court-martial convictions has also received 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-Maritla provisions are applicable only in a limited number of cases involving chronic military offenders. The typical administrative discharge action under which the service member may be issued a discharge under other than honorable conditions for misconduct is one where the member has a record of misconduct over a period of time and he has received Article 15 punishment and/or courts-martial convictions, none of which resulted in a punitive discharge. In most such cases punitive action has been taken on specific offenses and there remains no offense for which the respondent in an administrative discharge action may demand trial. The misconduct consists of the member's record of frequent involvement and the service is justified in concluding that he is not fit for further service and should be able to properly classify him as undesirable.

Original question 4: Related aide memoire question: With repect to the Navy answer to question 4, it will be noted that the Navy points our 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 perferable 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?

Navy answer:

1. The major difference in procedure between the Navy and the other services in administrative discharges now appear to be only 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 an officer exercising general court-martial authority. The consideration of all undesirable discharge cases at the headquarters level has proven to be a most equitable system, insuring consistency of action in similar cases.

Original question 5: Related aide memoire question: If a general dicharge 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?

Navy and Marine Corps answer: 1. All members being considered for discharge by reason of misconduct or unfitness are afforded the privilege of an administrative board hearing. The type discharge is determined by board action. In the majority of unsuitability discharges a duly diagnosed character and behavior disorder is the reason for discharge. In these cases a board hearing would serve no purpose.

Original question 5: 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. It not, why not?

Navy and Marine Corps answer: 1. It is believed 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 a 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 perform adequately in an environment which is shared by practically all young men at some time in their adult life.

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"?

Navy and Marine Corps answer:

1. Except in the cases of discharges by reason of unfitness, misconduct, or for security or certain unsuitability cases referred to headquarters, 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 or the Commandant of the Marine Corps. Such criteria is included in the answer to original question 5.

2. Any disabilities incurred are a result of separation prior to completing the contracted period of service rather than as a result of the type of discharge if it is honorable or general. Personnel separated with either an honorable or general discharge by reason of unsuitability, unfitness, misconduct, or for security reasons are not recommended for reenlistment. Those separated by reason of misconduct, unfitness, or for security reasons are subject to checkage of pay, on a pro-rata basis, for any current reenlistment bonus received. For all other reasons (expiration of enlistment, convenience of the Government, etc.) there are no disabilities attached to a general discharge. The only difference is that an honorable discharge is a separation from the service with honor and an indication of industrious performance of duty. A general discharge indicates that the individual's service was not sufficiently meritorious to warrant an honorable discharge.

3. Since one of the principal elements of the general discharge concept is to encourage 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.

Original question 5: Related aide memoire question: The Navy inidcates 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?

Navy answer: 1. The use of the word "Proficiency" was an unfortunate choice in answer to the original sub-committee question. The determiniation as to whether an honorable or general discharge is given is based on an over-all evaluation of a man's marks in professional performance, military behavior, leadership and supervisory ability, military appearance, and adaptability. A man needs only to be evaluated as adequate to earn an honorable discharge. It is believed that these minimum standards are more than fair criteria for determining eligibility for an Honorable Discharge.

Original question 6: Related aide memoire question: Concerning question 6. how many separations of enlisted personnel were the result of the exercise of waivers?

Navy answer: 1. Statistics on the number of waivers are not kept; however, in December 1965, in order to update information previously submitted, a survey was made. This survey shows that in approximately 80% of the cases processed for unfitness or misconduct discharge, the respondent executes a waiver of privileges.

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?

Navy answer: 1. The table below gives this information.

Active duty disciplinary separations of Navy 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
1962	81	69	85
1963	117	107	91
1964	107	96	90
1965	64	58	90

During the 9-year period depicted, 69 to 91 per cent of the officer disciplinary separations involved resignations and waivers of board action.

Marine Corps answer: 1. The table below gives this information.

Active duty disciplinary separations of Marine Corps officers

Fiscal year	Total disciplinary separations	Total resignations	Percent of resignations
1962	31	10	33
1963	36	4	11
1964	24	8	33
1965	12	3	25

Original question 8: 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 court-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?

Navy 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. 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." A survey conducted in December 1965 reveals that in those administrative hearings where the respondent requested counsel, 60% were represented by Article 27b, UCMJ, counsel, the remainder by non-lawyer counsel.

2. Enlisted lawyers are not utilized in the naval service to represent respondents in board hearings or accused persons in criminal proceedings.

Supplemental 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 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 allegations should be determined since the Congress relies on the Boards to rectify any injustice.

Answer:

1. The Navy Discharge Review Board's present complement of full-time members consists of one Navy Captain, three Commanders, two Lieutenant Commanders, and two Majors. In addition, as collateral duty, one Marine Colonel, three Lieutenant Colonels, and one Major are available to insure a majority of Marine members for the review of Marine cases. The tenure of permanent members is normally three years. An average of twelve hours per week is spent in formal board meetings.

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.

Supplemental question 9: 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.

Supplemental question 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: 1. The percentage of cases in which relief is granted is considered substantial.

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.

Supplemental question 9 and 10: 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.

Supplemental question 9 and 10: 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.

Supplemental question 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: 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 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.

Supplemental question 9: 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 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 for legal opinion. There are no legal specialists 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?

Navy and Marine Corps answer:

1. 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 determined 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.

Original question 11: 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?

Navy and Marine Corps answer:

1. Very briefly, in those cases in which the Navy and Marine Corps 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 3 boards have recommended separation.

3. It would be desirable for the Navy and Marine Corps to have a procedure for involuntarily separation 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.

Original question 11: Related aide memoire question: Would it be desirable to provide some type of subpoena power in discharge cases or show-cause cases and to what extent can depositions be taken for use in such procedures?

Navy and Marine Corps answer:

1. In show-cause cases, in the rare instances in which adversary procedures are actually required, subpoena 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 expresed lack of confidence in a subordinate's ship-handling ability, it is futile for the officer thus criticized to subpoena 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 facts, 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.

Supplemental 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: 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?

Navy and Marine Corps answer:

1. As related to original question 12 in the case of enlisted personnel, the discharge authority may set aside the findings and recommendations and refer the case to a new board if he finds legal prejudice to the substantial rights of the respondent. No member of the new board shall have served on a prior board which considered the same matter. The record of proceedings of the earlier board, minus the findings, recommendations, and prejudicial matter, may be furnished the successor board. The discharge authority may not approve findings or recommendations less favorable to the respondent than those rendered by the previous board.

2. Under paragraph 11 of the 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.)

3. The same paragraph goes on to provide for a de novo board proceeding in the Bureau of Naval Personnel and 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."

Supplemental 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:

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.

Supplemental 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: It is desirable to acquaint prospective court members with their functions and duties. To appropriately enlighten prospective court members is not proscribed by law. The U.S. Court of Military Appeals in a recent case dealing with such instructions commented as follows:

"Pretrial orientation of court members is authorized by the Manual for Courts-Martial, and has a worthwhile place in the court-martial system as a means of 'general [or broad] orientation on the operation of the court-martial procedures and the responsibilities of court members.'" *U.S.* v. *Johnson*, 14 USCMA 548 (1964).

The problem of orientation instructions for prospective court members is one of content and timing. There appears to be no reasonable means of accomplishing the purpose of familiarizing prospective members on the operation of the court-martial procedures and responsibilities of court members other than by some form of orientation program.

Supplemental question 22–A: 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 courts-martial involving bad conduct discharges, what legal advice, if any, is made available to the defendant as part of the negotiation?

Answer:

1. The extent of use of negotiated pleas in special courts-martial are set forth in answer to original question 22.

2. JAG Manual section 0109AB(2)(a) provides in part:

"In those cases wherein the agreement contemplates a punitive discharge, if counsel for the accused is not a lawyer within the meaning of article 27(b) of the Code, additional counsel so qualified will be made available to the accused, unless specifically waived by the accused. Such additional counsel will advise the accused relative to the pretrial agreement and will also witness the signature of the accused thereon."

If the agreement does not contemplate a bad conduct discharge, the regularly appointed defense counsel advises the accused relative to the meaning and effect of his guilty plea, and must ascertain that the accused understands and comprehends the meaning thereof, and all of its attendant effects and consequences.

Supplemental question 22–B: 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: Counsel for accused is required fully to advise the accused of the meaning and effect of a plea of guilty and to assure himself that the accused fully understands. The memorandum of pretrial agreement contains an acknowledgment (which must be read and signed by accused prior to completion of the agreement) that the accused is satisfied with his defense counsel in all respects and that he fully understands the meaning and effect of his negotiated plea. In addition, prior to accepting a plea of guilty, the law officer (president) must question the accused and assure himself that the accused understands the elements of the offenses to which he has pleaded guilty; that the accused understands the meaning and effect of his plea of guilty; that the plea is entered freely and voluntarily; and that the accused understands the maximum punishment for the offenses to which he has pleaded guilty.

Supplemental question 24: 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.

Supplemental questions 26 and 27: (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.

Supplemental 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: 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.

Supplemental 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 covening 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 6 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.

Supplemental 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: 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.

[Army answers]

ARMY SUPPLEMENTAL RESPONSES TO THE 1962 QUESTIONNAIRE AND AIDE-MEMOIRE [1]

Question 1 (Pages 827–829 and Pages 852–856, 1962 Hearings): [2]

a. The table on pages 827–829 of the 1962 hearings is brought up to date as follows:

Character of discharge or service of enlisted personnel of the Army, 1962–65

	Fiscal year 1962 [1]	Fiscal year 1963 [1]	Fiscal year 1964 [1]	Fiscal year 1965 [1]
Retirement (all types)	9,080	15,473	15,965	13,838
Character of discharge or service: [2]				
Honorable [2]	275,319	341,418	354,215	269,862
General (under honorable conditions)	12,198	11,658	12,616	13,925
Undesirable	7,968	8,490	8,479	8,561
Bad conduct [3]	725	764	604	787
Dishonorable	532	463	369	271
Total	305,822	378,266	392,248	307,244

[1] Includes enlisted females.
[2] Includes discharged for immediate enlistment or reenlistment, discharged from enlisted status to accept commission, and all type retirements.
[3] Discharges approved upon appellate review.

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[1] The 1962 answers to those questions for which no supplemental response is now given remain valid.
[2] Subcommittee note: The questions submitted to the Army in 1962 were identical to those asked the Navy. [The Questionnaire and *Aide-Memoire* interrogatories are reported as part of the Navy's 1966 Supplemental answers, which appear beginning at page 1025.

b. The table on page 852 of the 1962 hearings is brought up to date as follows:

Department of the Army enlisted administrative separation

Fiscal year	Enlisted strength, end of fiscal year	Total discharged	Type discharge						Retirement (all types)
			Honorable [1]	Percent	General	Percent	Undesirable	Percent	
1962	948,597	305,822	275,319	93.0	12,198	4.0	7,968	2.6	9,080
1963	865,768	378,266	341,418	94.4	11,658	3.1	8,490	2.2	15,473
1964	860,514	392,248	354,215	94.3	12,616	3.2	8,479	2.2	15,965
1965	854,929	307,244	269,862	92.3	13,925	4.5	8,561	2.8	13,838

[1] Includes discharged for immediate enlistment or reenlistment and discharged from enlistment status to accept commissions. Percent also includes retirements.

c. The table at the top of page 853 of the 1962 hearings is brought up to date as follows:

Department of Army enlisted punitive separations

Fiscal year	Enlisted strength, end of fiscal year	Total discharged	Type of discharge			
			Bad conduct	Percent	Dishonorable	Percent
1962	948,597	305,822	725	0.2	532	0.2
1963	865,768	378,266	764	.2	463	.1
1964	860,514	392,248	604	.2	369	.1
1965	854,929	307,244	787	.3	271	.1

d. The second table on page 853 of the 1962 hearings is brought up to date as follows:

Fiscal year	Officer strength, end of fiscal year	Total officer separations	Honorable separations	Other than honorable separations	Dismissals [1] pursuant to courts-martial
1962 [2]					
1963	108,302	26,130	26,107	8	15
1964	110,870	18,239	18,222	15	2
1965	112,120	16,436	16,405	26	5

[1] As approved upon completion of appellate review.
[2] Mechanically recorded data lost.

e. The table at the bottom of page 853 of the 1962 hearings is brought up to date as follows:

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
1962 [2]								
1963	6	32	3	72	8	33	5	17
1964	7	24	6	63	7	36	4	30
1965	5	9	10	54	5	32	8	14

[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.
[2] Mechanically recorded data lost.

Question 6 (Page 831 and Page 858, 1962 Hearings): The tables submitted in response to the question in the aide memoire, page 858 of the 1962 hearings, are brought up to date as follows:

Part I: Board action waived by Department of the Army:

(1) Period June 16, 1961 through June 15, 1962:	
(a) Fradulent Entry	590
(b) Conviction by Civil Court	879
(c) Juvenile Offender	28
(d) Prolonged Unauthorized Absence	[4] 392
Total	1,889
(2) Period June 16, 1962 through June 15, 1963:	
(a) Fraudulent Entry	23
(b) Conviction by Civil Court	926
(c) Juvenile Offender	6
(d) Prolonged Unauthorized Absence	[5] 260
Total	1,215
(3) Period June 16, 1963 through June 15, 1964:	
(a) Fraudulent Entry	3
(b) Conviction by Civil Court	826
(c) Juvenile Offender	0
(d) Prolonged Unauthorized Absence	347
Total	1,176
(4) Period June 16, 1964 through June 15, 1965:	
(a) Fraudulent Entry	0
(b) Conviction by Civil Court	666
(c) Juvenile Offender	0
(d) Prolonged Unauthorized Absence	[6] 762
Total	1,428

Part II: Department of the Army Board Action Waived by the Individual:

(1) Period June 16, 1961 through June 15, 1962:	
(a) AR 635-89—Homosexuals	459
(b) AR 635-206—Misconduct	147
(c) AR 635-208—Unfitness	4,729
(d) AR 635-209—Unsuitability	0
(e) AR 635-220—Resignation (in lieu of board)	2
Total	5,337
(2) Period June 16, 1962 through June 15, 1963:	
(a) AR 635-89	474
(b) AR 635-206	600
(c) AR 635-208	4,905
(d) AR 635-209	0
(e) AR 635-220	1
Total	5,980

[4] Includes 1 World War II deserter.
[5] Includes 1 World War II deserter.
[6] Includes 510 Korean War deserters.

(3) Period June 16, 1963 through June 15, 1964:

(a) AR 635–89	571
(b) AR 635–206	757
(c) AR 635–208	5,993
(d) AR 635–209	0
(e) AR 635–220	1
Total	7,322

(4) Period June 16, 1964 through June 15, 1965:

(a) AR 635–89	559
(b) AR 635–206	703
(c) AR 635–208	6,436
(d) AR 635–209	0
(e) AR 635–220	0
Total	7,698

Question 7 (Page 831 and Pages 859–860, 1962 Hearings):

a. The table on page 831 of the 1962 hearings is brought up to date as follows:

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			
1962	84	16	8	127
1963	51	10	8	91
1964	50	12	6	50
1965	31	3	2	51
	Officers with less than 3 years' service			
1962	34	0	1	39
1963	16	5	0	36
1964	21	0	0	40
1965	18	1	0	37

b. With regard to the related questions in the *aide memoire*, it is noted that the two identical questions on page 860, which read: "How many separations of officers involve resignations and/or waivers of Board action after adverse action has been recommended or initiated?" are incorrectly shown as two questions. A check of the material submitted in 1962 reveals that the answer to the second question which begins: "There were 79 officers who. . . ." was actually a continuation of the answer carried to another page. In bringing that answer up to date, statistics available for FY's 1962 through 1965 indicate:

The Army Council of Review Boards received 286 resignations in lieu of board action or trial by court-martial during the four fiscal years cited. Of that number, 210 received separations under other than honorable conditions, 53 were separated under honorable conditions, 3 were separated honorably, 19 were not accepted and were returned to subordinate commands for final action, and 1 was permitted to retire.

Question 9 (Pages 833–834 and Pages 861–865, 1962 Hearings):

a. The table on page 833 of the 1962 hearings is brought up to date in the answer to question 1*a*, part VI, of the 1966 questionnaire.

It is noted that the percentage of discharges changed by the Army Discharge Review Board has risen each year since fiscal year 1961. Accordingly, the first related question in the *aide memoire* (page 861, 1962 hearings) is no longer applicable to the Army.

b. The table on page 834 of the 1962 hearings is brought up to date as follows:

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	29	29	100.0								
General discharge	56	3	5.3	53	94.7						
Blue discharge	4					4	100.0				
Undesirable	5	1	20.0			4	80.0				
BCD											
Other	4									4	100.0
No change	43	1	2.3	12	28.0			30	69.7		
Total	141	34	24.1	65	46.1	8	5.7	30	21.3	4	2.8

Miscellaneous cases

	Board recommended	Action by the Secretary of the Army			
		Approved		Disapproved	
		Number	Percent	Number	Percent
Change	2,324	2,324	100.0	0	0
No change	182	150	82.4	32	17.6
Total	2,506	2,474	98.6	32	1.4

The average or median time for review of an application by the Army Board for Correction of Military Records is 108 days, based on the overall processing time during calendar year 1965.

Based on a 4-year average (1962–1965), including all types of cases, the Army Board for Correction of Military Records granted relief in 29.8 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.

During the period 1962–1965 the Army Board for Correction of Military Records considered a total of 8,399 applications. Hearings were granted in 2,645 of the cases or in 31.4 precent of the applications filed.

c. In response to the additional related questions in the *aide memoire* (bottom of page 861 through page 865 of the 1962 hearings) the following current information is submitted:

(1) The composition of the Army Discharge Review Board currently consists of six regular and nine alternate members. Four of the alternate members are members of the Judge Advocate General's Corps and two are members of the Women's Army Corps.

(2) With respect to the Army Board for Correction of Military Records membership, the Board as presently constituted consists of 14 members. The following are the present Board members, the date of their appointment to the Board, and their civilian position:

Mr. Chelsea L. Henson: Appointed to Board March 19, 1951. Director of Defense Supply Service, OSA.

Mr. Albert J. Esgain: Appointed to Board December 3, 1953. Chief, Operations Branch, International Affairs Division, Judge Advocate General's Office.

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. Frank W. Thomas: Appointed to Board January 17, 1957. Supervisory Supply Officer, Mutual Security Division, Office of Deputy Chief of Staff for Logistics.

Mr. Sherry B. Myers: Appointed to Board May 21, 1962. Staff Assistant, (Real Property) Military Construction and Real Property, Office, Assistant Secretary of the Army, Installations and Logistics.

Mr. Roswell M. Yingling: Appointed to Board May 21, 1962. Assistant for Management, Office, Secretary of the Army.

Mr. Edwin L. Brinckmann: Appointed to Board May 21, 1962. Chief, Fiscal Services and Accounting Policy Group, Office of Deputy Chief of Staff for Logistics.

Mr. Louie B. Rodier: Appointed to Board May 21, 1962. Supervisory Military Personnel Specialist, Office, Personnel Operations.

Mr. Donald H. Havermann: Appointed to Board March 3, 1964. Systems Planning Officer, Director of Army Programs, Office, Chief of Staff.

Mr. Alexander Naimon: Appointed to Board January 6, 1966. Assistant Chief of the Army Surgeon General's Legal Office.

Mr. John L. Blackburn: Appointed to Board January 6, 1966. Supervisory Employee Development Officer, Office of Deputy Chief of Staff for Personnel.

Mr. Harold F. Hufendick: Appointed to Board January 6, 1966. Supervisory Management Analysis Officer, Office of Assistant Chief of Staff for Force Development.

Mr. Tyler E. Williams: Appointed to Board January 6, 1966. Management Analysis Officer, Office Comptroller of the Army.

(3) A computation of hours spent by Army Board for Correction of Military Records members in adjudicating cases shows an increase compared with the prior report. The members of the Board spent an average of 4.8 hours per member per week in the formal hearing and adjudication of cases during calendar year 1965.

(4) With respect to the number of hearings granted by Army Board for Correction of Military Records, the records show that during the period 1962–1965 hearings were held in 31.4 percent of the cases.

Question 11 (Pages 834–835 and Pages 865–866, 1962 Hearings): The answers submitted in response to this question in the 1962 questionnaire and the related questions in the *aide memoire* are still valid. However, with respect to subpoena authority of the Army Board for Correction of Military Records, additional comment is contained in testimony of witnesses on S. 760.

Question 14 (Page 837 and Page 868, 1962 Hearings): The responses to question 14 in the 1962 questionnaire and to the related question in *aide memoire* are still valid, except that the citation on lines 10–11 in the second paragraph of the answer to question 14, page 837 of the 1962 hearings, should now be "Army Regulation 27–12"; the word "prohibit" immediately following that citation should be "prohibits"; and the last sentence in the answer should be changed to read as follows: "In the case of Specialists *above* the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior pay grade (par. 26*g*, AR 600–20, as changed by Change 5, 14 Mar 63)."

Question 15 (Page 837, 1962 Hearings): The response to this question in the 1962 questionnaire is still valid. However, see also the response to question 7, part III, of your 1966 questionnaire.

Question 18 (Page 838 and Page 868, 1962 Hearings): The response to this question in the 1962 questionnaire is still valid with the additional fact that the Navy has adopted a law officer program similar to that of the Army.

With regard to the related question in the 1962 *aide memoire*, the 1962 response is still valid. It is to be noted, however, that the Army trial judiciary has 21 Ready Reserve mobilization designees, some of whom are civilian judges and all of whom maintain their qualifications to serve as law officers by keeping current on the development of military law and by periodic active duty for training with active Army law officers and attendance at specialized judicial seminars.

Question 19 (Pages 838–839, 1962 Hearings): The response to this question in the 1962 questionnaire is still valid. However, as a further step to insure the independence of the law officer in the performance of his judicial functions, law officers are now rated by the Executive Officer, Army Judiciary, and indorsed by the Chief Judicial Officer.

Question 21 (Pages 840–842 and Pages 869–890, 1962 Hearings: The response to this question in the 1962 questionnaire and to the related question in the 1962 *aide memoire* is still valid. However, see also the responses to questions 3 and 4, part VIII, of your 1966 questionnaire, in which there is a discussion of two recent Army cases involving allegations of command influence.

Question 23 (Page 843, 1962 Hearings) : The table submitted in answer to this question is brought up to date as follows:

Percentage of guilty pleas

Fiscal year	General		Special		Summary	
	Not guilty	Guilty	Not guilty	Guilty	Not guilty	Guilty
1962	35.7	64.3				
1963	33.5	66.5				
1964	31.6	68.4				
1965	31.8	68.2				
1966 [1] (July to December 1965)	23.8	76.2	37.3	62.7	27.1	72.9

[1] The 1st year for which these statistics were received as to inferior courts.

Question 24 (Page 844, 1962 Headings) : The table submitted in answer to this question is brought up to date as follows:

Percentage of convictions

Fiscal year	General	Special	Summary
1962	93.9	94.9	95.8
1963	95.6	95.1	95.7
1964	94.5	95.0	94.9
1965	94.2	95.7	94.2

Question 25 (Page 844, 1962 Hearings) : The table submitted in answer to this question in the 1962 questionnaire is brought up to date as follows:

Median or "average" sentences

Offense	Fiscal year 1962	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965
	Months	*Months*	*Months*	*Months*
Absence without leave (art. 86, UCMJ)	6–9	6–9	6–9	6–9
Desertion (art. 85, UCMJ)	9–12	9–12	9–12	9–12
Failure to obey a lawful general order or regulation, or any other lawful order (art. 92, UCMJ)	6–9	6–9	6–9	6–9
Larceny (art. 121, UCMJ)	9–12	9–12	9–12	9–12
Wrongful appropriation (art. 121, UCMJ)	6–9	9–12	6–9	6–9
Assault (simple and aggravated) (art. 128, UCMJ)	9–12	9–12	12–18	9–12

Question 26 (Page 844 and Page 871, 1962 Hearings) : The response to these questions in the 1962 questionnaire and *aide memoire* are still valid. At the present time, three outstanding retired officers sit as members of Army boards of review. With respect to the grade of members of Army boards of review mentioned in Mr. Fitt's letter on page 881 of the 1962 hearings, the present composition is seven colonels and one lieutenant colonel. The single lieutenant colonel has been selected for promotion to colonel. Vacancies occurring as a result of retirement by present members during the year will be filled by colonels or lieutenant colonels selected for promotion to colonel.

Question 27 (Pages 844–845 and Page 872, 1962 Hearings) : At present the normal tour of duty for members of boards of review is from three to four years, and since 1 July 1962 the average tour has been 47 months. In most cases serv-

ice on a board of review continues until mandatory retirement and since 1 July 1962, six Army board members retired directly from this duty. The three retired officers referred to in the supplemental response to question 26, above, who are presently sitting as members of Army boards of review, were recalled for five-year terms.

With regard to the related question on page 872 of the 1962 hearings, it should be pointed out that, although the Army is satisfied that rating junior members by the chairman of the board has never had an adverse effect on the independence of board members, the Army's policy was changed on 19 March 1962 to avoid any remote suggestion of improper influence. At present, all board members are rated by The Assistant Judge Advocate General and indorsed by The Judge Advocate General.

It can be stated without qualification that members of Army boards of review enjoy complete judicial independence restrained only by the rule of law as interpreted by them and the mandates of the Court of Military Appeals.

Question 28 (Page 845, 1962 Hearings): The table submitted in answer to this question is brought up to date as follows:

Department of Army Boards of Review

Fiscal year	Affirmed		Sentence modified		Rehearings 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	
1962	1,107	78.0	282	19.9	5	0.4	5	0.4	6	0.4	13	0.9	1,418
1963	1,123	76.6	307	21.0	9	.6	7	.5	------	------	19	1.3	1,465
1964	1,053	70.6	395	26.5	15	1.0	10	.7	------	------	18	1.2	1,491
1965	849	67.3	386	30.6	8	.6	6	.5	------	------	12	.10	1,261

Question 29 (Page 845, 1962 Hearings): The table submitted in answer to this question is brought up to date as follows:

Fiscal year	Total convening authority actions	Sentence-findings approved		Sentence modified		Findings modified	
		Number	Percent	Number	Percent	Number	Percent
1962	1,762	775	44.0	953	54.1	34	1.9
1963	1,762	841	47.8	892	50.6	29	1.6
1964	1,763	776	44.0	958	54.4	29	1.6
1965	1,463	665	45.4	791	54.0	9	.06

Question 30 (Page 845, 1962 Hearings): The response to this question in the 1962 questionnaire is still valid with the exception of paragraph 6 of the answer, which should be changed to read as follows:

"During fiscal year 1965, approximately 59 percent of those confined in Army stockades were returned to duty. An additional 5 percent of prisoners confined in the U.S. disciplinary barracks with punitive discharges were restored to duty following retraining. The recidivist rate for disciplinary barracks prisoners restored to duty during fiscal year 1965 was 20 percent."

The 2.1 percent figure given in the 1962 response as the recidivist rate for fiscal year 1961 appears to be a typographical error and should have been 21 percent.

Question 32 (Page 847, 1962 Hearings): The response to this question in the 1962 questionnaire is still valid, except that the date in the citation for Army Regulation 22–160, lines 25–26 of the answer, should now be 3 December 1964.

Question 35 (Page 848, 1962 Hearings): See the testimony of the Honorable Thomas D. Morris, Assistant Secretary of Defense (Manpower), and Brigadier General Kenneth J. Hodson at the 1966 hearings. See also the Defense Department answers to the questions in part VII of your 1966 questionnaire.

The following changes and additions are made to the table submitted in answer to this question in the 1962 questionnaire (pages 849–851, 1962 hearings):

(1) Change the title of the table to "Results of trials of U.S. civilians and dependents in foreign tribunals".

(2) The citation to DOD Directive 5525.1 on page 849 of the 1962 hearings, immediately preceding section I of the table should be changed to "sec V, par. A, DOD Directive 5525.1, 20 January 1966".

(3) The word "converted" at the top of page 850 and at the top of page 851 of the 1962 hearings should be changed to "convicted".

(4) Section VIII of the table on page 851 of the 1962 hearings contains incorrect statistics and should be changed as follows:

VIII. Dec. 1, 1960–Nov. 30, 1961:	
Civilians tried	112
Dependents tried	109
Total	221
Acquittals:	
Civilians	5
Dependents	5
Total	10
Convictions:	
Civilians	107
Dependents	104
Total	211

(5) The table is brought up to date as follows:

*IX. Dec 1, 1961-Nov. 30, 1962:	
Civilians tried	105
Dependents tried	192
Total	297
Acquittals:	
Civilians	9
Dependents	18
Total	27
Convictions:	
Civilians	89
Dependents	169
Total	258
*X. Dec. 1, 1962-Nov. 30, 1963:	
Civilians tried	146
Dependents tried	188
Total	334
Acquittals:	
Civilians	7
Dependents	20
Total	27
Convictions:	
Civilians	139
Dependents	172
Total	311

See footnote at end of table.

*XI. Dec. 1, 1963-Nov. 30, 1964:	
Civilians tried	413
Dependents tried	630
Total	1043
Acquittals:	
Civilians	12
Dependents	13
Total	25
Convictions:	
Civilians	399
Dependents	620
Total	1019
*XII. Dec. 1, 1964-Nov. 30, 1965:	
Civilians tried	309
Dependents tried	491
Total	800
Acquittals:	
Civilians	5
Dependents	19
Total	24
Convictions:	
Civilians	308
Dependents	470
Total	778

Question 36 (Page 851, 1962 Hearings): See the testimony of the Honorable Thomas D. Morris, Assistant Secretary of Defense (Manpower), and Brigadier General Kenneth J. Hodson at the 1966 hearings. See also the Defense Department answers to the questions in part VII of your 1966 questionnaire.

[Air Force answers]

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 1962?

Answer: Reliable figures for the years fiscal year 1962 through fiscal year 1965 are attached.

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.

*Acquittals plus convictions need not, in any one-year period, equal total cases tried during the same period, since the "acquittal" and "conviction" statistics include only cases in which there was a final result (i.e., no appeal pending) and also may include some cases from the previous period where the final result was reached in this period.

Character of discharge or service	Retirements, all types	Discharges and releases	Aggregate
Fiscal year 1962:			
Honorable	8,357	[1] 160,335	168,692
General		6,037	6,037
Undesirable		1,295	1,295
Bad conduct		412	412
Dishonorable		120	120
Total	8,357	168,199	176,556
Fiscal year 1963:			
Honorable	14,371	[2] 104,204	118,575
General		6,158	6,158
Undesirable		1,220	1,220
Bad conduct		324	324
Dishonorable		63	63
Total	14,371	111,969	126,340
Fiscal year 1964:			
Honorable	14,040	[3] 161,683	175,723
General		4,671	4,671
Undesirable		848	848
Bad conduct		290	290
Dishonorable		66	66
Total	14,040	167,558	181,598
Fiscal year 1965:			
Honorable	14,694	[4] 195,620	210,314
General		4,407	4,407
Undesirable		781	781
Bad conduct		224	224
Dishonorable		33	33
Total	14,694	201,065	215,759

[1] Includes 92,890 immediate reenlistments.
[2] Includes 68,053 immediate reenlistments.
[3] Includes 76,630 immediate reenlistments.
[4] Includes 102,687 immediate reenlistments.

Number of punitive discharges suspended through the Office of the Judge Advocate General

Fiscal year	BCD	DD
1962	56	2
1963	37	2
1964	33	
1965	33	

Action by the Secretary of the Air Force

	Substituted for BCD			Substituted for DD		
	Honorable	General	Undesirable	Honorable	General	Undesirable
1962		8				
1963		6				
1964		7				
1965		4				

The following figures relate the total discharges to the total enlisted strength for fiscal years 1957 through 1965:

Fiscal year	Total enlisted strength	Total discharges	Fiscal year	Total enlisted strength	Total discharges
1957	776,566	193,409	1962	746,185	176,556
1958	735,759	197,679	1963	732,626	126,340
1959	704,562	177,740	1964	720,372	181,598
1960	680,666	154,521	1965	690,177	215,759
1961	689,557	187,884			

The types of discharges and/or release from active duty of officer personnel of the Air Force for fiscal years 1962 through 1965 are as follows:

Character of discharge or service of officer personnel of the Air Force

Fiscal year and character of discharge or service	Retirements (all types)	Discharges and releases	Aggregate
1962:			
Honorable	3,765	4,330	8,095
Under honorable conditions		25	25
Under other than honorable conditions		21	21
Dismissals			
Total	3,765	4,376	8,141
1963:			
Honorable	4,984	10,025	15,009
Under honorable conditions		21	21
Under other than honorable conditions		24	24
Dismissals			
Total	4,984	10,070	15,054
1964:			
Honorable	5,814	5,152	10,966
Under honorable conditions		35	35
Under other than honorable conditions		38	38
Dismissals			
Total	5,814	5,225	11,039
1965:			
Honorable	5,955	7,261	13,216
Under honorable conditions		83	83
Under other than honorable conditions		40	40
Dismissals			
Total	5,955	7,384	13,339
Total	20,518	27,055	47,573

The following figures for calendar year 1965 reflect a partial breakdown of the basis, reason or authority for the issuance of discharges (reliable figures for prior years are not readily available):

	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
A.w.o.l,, trial inadvisable	1	1	5	7
Homosexuality	109	332	350	791
Unsuitability	6,241	3,567	0	9,808

○

MILITARY JUSTICE

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

AND A

SPECIAL SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, and S. 2907

BILLS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE ARMED SERVICES

JANUARY 18, 19, 25, AND 26; MARCH 1, 2, AND 3, 1966

ADDENDUM TO
PART 3
(APPENDIX B)
Pages 1045 to 1059

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ADDENDUM TO APPENDIX B

QUESTIONNAIRES TO THE DEFENSE DEPARTMENT

NOTE.—Because of an error in printing, the complete text of the Air Force supplemental answers to the 1962 Subcommittee Questionnaire and *Aide-Memorie* was not included in Appendix B of the 1966 Hearings. The following material should be inserted in the back of part 3 following page 1044. For convenience, the portion of the Air Force answer that was originally included has been reprinted.

[Air Force answers]

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A.w.o.l., trial inadvisable	1	1	5	7
Homosexuality	109	332	350	791
Unsuitability	6,241	3,567	0	9,808

Question 2: Are trends evident with respect to different types of discharges and what are the explanations of those trends?

Answer: There has been a continuation of the trend established during the period FY's 1959–1962 which saw a decrease in the number of persons separated with less than honorable discharges.

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. This policy is paying dividends by reducing administrative discharge actions among career airmen who have reenlisted at least once.

d. The more liberal criteria used in determining the type of discharge certificate to be issued which are prescribed by DOD Directive 1332.14, dated 14 January 1959, and implementing Air Force Regulations.

e. The effect of a more selective reenlistment criteria of first term airmen.

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: No. The number of airmen separated under AFR's 39–16 and 39–17 during the period FY's 1962–65 has descreased 12.6% and 25.3% respectively. At the same time, the number of honorable and general discharges afforded under AFR 39–17 has continued to rise. For example, during FY 1965, approximately 91% of all persons discharged under AFR 39–17 were furnished discharges under honorable conditions, i.e., honorable or general discharges.

In connection with the change in policy announced in the DOD Directive 1332.14, of 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 the implementation of the new standards. This practice extends not only to undesirable discharges under Air Force Regulation 39–17 but also to all less than full "honorable" discharges. This policy was announced to veterans' service organizations, congressional liaison personnel, and interested Air Force staff officers.

Question 4: To what extent is there uniformity in the armed services with respect to discharge procedures?

Answer: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

Question 5: What are the criteria in each armed service for issuance of a general discharge instead of an honorable discharge?

Answer: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid, except the Air Force has now instituted a procedure in cases involving the issuance of a general discharge for reasons of expiration of term of service and convenience of the government that requires review of the discharge before it is executed by the officer exercising special court-martial

jurisdiction. That officer has the authority to upgrade the discharge to a full "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: Our 1962 reply to this question is still valid. The Air Force does not keep statistics upon which to base an answer to the aide-memoire relating to this question.

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: In the Air Force since 1961, in no case has less favorable action been taken than that recommended by the board which heard the case. Also, for the period 1962–65, of the 700 "show cause" cases involving officer personnel, 217 officers tendered resignations in lieu of "show cause" hearings. The remainder of our 1962 replies are still valid.

Question 8: To what extent are lawyers made available to represent respondents in board hearings on discharge?

Answer: The Air Force provides a military lawyer to represent respondents in all discharge board hearings. In 1964, appointment of a military lawyer to represent the respondent was made mandatory in all administrative discharge board proceedings. A military lawyer is defined in our instructions as an officer who is a member in good standing of the bar of one of the states or the District of Columbia.

The preceding paragraph modifies the 1962 answer to the aide-memoire question as it relates to administrative board proceedings. Otherwise our 1962 comments are still valid.

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 tables below 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	Relief granted	Percent, relief granted
Fiscal year 1965	1,325	315	23.77
Average fiscal year 1962 through 1965	2,056	266	12.94
Average fiscal year 1950 through 1965	2,098	230	10.96

Time lapse, discharge review cases (100-case random sample)

	Calendar days
1. In Discharge Review Board:	
(a) Nonpersonal appearance and personal appearance cases	23
(b) Counsel cases (nonpersonal appearance)	28
(c) No counsel cases (nonpersonal appearance)	11
(d) Average all types	21
2. In Directorate of Administrative Services (St. Louis) (estimate)	3
3. In Directorate of Administrative Services (Randolph AFB) (estimate based on sampling)	7
4. Time in transit between: St. Louis-Randolph AFB-Pentagon-Randolph AFB	5
5. Average time between receipt of application in St. Louis until finalization and notification of applicant by Administrative Services	36

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 7 weeks advance notice to applicant and counsel.

The Air Force Discharge Review Board, as convened in a given case, consists of five members. These five 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 four years, occasionally three years, and sometimes five years. The 15 to 17 members perform full-time duties as board members or in connection with the proceedings of six 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.

Board for Correction of Military Records

Cases on hand July 1, 1965	249
Average time for review (months)	3

The Air Force Board for the Correction of Military Records is composed of 14 members who are civilian officers or employees of the Department of the Air Force. All members have regular duties other than as Board members. However, each member devotes approximately 16 hours per week to Correction Board duties. Two individuals have been members of the Board since November 1948, one has served since August 1950, two since March 1958, two since October 1959, one since April 1961, one since August 1961, one since September 1963, one since October 1964, two since May 1965, and one since August 1965. 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 all 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.

In the decade preceding 1962, the Air Force Board for Correction of Military Records granted hearings in 5.4% of the cases filed. From 1 January 1962 to 30 June 1965, hearings were granted in 6.5% of the 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 percentage of cases in which relief has been granted by the discharge review board is contained in the reply to question 9. The following statistics apply to the Board for the Correction of Military Records:

Applications for change in type of discharge	2,182
Relief granted (all cases) (5.1%)	112
Cases relief granted which were previously considered by Discharge Review Board for period 1 January 1962–30 June 1965 (4.7%)	104

Our 1962 answers to the aide-memoire questions are still valid except the two civilian lawyers who were members of the Board for the Correction of Military Records are no longer with the 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 commission?

Answer: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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.

The following summaries, while atypical of the vast majority of cases, are typical of the nature and scope of issues raised in board proceedings:

Discharge proceedings were instituted against an airman under AFR 39–17 for black market activities. An investigative summary sheet was placed in evidence over defense counsel's objection. The names of the source witnesses to the basic facts on the summary sheet had been removed. The "letter of notification" to respondent did not contain sufficiently detailed information concerning the adverse allegations. Finally, the board failed to make findings of fact. Opinion rendered: The substantial rights of the respondent have been prejudiced and the findings and recommendations for elimination may not be sustained. Op. JAGAF 1962/347, 13 June 1962.

An airman with over 20 years of service was proceeded against under the provisions of AFR 39–17 for several instances of misconduct. He had been up and down the promotion ladder during his Air Force career, and had received nonjudicial punishment and administrative reprimands on several occasions. The board recommended a general discharge. The airman applied for retirement. The major command concerned recommended discharge. Opinion rendered: The airman should be permitted to retire in accordance with the Air Force policy of nondiscriminatory treatment of personnel in administrative proceedings. Op. JAGAF 1964/73, 5 February 1964.

Over a period of a year and a half an airman failed to pay his just debts even though he was counseled by his superiors some 33 times. His work schedule was rearranged so that he might undertake outside employment. He failed, however, to apply the extra income to his debts. Efforts were made to consolidate his debts and arrange a schedule of monthly payments, but he made no efforts to pay in accordance with the arrangements. Instead, he incurred additional debts. After the return of his wife and children to the U.S., the airman was observed gambling and keeping company with lady friends. An AFR 39–17 board heard the case and recommended a general discharge. Opinion rendered: Neither probation nor further efforts at rehabilitation is appropriate. Recommend discharge for unfitness with a general discharge certificate. Op. JAGAF 1964/688, 12 October 1964.

A board of officers was convened under the provisions of AFR 39–17 to consider an airman for discharge for being discreditably and frequently involved with military and civil authorities. The acts of misconduct occurred over the period from August 1960 to September 1963. The last act was a failure to repair on 6 September 1963, for which the airman received nonjudicial punishment. Following the latter incident the airman's attitude and duty performance improved to the extent that every witness before the board who was familiar with his work performance had praise for him and his work. The board, convened on 18 March 1964, found in the airman's favor on all the alleged major acts of misconduct but found against him as to several minor acts committed prior to September 1963. A general discharge was recommended. The question presented was whether the rehabilitation demonstrated by the airman constituted a bar to administrative elimination. Opinion rendered: Paragraph 7, AFR 39–17, requires that rehabilitation efforts be made prior to initiation of elimination action. Thus, where, as in this case, the board found in favor of the respondent concerning the major allegations of misconduct, proof that he has been rehabilitated subsequent to commission of other minor acts of misconduct must be regarded as an effective legal bar to elimination. The proceedings are disapproved. Op JAGAF 1964/368, 9 June 1964.

A letter which had been widely distributed within an Air Force command purportedly set forth guidelines for members of AFR 35–66 boards in considering homosexuals for elimination from the Air Force. The letter stated

that an undesirable discharge was prescribed for class II cases and directed that upon a finding that any homosexual act was committed, attempted or proposed, the party must be categorized as a homosexual and discharge of the appropriate type ordered. (The letter does not accurately state the principles of AFR 35–66 nor furnish proper guidelines.) Following distribution of the letter, five airmen were proceeded against jointly by an AFR 35–66 board for admitted homosexual acts. The board found against them and recommended undesirable discharges, which were approved by the discharge authority and executed. Opinion rendered: There are situations in which a joint hearing would be proper. Here, however, there were a number of separate unrelated acts. The joint hearing was prejudicial to the rights of each respondent. Further, the command guideline letter was legally prejudicial to the rights of each respondent. It is recommended that the cases be forwarded to the Discharge Review Board with the suggestion that the Board entertain jurisdiction on its own motion and change the calibre of discharges to general or honorable as warranted. It is also recommended that a message be dispatched to the command concerned directing rescission of the objectionable letter and all other local directives of a similar nature. Op JAGAF 1964/191, 24 March 1964.

In August 1963 an airman was proceeded against under the provisions of AFR 35–66 which sets forth the procedures for elimination of homosexuals from the Air Force. The board members were aware of their authority to recommend discharge under either AFR 39–16 or AFR 93–17 and, in fact, heard evidence, aside from homosexual tendencies of the airman, pertaining to his suitability and fitness to remain in the Air Force. The board recommended retention in the service and the discharge authority approved. In February 1964 proceedings were instituted against the airman under the authority of Section B, AFR 39–16, based upon the same evidence which was before the previous board. The only new evidence was a Psychiatric Evaluation Certificate which recommended his separation from the service. The legality of the second board proceedings was questioned. Opinion rendered: Having retained respondent in the service in August 1963, further action pursuant to AFR 35–66 and any lesser included proceeding are now precluded. Any further elimination action which can be construed as predicated upon the same causes and evidence considered by the original board is barred by AFR 35–66 and AFR 39–16. Op JAGAF 1964/310, 18 May 1964.

An airman was convicted in a civilian court of larceny of Government property, the value of which was not established. Air Force Regulation 39–22 provides that airmen are subject to discharge upon conviction by civil court of an offense for which the maximum penality under the Uniform Code of Military Justice is death or confinement in excess of one year; or which involves moral turpitude as defined in the regulation. Paragraph 127c, Manual for Courts-Martial, 1951, establishes the maximum punishments for larceny as follows: Property of a value of $20 or less—Dishonorable Discharge, total forfeitures and confinement for six months; property of a value of $50 or less but more than $20—Dishonorable Discharge, total forfeitures and confinement for one year; property of a value of more than $50—Dishonorable Discharge, total forfeitures and confinement for five years. The question presented was whether the civil conviction would support a discharge under AFR 39–22. Opinion rendered: Where conviction is for theft of Government property, the value of which was not pleaded or proved, the civil conviction is for theft of property of "some value," which is punishable under the USMJ by confinement for not more than six months. The civil conviction will not support discharge under the mentioned regulation. Op JAGAF 1964/648, 25 September 1964.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid. We know of no special courts-martial since 1962 in which a fully qualified lawyer has not been appointed for an 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: Our 1962 reply to this question and to the aid-memoire relating thereto is still valid.

Question 16: What are the effects on a serviceman's career of conviction by summary or special court-martial?

Answer: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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 1960?

Answer:

GENERAL COURT-MARTIAL

Calendar year	Percent guilty pleas	Percent [1] not guilty pleas
Airmen:		
1960	45.6	54.4
1961	46.9	53.1
1962 (figures unavailable) [2]		
1963	39.8	60.2
1964	38.8	61.2
1965 (January to June 1965) [2]	38.6	61.4
Officers:		
1960	17.6	82.4
1961	20.0	80.0
1962	13.5	86.5
1963	35.3	64.7
1964	5.3	94.7
1965 (January to June 1965) [2]	11.1	88.9

SPECIAL COURT-MARTIAL (BAD CONDUCT DISCHARGE)

Airmen:		
1960	73.0	27.0
1961	76.4	23.6
1962 (figures unavailable) [2]		
1963	59.9	40.1
1964	78.2	21.8
1965 (January to June 1965) [2]	66.1	33.9

SPECIAL COURT-MARTIAL (NON-BAD-CONDUCT DISCHARGE)

Airmen:		
1960	55.4	44.6
1961	56.1	43.9
1962 (figures unavailable) [2]		
1963	40.2	59.8
1964	56.6	43.4
1965 (January to June 1965) [2]	56.4	43.6

SUMMARY COURT-MARTIAL

Airmen:		
1960	63.5	36.5
1961	62.0	38.0
1962 (figures unavailable) [2]		
1963	39.3	60.7
1964	50.3	49.7
1965 (January to June 1965) [2]	43.6	56.4

[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] Reliable figures are not available for 1962 or for the last half of calendar year 1965.

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 1962?

Answer:

I. Based on number of offenses tried:

[In percent]

Fiscal year	Summary	Special	General
1962	92.2	89.1	85.0
1963	91.4	89.5	89.7
1964	90.6	90.0	89.0
1965	87.7	89.8	84.9

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 1961–65, 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.

Calendar year and type	Number of trials [1]	Number convicted of 1 or more offenses	Number acquitted of all charges	Percent of convicted 1 or more offenses
1961—Summary court-martial	14,624			
Special court-martial	3,474			
General court-martial	504			
Total	15,602	14,874	840	94.7
1962—Summary court-martial	12,149			
Special court-martial	3,026			
General court-martial	486			
Total	15,661	14,968	831	94.7
1963—Summary court-martial	5,924			
Special court-martial	2,656			
General court-martial	444			
Total	9,024	8,596	559	93.9
1964—Summary court-martial	3,073			
Special court-martial	2,591			
General court-martial	423			
Total	6,087	5,705	492	92.1
1965—Summary court-martial	916			
Special court-martial	1,067			
General court-martial	207			
Total (January to June)	2,190	2,045	189	91.5

[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 sentences approved by the Office of The Judge Advocate General, USAF

GENERAL COURT-MARTIAL

Offenses	Calendar year	Number of cases	Type of discharge			Confinement (average months)
			Dishonorable	Bad conduct	None	
Art. 85—Desertion:						
1 year or less	1961	8	2	6		11.6
	1962	9	4	5		12.0
	1963	10	1	7	2	10.6
	1964	3	2	1		20.0
	[1] 1965	2	1	1		18.0
Over 1 year, not over 5 years	1961	8	5	3		11.6
	1962	10	5	5		15.0
	1963	6	5	1		12.5
	1964	4	3	1		15.0
	[1] 1965	1	1			12.0
Over 5 years	1961	2	2			0
	1962	1		1		0
	1963	0				
	1964	1	1			12.0
	[1] 1965	0				
Art. 86—Unauthorized absence: Over 30 days	1961	36	4	29	3	6.8
	1962	29	3	18	8	6.5
	1963	14	1	10	3	6.2
	1964	26	3	21	2	7.0
	[1] 1965	11		9	2	5.0
Art. 93—Failure to obey: Failure to obey any lawful general order or regulation	1961	5	1	2	2	9.2
	1962	5	0	3	2	6.4
	1963	7	0	1	6	1.7
	1964	3	0	3	0	9.3
	[1] 1965	4	0	3	1	16.5
Art. 121—Larceny: Larceny, over $50	1961	115	15	65	35	10.2
	1962	98	16	51	31	10.1
	1963	74	10	37	27	10.6
	1964	85	13	43	29	12.1
	[1] 1965	38	6	19	13	17.7
Larceny, $50 or less	1961	17	2	11	4	7.6
	1962	11	2	8	1	9.8
	1963	4		4		13.5
	1964	8	2	3	3	9.0
	[1] 1965	7	1	3	3	6.9
Art. 128—Assault:						
Assault with battery	1961	1			1	6.0
	1962	4		1	3	4.3
	1963	2			2	6.0
	1964	7		2	5	4.6
	[1] 1965	2			2	4.0
Assault with a dangerous weapon	1961	7	1	3	3	7.7
	1962	11	2	4	5	9.0
	1963	16	3	6	7	11.1
	1964	15	2	7	6	11.5
	[1] 1965	3		3		10.0
Intentionally inflicting bodily harm	1961	3	2	1		40.0
	1962	4		4		18.8
	1963	7	3	3	1	18.0
	1964	6	3	2	1	26.0
	[1] 1965	4	1		3	16.3

[1] Jan. 1 to June 30.

SPECIAL COURT-MARTIAL (BCD)

Art. 86—Unauthorized absence:						
Over 3 days, not over 30 days	1961	59		56	[2] 3	3.6
	1962	42		42		4.0
	1963	35		35		4.1
	1964	21		19	[2] 2	3.8
	[1] 1965	9		9		4.1
Over 30 days	1961	204		204		4.2
	1962	159		158	[2] 1	4.1
	1963	110		110		4.0
	1964	137		136	[2] 1	3.9
	[1] 1965	43		43		2.9
Art. 92—Failure to obey: Failure to obey any lawful general order or regulation	1961	14		14		3.6
	1962	13		13		3.8
	1963	11		11		1.0
	1964	9		9		5.3
	[1] 1965	6		6		4.8
Art. 121—Larceny:						
Larceny, over $50	1961	51		51		4.3
	1962	69		69		3.9
	1963	41		41		3.8
	1964	39		39		4.7
Larceny, $50 or less, over $20	[1] 1965	20		20		4.2
	1961	66		66		3.6
	1962	47		47		4.4
	1963	32		32		4.3
	1964	18		18		4.2
	[1] 1965	14		14		4.3
Larceny, $20 or less	1961	78		78		4.1
	1962	61		60	[2] 1	4.0
	1963	39		39		4.9
	1964	41		41		4.0
	1965	20		20		4.4
Art. 128—Assault:						
Assault with battery	1961	4		4		5.0
	1962	4		4		4.8
	1963	6		6		4.0
	1964	5		5		5.0
	[1] 1965	0		0		0
Assault with a dangerous weapon	1961	13		13		3.8
	1962	21		21		4.2
	1963	11		11		4.5
	1964	8		8		4.5
	[1] 1965	6		6		3.5
Assault with intent to inflict bodily harm	1961	1		1		4.0
	1962	2		2		6.0
	1963	3		3		3.7
	1964	2		2		5.0
	[1] 1965	1		1		3.0

[1] Jan. 1 to June 30.
[2] B/R.

Special court-martial (non-BCD)

Offense	Calendar year	Number of cases	Confinement (average months)
Art. 86: Failure to repair or a.w.o.l. not over 30 days	1963	481	3
	1964	647	3
	[1] 1965	238	3
Art. 92: Failure to obey	1963	54	3
	1964	106	3
	[1] 1965	30	3
Art. 121: Larceny or wrongful appropriation	1963	488	3
	1964	672	4
	[1] 1965	295	4
Art. 128: Simple assault	1963	73	3
	1964	144	3
	[1] 1965	39	3

[1] Jan. 1 to June 30.

NOTE.—Forfeitures and reduction in grade commensurate with pay scale or grade of accused. (Insufficient data received to make a fair average for 1962.)

Summary court-martial

Offense	Calendar year	Number of cases	Confinement (average days)
Art. 86: Failure to report or a.w.o.l. not over 30 days	1963	256	20
	1964	573	25
	[1] 1965	193	22
Art. 92: Failure to obey	1963	63	18
	1964	309	20
	[1] 1965	96	17
Art. 121: Larceny or wrongful appropriation	1963	213	20
	1964	315	21
	[1] 1965	66	19
Art. 128: Simple assault	1963	10	11
	1964	63	11
	[1] 1965	14	16

[1] Jan. 1 to June 30.

NOTE.—Forfeitures and reduction in grade commensurate with pay scale or grade of accused. (Insufficient data received to make a fair average for 1962.)

Question 26: To what extent are civilians used on the boards of review operating under the Uniform Code of Military Justice?

Answer: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

Question 28: With respect to each service and for each year since 1962, 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:

Calendar years	General court-martial		Special (BCD) court-martial	
	Percent, findings disapproved	Percent, sentences reduced	Percent, findings disapproved	Percent, sentences reduced
1962	1.9	13.3	0.7	3.8
1963	3.2	13.0	1.3	3.9
1964	4.9	12.3	0.5	4.5
1st and 2d quarters, 1965	3.6	9.4	1.7	5.0

Question 29: To what extent have convening authorities and/or the officers exercising general court-martial jurisdiction acted either to disapprove findings or reduce sentences in cases which they reviewed?

Answer:

Percent findings disapproved and/or sentence reduced

Calendar year	GCM	SPCM-BCD	SPCM-non-BCD	SCM
1962 [1]	—	—	—	—
1963	29.2	23.1	15.9	2.1
1964	28.3	22.2	17.6	9.3
1st and 2d quarters, 1965	33.3	24.9	18.3	8.1

[1] Reliable figures for 1962 are not available.

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, through fiscal year 1965, 7,352 airmen have been processed. Of this number, 3,851 (over 52 percent) have been returned to duty. Of this number restored, 1,678 had bad conduct discharges, 737 had dishonorable discharges, and 1,436 had sentences which did not include punitive discharges.

Of the total number returned to duty, 75 percent have satisfactorily completed their enlistment. In many cases, airmen have reenlisted and are still on duty. A check with commanders shows that six months after returning to duty, 89 percent are rated in performance as average or above average, as compared with other duty airmen. Of this number, 92 percent have not been involved in any disciplinary infraction, and eight percent had only one minor infraction on their record. The records further reflect that 16 percent of those restored have gone back in aircraft and missile maintenance career fields. It is also noteworthy that 57 percent of those restored to duty are performing at the skilled level in an Air Force specialty and 40 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 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. We stated in an earlier questionnaire that we did not believe that it would be desirable to use Amarillo for retraining prisoners from other services. The prisoner population during the fiscal year 1965 averaged 156. 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 still believe that under existing conditions it would be neither feasible nor desirable to use the retraining group at Amarillo for the rehabilitation of personnel from other servces.

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 Manual for Courts-Martial prohibits confinement pending trial unless it is deemed necessary to assure the presence of the accused at trial or because of the seriousness of the offense charged. (MCM, 1951, par 20c.)

Records of trial reviewed at this Headquarters confirm the fact that pretrial confinement is imposed infrequently and appropriately. At all installations where confinement facilities are maintained, confinement officers furnish the commander a daily report of prisoner status. This report is also reviewed by the staff judge advocate and the director of security and law enforcement, thus providing close and continuing scrutiny of every instance of pretrial physical restraint. Reviewing staff judge advocates and boards of review are required to comment on the chronology of every case reviewed, giving particular attention to those involving 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: On July 19, 1955, the Attorney General of the United States and the Secretary of Defense signed an agreement concerning the investigation and prosecution of crimes in cases where the two Departments have concurrent jurisdiction. Generally it was agreed that the Armed Forces would have primary jurisdiction of crimes committed on military and naval installations if only persons subject to military law were involved. An exception is made when 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.

The practical application of this exception has not always been satisfactory. In several instances where the Department of Justice has properly asserted its primary right under the agreement to investigate, such action has had adverse effects on the Armed Forces. Military witnesses have been "frozen" in place for extended periods during which they were denied leaves of absences to which they were entitled by law, reassignment was impossible, and their usefulness to the Air Force was substantially reduced. Rigorous application of the exception would make the Air Force position very difficult, but the cooperation of the Department of Justice in relinquishing their primary jurisdiction has reduced the number of actual problem cases to a very small group.

In most instances, too, where the Department of Justice has asserted its rights to primary jurisdiction, the cases have eventually been disposed of as misdemeanors. The Armed Forces could have handled these cases promptly, with full protection of the rights of those involved.

The two Departments have been negotiating in an attempt to solve this problem. From the standpoint of the Armed Forces, it would be better if the exception were eliminated, thus permitting the services to assert primary jurisdiction of all crimes committed on military and naval installations when only military persons are involved.

In cases where Federal crimes are committed outside military reservations, the Department of Justice generally has primary jurisdiction except where the military persons involved have been engaged in scheduled military activities or organized movement. There have been no significant problems in this area. The Department of Justice frequently relinquishes to the Armed Forces its primary right to proceed in these cases.

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: It is the general policy of the Air Force that military punitive measures will not be instituted when State civil authorities have brought the alleged offender to trial for substantially the same offense, whether conviction or acquittal has resulted (AFM 110–SM, par. 7c).

Subject to the exception noted below, no member of the Air Force may be brought to trial by court-martial, or punished nonjudicially under Article 15, for substantially the same act or omission for which he has been tried in a State court for violation of State law. Whether the member has been tried in the State court is determined by whether jeopardy attached under the law of the State concerned.

An exception to this policy may be authorized only by the Department of the Air Force. It is intended that an exception will be granted only in a most unusual case, when the ends of justice and discipline can be met in no other way. No exception has been granted since this policy was promulgated in writing on February 8, 1965.

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: Our 1962 reply to this question and to the aide-memoire relating thereto is still valid.

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. 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. The Department of Defense is now making a study of several proposals designed to meet the problem in an effort to obtain a solution which will overcome the objections which were raised to previously proposed legislation on the subject. It is recommended that no action be taken on pending legislation until the completion of this study.

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 who have severed all connections with the Department of Defense, it is believed that the Department of Justice, which would have primary responsibility in the prosecution of these cases, should determine the most suitable method of filling this jurisdictional gap.

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