

88th Congress }
1st Session }

COMMITTEE PRINT

CONSTITUTIONAL RIGHTS OF
MILITARY PERSONNEL

SUMMARY—REPORT OF HEARINGS
BY THE
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

PURSUANT TO

S. Res. 58

88th Congress, 1st Session



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

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PREFACE

No persons should be more entitled to protection of their constitutional rights than the servicemen engaged in protecting the sovereignty of the United States. Appropriately, the Subcommittee on Constitutional Rights has been concerned since its formation with the rights of military personnel and has made several studies in that connection.

In light of the Supreme Court's ruling in *Wilson v. Girard*,¹ which upheld a waiver by military authorities of jurisdiction to try a serviceman for a homicide committed in Japan, the subcommittee investigated the extent to which the rights of servicemen are abridged when they are stationed abroad and so become subject, in some degree, to the jurisdiction of foreign governments. Also, the subcommittee has studied the implications of constitutional limitations enunciated in cases, such as *Reid v. Covert*,² *Kinsella v. Singleton*,³ and *McElroy v. Guagliardo*.⁴ These cases invalidated the provisions of article 2 of the Uniform Code of Military Justice,⁵ which purport to authorize trial by court-martial of military dependents and employees accompanying the Armed Forces overseas in time of peace; but the problem remained of providing a forum for the trial of such individuals where all their constitutional rights would be preserved. Similarly, the subcommittee has grappled with the problem of a suitable tribunal to try offenses committed by ex-servicemen while they were still on active duty but which, under the holding of *Toth v. Quarles*,⁶ cannot be made subject to military jurisdiction.

The subcommittee has followed closely the perceptible trend in the Federal courts toward greater judicial protection for the American serviceman. During the last century the Supreme Court established firmly the doctrine that review of court-martial proceedings by Federal civil courts was limited to a determination whether the court-martial had jurisdiction of the person accused and of the offense charged and whether the punishment was within lawful limits.⁷ As recently as 1950, the Court was adhering to this general position in *Hiatt v. Brown*,⁸ although in *Whelchel v. McDonald*,⁹ decided later that year, it seemed to be groping toward a wider scope of review. Finally, in *Burns v. Wilson*,¹⁰ the Supreme Court acknowledged that court-martial proceedings are subject to "due process" requirements and that Federal civil courts could review a conviction by court-martial if military authorities refused to consider fully and fairly the accused's contention that he had not been accorded his constitutional rights. Even under *Burns v. Wilson*, Federal civil court review of court-

¹ 354 U.S. 524.

² 354 U.S. 1.

³ 361 U.S. 234.

⁴ 361 U.S. 281.

⁵ 10 U.S.C., sec. 802.

⁶ 350 U.S. 11.

⁷ *Dynes v. Hoover*, 61 U.S. (How.) 65; *Ex parte Reed*, 100 U.S. 13; *Johnson v. Sayre*, 158 U.S. 109.

⁸ *Hiatt v. Brown*, 339 U.S. 103.

⁹ *Whelchel v. McDonald*, 340 U.S. 122.

¹⁰ *Burns v. Wilson*, 346 U.S. 137.

martial convictions remains more restricted than the review of State court convictions—a limitation on the scope of review which has been criticized in some quarters as anomalous but has been explained by others in terms of the peculiar relationship between civil and military law.

Just as courts-martial were once almost insulated from collateral attack in civil courts, discharge action by the armed services was long deemed nonreviewable in civil courts. In short, there was no way for the ex-serviceman to attack in the courts discharge action which he considered to be arbitrary, capricious, or contrary to law. However, in *Harmon v. Brucker*,¹¹ the Supreme Court ruled that the character of an administrative discharge issued by the Army could be judicially reviewed. Moreover, the Court held there that the character of a discharge could not be affected by misconduct which had occurred prior to a soldier's induction into the Army. With *Harmon v. Brucker, supra*, as a precedent sustaining judicial review of arbitrary discharge action, successful collateral attacks have been made against administrative discharges by means of suits for back pay brought in the Court of Claims.¹²

Despite these recent safeguards for the serviceman, provided by the courts, the subcommittee members and individual Senators continued to receive complaints concerning military justice and the issuance of administrative discharges by the armed services. In view of a decade's having passed since the Uniform Code of Military Justice was enacted, the subcommittee was disturbed by claims that abuses persisted which the code was designed to eliminate. Furthermore, there were reports that the safeguards of the Uniform Code, vigorously implemented in the decisions of the Court of Military Appeals, had induced the military to resort to administrative action, which was not subject to these safeguards.

In this connection, the subcommittee was especially mindful of the comment in the Annual Report of the Court of Military Appeals for 1960 that:¹³

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

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 whether it was 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 has been discharged under other than honorable conditions, stigmatized, and deprived of veterans' benefits by an administrative discharge, rather

¹¹ 355 U.S. 579.

¹² See *Clackum v. U.S.*, Ct. Cl. 246-56; and *Murray v. U.S.*, Ct. Cl. 237-57.

¹³ Hearings, "Constitutional Rights of Military Personnel," Feb. 20 and 21, and Mar. 1, 2, 6, 9, and 12, 1962, p. 2.

than by a discharge imposed in the sentence of a court-martial. Thus, 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.

After the subcommittee decided to conduct hearings on the constitutional rights of military personnel, extensive research was undertaken and detailed questionnaires were submitted to the Department of Defense for answer by each armed service. Moreover, copies of service regulations pertinent to military justice and administrative discharges were examined in detail. The hearings occupied 7 days, and testimony was received from spokesmen for the Defense Department and each armed service, from the judges of the Court of Military Appeals, from representatives of bar associations and veterans' organizations, and from various individuals with special experience relevant to the subcommittee's inquiry.

This report summarizes the most significant opinions expressed during the hearings. Recommendations of the subcommittee, based on the testimony and on the study made in preparation for the hearings, also appear at appropriate places in the text of the report.

SAM J. ERVIN, Jr.,

Chairman, Subcommittee on Constitutional Rights.

CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

ADMINISTRATIVE DISCHARGES

At the present time there are five types of discharge from the armed services, namely, the honorable, general, undesirable, bad conduct, and dishonorable.¹ Both the honorable and the general discharge are considered to be "under honorable conditions"; in either case, the veteran is fully entitled to veterans' benefits.² However, according to some of the testimony, the general discharge tends to create a stigma for its recipient.³ The undesirable discharge is issued administratively and will bar veterans' benefits if issued for one of the following reasons, unless the individual was insane: (a) to escape trial by general court-martial; (b) willful and persistent misconduct, an offense involving moral turpitude, or mutiny or spying; or (c) overt act of homosexuality.⁴ The bad conduct discharge is a punitive discharge, which, under the Uniform Code, can only be given by a special or general court-martial. At the present time its use in the Army, unlike the other services, is limited in practice to the general court-martial. When imposed as part of the sentence of a special court-martial, a bad conduct discharge bars veterans' benefits under the same circumstances where an undesirable discharge would bar such benefits.⁵ If imposed by the sentence of a general court-martial, a bad conduct discharge is always a bar to veterans' benefits under the provisions of 38 U.S.C.A. 3103.⁶ A dishonorable discharge can only be imposed by a general court-martial, and it is always a bar to veterans' benefits.⁷

One source of confusion in understanding the classification of discharges and their effects is that by statute, for purposes of veterans' benefits, a man may be deemed to have been discharged under "dishonorable" conditions, although he did not receive a dishonorable discharge. For instance, a serviceman receiving an undesirable or bad conduct discharge because of an offense involving moral turpitude or because of an overt act of homosexuality would apparently be considered by the Veterans' Administration to have been discharged under "dishonorable" conditions.⁸ On the other hand, a serviceman may be viewed as discharged "under honorable conditions" or, in the words of title 38, United States Code, section 101(2) "under conditions other than dishonorable"⁹ even though he did not receive an honorable discharge. The terminology is confusing on its face and, as Congressman Doyle acknowledged in his testimony, few persons understand

¹ Hearings, "Constitutional Rights of Military Personnel," Feb. 20 and 21, and Mar. 1, 2, 6, 9, and 12, 1962, hereinafter referred to as "Hearings," pp. 93-97.

² *Id.*, p. 356.

³ *Id.*, pp. 330-341. See also Air Force Regulation 39-10, par. 8a, dated Mar. 17, 1959.

⁴ *Id.*, p. 357.

⁵ *Id.*

⁶ *Id.*, pp. 355, 385-386.

⁷ *Id.*, pp. 355, 357.

⁸ *Id.*, p. 357.

⁹ *Id.*, p. 257.

the difference between a dishonorable discharge given by a general court-martial and an undesirable discharge given administratively.¹⁰ He also commented with respect to the stigma created by an undesirable discharge:¹¹

He is an undesirable. You don't want to have anything to do with him. You don't go into detail to find out what makes him undesirable. You think he may be a thief, he may be a homosexual, he may not be supporting his children, his family in the minds of some people, but he is undesirable, you don't want him around. And I think the ordinary patriotic, sound-thinking American citizen doesn't want to have anything to do with an undesirable man and that applies to an undesirable man from the military, something has occurred there in the military for which he has gotten an undesirable discharge; it is a stigma. It is a liability, and a heavy one.

In a similar vein, Chief Judge Quinn of the Court of Military Appeals, testified concerning the undesirable discharge, that:¹²

I think, generally speaking, Mr. Chairman, it is worse than a bad conduct discharge, as far as its implications are concerned, and the results also are quite severe. You cannot get a job in a bank or a trust company or for the Government; for Electric Boat, for instance, at New London or any of the places where there is any confidential requirement. They will not give work to a man with an undesirable discharge. It is a very severe penalty.

I think that an undesirable discharge is a very severe penalty, and I believe that it should not be given except as a result of a court-martial, except in the instance where the individual, after proper legal advice, and proper legal protection, decides to accept it for his own personal protection. I mean in the case of homosexuals, I can see there where they might want to take the undesirable discharge. But I think they ought to have a right to a trial. I think it is a very severe penalty.

Because of the effects of the undesirable discharge, and to a much lesser extent of the general discharge, the subcommittee considers it essential that the procedures for issuing such discharges provide adequate protection for the constitutional rights of military personnel. Moreover, it is important to assure that the serviceman, especially if immature, understands fully the consequences of receiving anything other than an honorable discharge, so that he can conform his conduct to the standards required by the military and can appreciate that every means available should be used to prevent issuance of any administrative discharge which improperly stigmatizes him. The subcommittee has received many letters from ex-servicemen who complain that they readily accepted an undesirable discharge because they did not fully comprehend at the time the stigma and difficulty in getting employment that it creates.

Under the terms of a Department of Defense directive dated January 14, 1959, and applicable to all services, undesirable discharges are issued for "unfitness, misconduct, or for security reasons."¹³ The directive defines "misconduct" as consisting of three categories: (1) conviction by civil authorities (foreign or domestic); (2) fraudulent enlistment; and (3) prolonged unauthorized absence. "Unfitness" is defined as follows:

1. Frequent involvement of a discreditable nature with civil or military authorities.
2. Sexual perversion including but not limited to (a) lewd and lascivious acts, (b) homosexual acts, (c) sodomy, (d) indecent exposure, (e) indecent acts with or assault upon a child, or (f) other indecent acts or offenses.

¹⁰ *Id.*, pp. 327-328. See also pp. 257-258 for other views on this point.

¹¹ *Id.*, p. 328.

¹² *Id.*, p. 188.

¹³ *Id.*, p. 21.

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.

By virtue of the sixth classification under this definition, the Secretary of each department is left free to promulgate additional criteria of unfitness. The Secretary of the Army does not seem to have utilized this delegated authority, and has limited the definition of unfitness to the first five major classifications stated in the Department of Defense definition.¹⁴ On the other hand, the Department of the Air Force defines unfitness to include also situations "where there is evidence of habits and traits of character warranting separation from the service for unfitness for such reasons as antisocial or immoral trends, psychopathic personality disorder or defect, uncleanness, or malingering."¹⁵ Under the wording of this regulation, an airman could apparently be issued an undesirable discharge because of unclean habits or "antisocial" trends, as interpreted by the Air Force board hearing his case. The subcommittee has not been apprised of reasons why the criteria of unfitness, as distinguished from unsuitability, should differ among the services or why a man should be subject to being labeled as "undesirable" by one service under circumstances which would not result in his being so designated in another service. This, of course, does not relate to each service's right to determine its own criteria to be applied in determining whom to induct or enlist and whom to discharge under honorable conditions as unsuitable. Furthermore, since an undesirable discharge for unfitness creates a lasting stigma for the recipient, it seems appropriate to call attention here to the constitutional requirement that standards of guilt and innocence be defined clearly and without "vagueness."¹⁶

If a serviceman is tried by court-martial for alleged misconduct, he is provided the right of confrontation and can subpoena witnesses, just as could a defendant in a Federal district court.¹⁷ In fact, in order to implement fully the right of confrontation, the Court of Military Appeals has ruled invalid a previously well-established military practice under which depositions of prosecution witnesses could be taken without the presence of the accused and then used against him in a court-martial.¹⁸

On the other hand, the serviceman who is brought before a board considering the issuance of an undesirable discharge may not have the opportunity to confront adverse witnesses or to subpoena witnesses in his own favor. The Department of Defense directive of January 14, 1959, governing administrative discharges, specifically grants the serviceman the right to a hearing before a board of at least three members, to appear in person before this board, to be represented by counsel, who, if reasonably available, should be a lawyer, and to submit statements in his own behalf.¹⁹ There is no mention in this directive of confrontation or of assistance to the respondent in producing witnesses in his own behalf. Some of the service regulations

¹⁴ See Army Regulation 635-208, dated Apr. 8, 1959, par. 3.

¹⁵ Air Force Regulation 39-17, dated Mar. 17, 1959, par. 4f.

¹⁶ See *Lanzetta v. State of New Jersey*, 306 U.S. 451.

¹⁷ See sixth amendment, U.S. Constitution.

¹⁸ *U.S. v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244.

¹⁹ Hearings, p. 27.

provide additional safeguards, such as the right to have witnesses appear who are reasonably available.²⁰

Insofar as civilian witnesses are concerned, an administrative discharge board apparently lacks the power to compel their attendance and testimony. Article 47 of the Uniform Code of Military Justice refers to persons—

duly subpoenaed to appear as a witness before a 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 a court, commission, or board.²¹

However, this article is apparently not construed by the armed services as authorizing the issuance of subpoenas by military boards convened to rule on administrative discharges.²² During the subcommittee's hearings, it was suggested that it would be desirable to confer on such boards the authority to subpoena witnesses whose testimony the boards, in their discretion, considered to be necessary or desirable.²³ In light of the severe consequences attendant upon an undesirable discharge, the subcommittee would recommend that administrative discharge boards be provided with some procedure for compelling the attendance of witnesses. Under article 47 of the Uniform Code, the subpoena power is already available to courts-martial, military commissions, and courts of inquiry. Thus, it would be no great innovation to extend this power to the administrative discharge boards. At the same time, the wording of article 49 of the Uniform Code might be revised in order specifically to authorize the taking and use of depositions in connection with the proceedings of administrative discharge boards.

Under the provisions of the sixth amendment, as interpreted by the Supreme Court, a defendant in a Federal criminal court must be provided with counsel.²⁴ In State criminal trials "due process" under the 14th amendment also requires that counsel be furnished to the defendant. Similarly, in general court-martial cases, it is required by article 27 of the Uniform Code that an accused be furnished with legally qualified counsel.²⁵ Despite the stigma and other severe consequences that follow from an undesirable discharge, there appears to be no statutory requirement that the serviceman be provided with counsel to assist him in contesting such a discharge. Furthermore, although the Defense Department directive of January 14, 1959, requires that counsel be furnished, a lawyer need be provided as counsel only if he is "reasonably available."²⁶ During the hearings, the subcommittee directed its attention on several occasions to the criterion of reasonable availability; and each service furnished information concerning the extent to which lawyers were declared reasonably available as counsel before administrative discharge boards.²⁷ While realizing that, in some instances, it may be difficult for the armed services to furnish legally trained counsel to represent the respondent in an administrative discharge hearing, the subcommittee has concluded that, during time of peace, the additional burden on

²⁰ See, for example, Air Force Regulation 39-17, dated Mar. 17, 1959, par. 13c(3).

²¹ 10 U.S.C., sec. 847.

²² Hearings, pp. 114, 117.

²³ *Id.* pp. 114-115, 46-47.

²⁴ *Johnson v. Zerbst*, 304 U.S. 458.

²⁵ 10 U.S.C., sec. 827.

²⁶ Hearings, p. 27.

²⁷ *Id.*, pp. 332, 333, 335, 316, 333, 332.

the services in providing lawyers to respondents facing undesirable discharges is justified by the severe consequences of receiving such a discharge. At the very least, the commander who convenes the board and fails to declare a lawyer "reasonably available" to represent the respondent, should be required to furnish a detailed written explanation of the reasons for the unavailability of a lawyer and of the efforts he has made to obtain a lawyer as counsel.

In many instances, a serviceman being considered for an undesirable discharge will waive his right to a field board hearing. Each service stated to the subcommittee that no inducement is given to obtain such a waiver.²⁸ Apparently the serviceman is furnished counsel before executing any such waiver; but this counsel may not be legally trained. If the rights granted service personnel with respect to undesirable discharges are to be meaningful, it is important that these rights not be waived improvidently. Accordingly, except in the most unusual cases, a waiver of rights should not be accepted until the serviceman has been afforded the opportunity to consult with legally qualified counsel.

Although, as previously noted, the general discharge is issued under honorable conditions and does not affect veterans' benefits, witnesses before the subcommittee did feel that it created some stigma.²⁹ An Air Force regulation comments:

However, a general discharge has been found to be a definite disadvantage to an airman seeking civilian employment.³⁰

Therefore, it would also seem desirable to assure that, wherever feasible, an airman be given the opportunity to consult with legally qualified counsel before waiving any rights he might have to contest a general discharge which has been proposed for him.

Under the fifth amendment double jeopardy is prohibited; and a leading Supreme Court case concerns the application of this prohibition to trials by court-martial.³¹ Article 44 of the Uniform Code states clearly that "no person may, without his consent, be tried a second time for the same offense."³² In some instances problems somewhat akin to double jeopardy may arise when administrative action is taken by the armed services on the basis of events which previously were considered by civil or military tribunals. For instance, under the directive of January 14, 1959, and implementing service regulations, a serviceman can be discharged as undesirable because of conviction of a major crime in a civil court.³³ Similarly, "unfitness" within the meaning of this directive might be demonstrated by repeated convictions by civil courts or courts-martial.³⁴ Also, so far as the subcommittee has been informed, there is no prohibition against discharging a serviceman as undesirable because of alleged acts for which he has been tried by court-martial and acquitted.

Differences between "punitive" and "administrative" action may make inapplicable to administrative proceedings some of the rules pertinent to successive criminal trials for the "same offense." However, the subcommittee feels that it is impossible to justify a procedure authorized in some military regulations for referring a case to a second

²⁸ *Id.*, pp. 831, 898, 930.

²⁹ *Id.*, pp. 328, 330-341.

³⁰ AFR 39-10, dated Mar. 17, 1959, par. 8a.

³¹ *Wade v. Hunter*, 336 U.S. 684.

³² 10 U.S.C., sec. 844.

³³ Hearings, p. 26.

³⁴ *Id.* See also p. 381.

board if the reviewing authority disagrees with the findings or recommendations of the first board. For instance, Air Force Regulation 39-17, dated March 17, 1959, which deals with discharges of airmen for unfitness, provides:

If the findings of the board are not consistent with the facts in the case or the recommendations of the board are not consistent with the findings, the discharge authority may set aside the board's findings and recommendations and direct that a new board of officers be appointed to hear and consider the case. In such instance, no voting member of the new board may have been a member of the first board. Where a new board is appointed, the proceedings of the first board, less the findings and recommendations, will be forwarded to the new board for its information and consideration.

The same wording appears in Air Force Regulation 39-22, dated March 17, 1959, paragraph 8b. The subcommittee has been informed that, since the date of the original hearings, Air Force regulations governing administrative discharges (including the two regulations referred to above) were amended on September 26, 1962, by an unclassified message stating in part as follows:

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. If the first board's proceedings are set aside, no person who was a voting member thereof may be appointed as a member of the new board. The proceedings of the first board will be forwarded to the new board for its information and consideration; however, findings and recommendations and such evidence as is considered the basis of the legal prejudice upon which the rereferral is predicated will be excised. After completion of the second hearing, the discharge authority may not approve findings or recommendations less favorable than those rendered by the initial board.

In dealing with the same matter, Army Regulation 635-208, dated April 8, 1959, concerning discharges for unfitness, provides:

In the absence of either newly discovered substantial evidence or subsequent conduct by the individual indicating that new proceedings should be instituted, a second board of officers may not be appointed to reconsider the case. However, if the board has not adequately developed the facts of the case, or if the rights of the respondent have been substantially prejudiced through errors committed by the board, the convening authority may disapprove the findings and recommendations of the board and order a new board to be convened. In such case, the proceedings of the old board, or such portions thereof as do not substantially prejudice the respondent, will be furnished to the new board for its consideration and incorporation in the records. Only one new board may be convened without approval of Headquarters, Department of the Army.

Mr. Carlisle P. Runge, Assistant Secretary of Defense, agrees that:³⁵

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

The subcommittee agrees that a commander should be free to discharge a serviceman administratively for unfitness, if conduct subsequent to that proceeding viewed together with the respondent's earlier conduct, shows that he is unfit. However, a commanding officer should not be free to send a discharge case to a second board on the same evidence simply because he does not like the results in the first board.

³⁵ Id., p. 38. For some cases involving this problem, see pp. 371-372, 383-384.

In dealing with the powers of commanders, attention should be called to article 37 of the Uniform Code of Military Justice (10 U.S.C. 837), which states:

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 case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

So far as the subcommittee can determine there is no statutory prohibition against efforts by commanding officers or others to influence the action of boards appointed to consider administrative discharges. Yet an undesirable discharge recommended by these boards can be as onerous for the recipient as many forms of court-martial action. Also, there are other kinds of administrative boards appointed by the armed services whose actions or recommendations may have great impact on the individual servicemen whose cases they consider. The whole purpose of appointing a board to consider and evaluate facts is negated if a commanding officer is allowed to influence the board in its findings and recommendations. Indeed, under such circumstances having a board hearing becomes merely a deceptive formality. Therefore, the subcommittee considers that the policy of article 37 of the Uniform Code should be extended by statute to apply to administrative boards, and that commanders and others should be prohibited by statute from attempting to influence the action of these boards.

No serviceman can be discharged by a court-martial without the preparation of a verbatim record of his trial, which can then be reviewed at several levels, including the Court of Military Appeals. The Department of Defense directive of January 14, 1959, does not require a verbatim record of proceedings before a discharge board.³⁶ On the other hand, in some instances, service regulations do provide for a verbatim record.³⁷ Certainly, to the greatest extent feasible, the subcommittee favors the preparation of verbatim records of board proceedings where an undesirable discharge has been recommended.

In general courts-martial, a law officer must be appointed to rule on all matters of law which arise during the trial. This law officer must be a qualified lawyer; he sits apart from the court members and does not vote on guilt or innocence. Special courts-martial, which have the authority to impose a bad conduct discharge and up to 6 months' confinement and forfeitures of pay do not have a law officer; and it apparently would be unusual to have lawyers sitting as members of these courts.³⁸

Boards considering projected administrative discharges are not required by statute to have a law officer, legal adviser, or board member with legal experience. Nor does the governing directive make any provision for a lawyer to be present to advise a discharge board on legal points that may arise at the hearing.³⁹ In some

³⁶ *Id.*, pp. 23-27.

³⁷ AFR 39-17, dated Mar. 17, 1959, par. 13f.

³⁸ Hearings, pp. 124, 868.

³⁹ *Id.*, pp. 23-27.

instances, service regulations do state that among the members of the discharge board "should be a legal officer or an officer possessing legal experience, if such an officer is available, especially when the airman is represented by counsel."⁴⁰ However, even when provision is made for a lawyer to serve as a "member" of a discharge board, it is sometimes unclear whether the lawyer is to be a "voting member" or a nonvoting member and, if the latter, whether he is allowed to retire with the voting members during their deliberations.⁴¹

The subcommittee raised the question whether discharge board proceedings should be presided over by an experienced attorney, like the "law officer" who sits in a general court-martial. The premise underlying this question was that the severe consequences to the serviceman of receiving an undesirable discharge justify providing procedures that will better assure the correct decision of legal issues arising before a discharge board. Furthermore, it may be setting the stage for confusion if a respondent were provided with legally trained counsel, but no lawyer were available to advise the board impartially with respect to legal points raised by counsel.

Hon. Carlisle P. Runge, Assistant Secretary of Defense, stated that it would be necessary to enlarge the judge advocates corps of all the services in order to have a law officer preside over administrative discharge hearings.⁴² Obviously the extent of such enlargement would depend on the number of discharge cases in which boards were convened. The subcommittee considers that in any board proceeding, which may result in an undesirable discharge for the serviceman, a lawyer, if reasonably available, should be present to advise the board. In the event of unavailability, perhaps it would be wise to require that the convening authority state in writing the reasons therefor and his efforts to provide a legal adviser for the board. In any event, duties of the legal adviser should be clarified—for example, whether he is to vote as a board member and to retire with the members during deliberations. On the analogy of the judge-jury relationship, which apparently was used by the draftsmen of the Uniform Code in providing for the structure of general courts-martial, the legal adviser should be a nonvoting member, sitting apart from the voting members and not retiring with them to deliberate.

The procedures for issuing administrative discharges are related in several ways to military justice. For one thing, court-martial convictions and nonjudicial punishments under article 15 of the Uniform Code will often form a basis for showing that a serviceman is unfit and should be discharged. Thus, the fairness or unfairness of the original punitive proceeding will be reflected in the administrative action. Also, as noted earlier in this report, it has been charged that administrative discharge action is sometimes resorted to in order to bypass the safeguards with which the Uniform Code has surrounded trials by court-martial. Maj. Gen. Reginald C. Harmon, retired, formerly Judge Advocate General of the Air Force, reiterated this charge in his testimony before the subcommittee.⁴³ Earlier this charge had been disputed by Hon. Carlisle P. Runge, Assistant Secretary of Defense.⁴⁴

⁴⁰ AFR 39-17, dated Mar. 17, 1959, par. 12.

⁴¹ AFR 39-17, *supra*, par. 15.

⁴² Hearings, p. 43.

⁴³ *Id.*, p. 165.

⁴⁴ *Id.*, p. 47.

In some instances the serviceman may be pleased that he will receive an administrative discharge, even if it is an undesirable discharge. He may anticipate that, if tried by court-martial, he would be found guilty and sentenced to lengthy confinement.

As General Kuhfeld put it:⁴⁵

I think that the fellow that asks for a court-martial, except in these unusual circumstances such as I am talking of, is a very rare breed. You do not find a fellow very, very often asking for a court-martial instead of administrative action, because when he asks for a court-martial, he visualizes himself sitting in jail or something like that, and this he does not want.

In other instances, however, where an undesirable discharge is proposed and is to be based on alleged acts which would constitute violations of the Uniform Code of Military Justice and could be tried by court-martial, the serviceman may deny that he committed the acts and may request trial. In this regard, Chief Judge Quinn of the Court of Military Appeals testified:⁴⁶

I think that an undesirable discharge is a very severe penalty, and I believe that it should not be given except as a result of a court-martial, except in the instance where the individual, after proper legal advice, and proper legal protection, decides to accept it for his own personal protection. I mean in the case of homosexuals, I can see there where they might want to take the undesirable discharge. But I think they ought to have a right to a trial. I think it is a very severe penalty.

On the other hand, Maj. Gen. A. M. Kuhfeld, the Judge Advocate General of the Air Force, testified:⁴⁷

Now the area, as I see it, that the chairman is getting into is, supposing one of these individuals said: "I would rather be tried by court-martial." Should he be entitled to be tried by court-martial? I would say not.

I would say that the decision as to whether he should be tried by court-martial should be left to the military authorities. Now why do I say that?

The cases in which the man is not tried by court-martial—let us take a child molestation case, for instance—you will have a situation where a youngster 5 or 6 or 7 years old—one case that I am thinking about in particular, where the youngster made a statement identifying the individual as the person who had taken indecent liberties with her, a little girl. The individual made a statement himself admitting that he had taken these indecent liberties.

Then he learns that a psychiatrist, a chaplain, the little girl's parents have said: "This will irreparably hurt this little girl if she is required to go on the witness stand and testify to these things that happened."

Now in that kind of a case I think the commander should be supported 100 percent in his determination that we have got to rid the service of this individual, but we do not have to sacrifice this little girl in order to do it, and we will use the little girl's statement and we will use his statement, the respondent's statement, to show what he did, and then eliminate him, despite the fact that he is asking for a court-martial, with full knowledge that we would not be inhuman enough to put the little girl on the witness stand.

I think you have got to consider all of those factors, Mr. Chairman, when you go into considering a problem of: Can this man force you to give him a court-martial?

One of the questions initially directed to the Defense Department concerned this issue of the right, if any, to demand court-martial with respect to alleged misconduct which is being made the basis of administrative action.⁴⁸ Of course, the subcommittee was primarily concerned with alleged misconduct which had not resulted in a civil court conviction.

⁴⁵ Id., p. 139.

⁴⁶ Id., p. 188.

⁴⁷ Id., p. 139.

⁴⁸ Id., pp. 835, 878-880, 901, 932-933.

As General Kuhfeld pointed out, the serviceman proposed for administrative action usually will not ask for a court-martial.⁴⁹ And perhaps a request for court-martial will sometimes be due to the accused's anticipation that the Government would encounter difficulty in obtaining witnesses or in establishing a *corpus delicti*.⁵⁰ Nonetheless, in light 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 in light of the stigma produced by an undesirable discharge, the subcommittee considers that, if a serviceman's request for court-martial is denied, he should then not receive an undesirable discharge. Apparently this is the approach which the Navy has taken to this problem; and according to Navy spokesmen, a sailor whose request for court-martial is denied usually is discharged under honorable conditions, rather than with an undesirable discharge.⁵¹

One type of "unfitness" that received detailed attention during the hearings involves "an established pattern showing dishonorable failure to pay just debts."⁵² The services were asked whether it would be desirable to eliminate nonpayment of debts as a basis for punitive and administrative action,⁵³ and their answers provide plausible reasons for the retention by the armed services of some authority to take action against a serviceman who is a thoroughgoing "dead-beat." However, as one witness vividly illustrated,⁵⁴ as complaints to the subcommittee have corroborated, and as was acknowledged by the Army in its reply to the subcommittee,⁵⁵ part of the problem stems from "overselling" and poor business procedures on the part of prospective creditors. Criminal prosecution for debt is generally not permitted in the United States; and the power of the armed services to court-martial or administratively discharge a serviceman for failure to pay his debts is an extraordinary power, which should be used most sparingly.⁵⁶

When a serviceman has been finally convicted of a serious crime by a civil court, there can be no objection to his being administratively discharged as undesirable. However, the subcommittee was disturbed to learn that there have been cases where the serviceman received the undesirable discharge by reason of a civil court conviction that later was set aside on appeal. For example, these were the facts underlying the case of *Jackson v. U.S.*,⁵⁷ where, after an unsuccessful application for relief to the Air Force Board for Correction of Military Records, the ex-serviceman sued for back pay in the Court of Claims.⁵⁸ Although General Kuhfeld, the Judge Advocate General of the Air Force, ably espoused the contrary view,⁵⁹ the subcommittee considers that a serviceman should be entitled to a change in the character of an undesirable discharge based on a civil court conviction which is reversed on appeal with subsequent dismissal of charges. Any other result is inconsistent with the "presumption of innocence" that is entrenched in American "due process" concepts.

⁴⁹ *Id.*, p. 139.

⁵⁰ *Id.*

⁵¹ *Id.*, pp. 61-62, 396-397, 901, 914-915, 866-867, 956. See also 259-260, 268, 476-480.

⁵² *Id.*, pp. 26, 41.

⁵³ *Id.*, pp. 867, 923, 956.

⁵⁴ *Id.*, p. 274.

⁵⁵ *Id.*, pp. 867-8.

⁵⁶ *Id.*, p. 41.

⁵⁷ Ct. Cl. 403-60.

⁵⁸ Hearings, pp. 32-35, 158-159, 399, 963.

⁵⁹ *Id.*, pp. 158-159.

The replies to the subcommittee's questionnaires revealed that headquarters approval of undesirable discharges is required in the Navy, while in the Army, Air Force, and Marine Corps such discharges can be approved by the officer exercising general court-martial jurisdiction over the serviceman being discharged.⁶⁰

As stated by the Air Force:⁶¹

The officer exercising general court-martial jurisdiction is a senior officer of mature judgment and wide experience, and he has available to him a full staff capable of adequately reviewing the case and providing him with legal, medical, or such other assistance as may be appropriate.

Presumably the discharge can be expedited if it need not be referred to headquarters in Washington for approval. On the other hand, a requirement of centralized control of undesirable discharges would tend to promote greater uniformity of result for each service.

The subcommittee does not take a position on the Navy's system of centralized control over undesirable discharges. However, the officer exercising general court-martial jurisdiction over a particular serviceman and that officer's staff may have been associated with the decision to initiate administrative discharge action in the first place, or may have appointed the field board.⁶² Moreover, the members of the field board which hears the case will often be under the command of the officer exercising general court-martial jurisdiction. Thus, it is important to avoid any semblance of command influence by that officer, or by his staff, or the members of the field board. As stated earlier in this report, the subcommittee suggests that, by amendment of article 37 of the Uniform Code or by new legislation, a statutory prohibition should be imposed on the exercise of command influence on the members of discharge boards or other administrative boards.

A serviceman who is dissatisfied with the character of a discharge that he has received may seek relief from the discharge review board of the appropriate service and, if he fails there, may then apply to that service's board for correction of records. The structure, functions, and duties of these boards were thoroughly examined by the subcommittee.⁶³

Prior to the hearings, the subcommittee had received suggestions that it would be desirable to consolidate the discharge review boards and the corrections boards on an interservice basis; and it asked the services to comment on such proposals. These comments were all in the negative.⁶⁴ Nor did the services favor proposals to consolidate each service's discharge review board, composed entirely of military personnel, with its board for correction of military (or naval) records, composed solely of civilians.⁶⁵

In this connection, Mr. Neil Kabatchnick, secretary of the Military Law Committee of the District of Columbia Bar, pointed out that the boards for correction of records grant hearings only as a matter of grace⁶⁶ and that in 75 to 80 percent of their cases the correction boards deny a hearing.⁶⁷ On the other hand, in discharge review boards there is an absolute right to a hearing. Therefore, Mr. Kabatchnick

⁶⁰ *Id.*, pp. 856, 895, 915, 950.

⁶¹ *Id.*, p. 950; see also p. 141.

⁶² *Id.*, pp. 143, 146.

⁶³ *Id.*, pp. 833-834, 861-866, 899-900, 918-922, 931, 953-955.

⁶⁴ *Id.*, pp. 864, 920, 954.

⁶⁵ *Id.*, pp. 864, 919, 954.

⁶⁶ *Id.*, p. 513.

⁶⁷ *Id.*, p. 805.

recommended that the two boards not be consolidated unless there was provided by statute an absolute right to a hearing before the consolidated board.⁶⁸ Mr. Kabatchnick also recommended that subpoena power and discovery procedures be made available to discharge review boards and correction boards.⁶⁹ This same point was touched upon by the subcommittee in its questionnaire to the armed services.⁷⁰ The answers furnished do not suggest that there is currently any uniformity of practice among the services in that regard.

In light of the information adduced at the hearings, the subcommittee is persuaded that it would be unwise at this time to attempt consolidation of the discharge review boards with the correction boards of the respective services. In the interests of greater uniformity and "equal protection" for servicemen in different armed services, it might be desirable for the discharge boards, or the correction boards, or both to be consolidated on an interservice basis at the Department of Defense level.⁷¹ However, the Army has pointed out that the result of statutory consolidation of these boards would probably be "that such boards would ultimately be compartmented and would operate almost as independently as they do at the present time."⁷²

On the other hand, the subcommittee considers that it is important to broaden the hearing available before these boards, especially in light of the relative paucity of safeguards now provided to the serviceman prior to issuing him an undesirable discharge. Contrary to what is apparently now the practice of the Air Force,⁷³ a correction board or discharge review board should not hesitate to grant confrontation and cross-examination if the applicant for relief has raised a significant new factual issue. The subpoena power and the power to order the taking of depositions should also be granted to these boards—not with the expectation that they would be used as a matter of course, but so that they would be available in instances where the board wished to obtain material testimony that otherwise would be unavailable.⁷⁴

Of course, the subcommittee is not suggesting that there be a series of administrative hearings on the same issues. For example, if the field board provided a full and complete hearing prior to discharge, at which time the respondent was represented by counsel and had full opportunity to confront and cross-examine all material witnesses, then there would be little occasion to recall the same witnesses before the discharge review board or correction board. Similarly, where the discharge review board has conducted a complete hearing, there is much less occasion for the correction board to traverse the same ground.

As noted at the outset, the Federal courts have established the right to judicial review of administrative discharge action.⁷⁵ The attacks on administrative discharges have included suits in district courts to enjoin a threatened discharge or to obtain a declaratory judgment as to the legality of a previously issued discharge and actions brought for back pay in the Court of Claims.⁷⁶ The subcommittee had received suggestions that the Court of Military Appeals be granted jurisdiction

⁶⁸ *Id.*, p. 809.

⁶⁹ *Id.*, p. 513.

⁷⁰ *Id.*, pp. 865-866, 920-921, 955.

⁷¹ *Id.*, pp. 46, 260-261.

⁷² *Id.*, p. 864. See also p. 46.

⁷³ *Id.*, p. 955.

⁷⁴ *Id.*, pp. 46-47, 922.

⁷⁵ *Harmon v. Brucker*, 355 U.S. 579.

⁷⁶ Hearings, pp. 880-889, 920-921, 961-964.

to review legal issues connected with the giving of an administrative discharge which was other than an honorable discharge.⁷⁷ The court could be granted this right of review either to supplement the jurisdiction of other Federal courts or to supplant that jurisdiction.

With respect to any such increase in the jurisdiction of the Court of Military Appeals, Chief Judge Quinn noted that it would increase the court's "fairly severe workload" but that he "would have no objection."⁷⁸ Then he continued:⁷⁹

I think perhaps it might be a desirable protection to American citizens. I mean it is a very severe penalty to be given administratively, and I think there should be some additional protections thrown around people who get undesirable discharges.

The execution of a punitive discharge imposed by a court-martial can be suspended. However, so far as the subcommittee has been informed, there is no formal procedure for suspending an administrative discharge or putting a serviceman on probation before the issuance of the discharge. (Subsequent to the hearings the subcommittee was informally advised that the Navy has developed a practice resembling probation for a sailor who has been recommended for an administrative discharge.) For this reason, the subcommittee inquired at length with respect to the counseling that precedes administrative discharge proceedings and the opportunity the serviceman receives to correct his defects before being administratively discharged. Defense Department spokesmen described the counseling received by the serviceman before efforts are made to discharge him administratively.⁸⁰ Mr. Alfred B. Fitt, Deputy Under Secretary of the Army, doubted the wisdom of requiring formal notice to a serviceman that, unless his performance improved, he would be considered for discharge.⁸¹

Since suspension of sentence and probation do not presently appear to be available in connection with administrative discharges, various proposals have been made to devise other tools of rehabilitation. Congressman Clyde Doyle, of California, repeatedly proposed legislation providing for issuance by the armed services of exemplary rehabilitation certificates, which would certify that an ex-serviceman has led an exemplary life for at least 3 years since he received an undesirable discharge.⁸² Congressman Doyle explained in detail to the subcommittee the most recent bill—H.R. 1935—which he had introduced on this subject. He testified that its purpose was—⁸³

* * * to help—at least a little bit—to remove the stigma of a life sentence which automatically attached and also to help at least some percentage thereof to be able to become economic assets by reason of this exemplary rehabilitation certificate enabling them to a better chance of obtaining decent working positions and employment; such exemplary certificate cannot take the place of an honorable discharge as relates to employment offers but it will help some percentage of the many thousands involved to obtain at least an interview with possible employers and such interview cannot be obtained with a veteran presenting any type of less-than-honorable discharge.

The Department of the Navy took a position at the hearings in opposition to the Doyle bill.⁸⁴ On the other hand, Maj. Gen. Reginald

⁷⁷ Id., pp. 45, 558-559.

⁷⁸ Id., p. 189.

⁷⁹ Id.

⁸⁰ Id., pp. 31, 104-107, 882.

⁸¹ Id., p. 106.

⁸² Id., pp. 314-315.

⁸³ Id., pp. 329-330.

⁸⁴ Id., p. 57.

C. Harmon, retired, formerly the Judge Advocate General of the Air Force, stated:⁸⁵

I am for rehabilitation all the way, and I think that that would probably be good legislation.

Mr. Benjamin W. Fridge, of the Air Force, commented:⁸⁶

As I understand his bill, it would provide a certificate of rehabilitation, let us call it, when a man, after discharge, had shown that he was qualified in civilian life.

This appears to me to be a worthy thing to do for an individual who, in his younger years, had had certain problems within the military service. As to just who should do this and how it should be done, I would leave that to the wisdom of Congress to decide.

General Kuhfeld, of the Air Force, expressed his views in this way:⁸⁷

Well, my own personal views, now—as you perhaps know, Mr. Creech, I was the witness for the Department of Defense in the hearings before the Doyle subcommittee on that bill.

I think that something like this would do the man good in connection with his seeking employment. * * * I think that Mr. Doyle's position that the certificate of exemplary rehabilitation would be worth more, if given by the concern that gave him the undesirable discharge, that it has got a lot of reasonable basis.

Without attempting to evaluate every specific feature of H.R. 1935 as offered by Congressman Doyle, the subcommittee considers that legislation of this type would be desirable.

OFFICER SHOW CAUSE PROCEEDINGS

On October 25, 1961, a civil action, *Beard v. Stahr*, was filed which challenged certain procedures currently used for the elimination of officers from the Army.⁸⁸ The plaintiff appealed to the Supreme Court from an adverse decision in the District Court for the District of Columbia; and this appeal was subsequently dismissed as premature. At the request of the subcommittee, Mr. Frederick Bernays Wiener, who represented the plaintiff, explained the background of *Beard v. Stahr* and the issues that had been presented there.⁸⁹ Prof. A. Kenneth Pye, of Georgetown University Law School, criticized the procedures employed in eliminating officers and commented that in such a proceeding the officer "has no right of compulsory process, he has no right of confrontation, and the board has been informed in advance that he does have the burden of proof."⁹⁰ Professor Pye suggested that the subpoena power and deposition procedures be made available for these elimination boards.⁹¹

In replying to the subcommittee questionnaire, each service furnished detailed information concerning its officer elimination procedures.⁹² These replies revealed that the Army and Air Force officer elimination procedures, as provided by statute, differ from those applicable in the Navy and Marine Corps. The Army and Air Force recommended that a uniform procedure for elimination of officers be provided and noted that legislation is now under consideration which, in general, would extend the Army-Air Force system to the Navy and Marine Corps.⁹³ The Department of the Army noted that it pre-

⁸⁵ Id., p. 176.

⁸⁶ Id., p. 148.

⁸⁷ Id., pp. 148-149.

⁸⁸ Id., pp. 606-624, 836.

⁸⁹ Id., pp. 575-776.

⁹⁰ Id., p. 555.

⁹¹ Id., pp. 555-556.

⁹² Id., pp. 834-835, 866, 877-878, 900, 921, 931-932, 955.

⁹³ Id., pp. 866, 956.

ferred its own system, "primarily because it appears to better protect the rights of the individual."⁹⁴ The Navy apparently considers the Army-Air Force system to be somewhat inflexible and cumbersome.⁹⁵ With respect to providing subpoena power in officer elimination proceedings, the Air Force commented that such power would be desirable,⁹⁶ and the Army and Navy suggested that, to the extent necessary, "subpena power, confrontation, and cross-examination can be afforded by resort to established formal investigative or court of inquiry procedures."⁹⁷

The subcommittee believes that elimination procedures for officers should be uniform for all the services. The Army-Air Force system seems to be a satisfactory model in this regard. However, a board considering the elimination of an officer should have the power to subpoena whatever witnesses it considers necessary or to take their depositions. Such power is especially important where, as in a case like *Beard v. Stahr*, specific alleged misconduct is the primary basis for elimination. In instances where the officer denies the misconduct and this misconduct would constitute a violation of the Uniform Code of Military Justice, consideration should be given by military authorities to trying the officer by general court-martial, where he would have all the safeguards provided by the code. The penalties resulting from conviction by court-martial should usually be sufficient deterrent to prevent a flood of specious requests for trial by court-martial.

In connection with show cause proceedings for officers and with administrative discharges generally, the subcommittee is cognizant of the need the armed services have for separating persons who are ill suited for military duty or whose retention might jeopardize the military mission. For example, as Professor Pye noted:⁹⁸

I don't think the services should be required to have a homosexual stay on active duty simply because they don't have a sufficient amount of corroboration or that the statute of limitations has run since the last homosexual act.

Part of the controversy concerns the label that should be attached to a separation, and the rights that should be forfeited thereunder, if the armed services are unable to establish misconduct in proceedings where the serviceman enjoys safeguards akin to those which Congress provided under the Uniform Code of Military Justice.

COMMAND INFLUENCE

Among the most insistent complaints giving rise to the Uniform Code of Military Justice was that of command influence on courts-martial.⁹⁹ Article 37 of the code (10 U.S.C. 837), which proscribes command influence, has been quoted earlier in this report. There it was noted that the wording of this article does not purport to prohibit efforts by commanders to influence the action of a discharge board or other administrative board. It also deserves attention that the prohibition imposed by article 37 is in some respects limited to convening authorities and other commanding officers. The suggestion has been made that article 37 should be broadened so as specifically to include censure, reprimand, or admonition of a court-martial, or

⁹⁴ Id., p. 866.

⁹⁵ Id., p. 921.

⁹⁶ Id., p. 955.

⁹⁷ Id., pp. 922, 866.

⁹⁸ Id., p. 565.

⁹⁹ Id., pp. 261-262.

any member, law officer, or counsel thereof by persons other than a commanding officer. Since some of the leading "command influence" cases under the Uniform Code concerned alleged pressure exerted on personnel of a court-martial by members of a commander's staff, such as his staff judge advocate,¹⁰⁰ an expansion of article 37 in order specifically to include such cases would seem in order.

The Court of Military Appeals in *United States v. Danzine* (12 USCMA 350, 30 CMR 350), held by a 2-to-1 vote that article 37 of the Uniform Code does not prohibit a convening authority from giving members of a court-martial a lecture on their duties and responsibilities as court members, the law relating to their duties as members, sentence appropriateness, and other general principles. However, Chief Judge Quinn testified that "I think perhaps it might be well if that process were eliminated."¹⁰¹ Judge Ferguson referred the subcommittee to his dissenting opinion in *Danzine*, where he had stated his view that pretrial instructions to court-martial members from the commander who appointed them violate article 37.

In response to questions posed by the subcommittee concerning pretrial instructions to court-martial members, the Department of the Army recognized that such instructions might have a tendency to sap public confidence in the administration of military justice.¹⁰² Both the Judge Advocate General of the Army and the Chief of Staff of the Army concluded that—

whatever beneficial results flowed from such instructions were overshadowed by the detrimental results occurring when such instructions were improperly, albeit unintentionally so, administered.¹⁰³

Therefore, soon after the subcommittee's questionnaire to the Defense Department had been received and shortly before hearings began, the Army directed that staff judge advocates eliminate special pretrial instructions to court-martial members.

In a letter of February 5, 1962, to each officer in the Army exercising general court-martial jurisdiction, General Decker, Army Chief of Staff, stated:

The purpose of this letter, which is being sent in identical form to all commanders exercising general court-martial jurisdiction, is to express my views and concern regarding the question of "command influence." You should not regard this letter as being in any way a criticism of the operations of your command.

As you are aware, it is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice. No other single factor has a greater tendency to destroy public confidence in the system than allegations of "command influence." Although these allegations may often be unsubstantiated, the appearance of evil in only a relatively few cases is all that is required to undermine the faith of the public in the essential fairness and impartiality of our military justice procedures.

Many of the recent allegations of "command influence" have arisen from instructions given either by commanders or by staff judge advocates to present or prospective members of courts-martial. In my opinion, such special instructions are wholly unnecessary. Basic instruction in military justice forms a key portion of the curriculums of service schools and unit instruction for all personnel. Such instruction affords personnel an adequate foundation in the basic principles of military law. The law officer of a general court-martial is required to instruct members of the court in detail both with respect to legal issues and procedural matters in the particular case being tried. They are tailored to fit the specific facts under consideration and do not confuse court members with theories and propositions unrelated to particular problems before them.

¹⁰⁰ *Id.*, pp. 841-842.

¹⁰¹ *Id.*, p. 187.

¹⁰² *Id.*, pp. 869-870.

¹⁰³ *Id.*, p. 869.

The Judge Advocate General, in the discharge of his technical supervisory responsibility for the administration of military justice throughout the Army, has directed that staff judge advocates eliminate special instructions to members of courts-martial from the future activities of their offices. In view of the above, it is suggested that you also eliminate such instructions given by you, your senior representatives, or subordinate commanders exercising court-martial jurisdiction if there is any need for you to do so. The long-range, concrete benefit to the Army as a whole from such action should be apparent to all.

The Department of the Navy advised the subcommittee that—¹⁰⁴ to overcome any possible criticism, the Navy has sponsored a "Handbook for Court Members" similar to the "Handbook for Jurors" used in many civilian jurisdictions. This proposal has been submitted to the Army and Air Force for comment and concurrence. The adoption of such a handbook would obviate the necessity for any other means of instructing court members.

Rear Adm. William C. Mott, the Judge Advocate General of the Navy, reaffirmed that the Navy is contemplating the issuance of the handbook for court-martial members although he noted that "it will be a most difficult book to write and to review."¹⁰⁵ The Air Force, through its response to the subcommittee's questionnaire¹⁰⁶ and through the testimony of its Judge Advocate General¹⁰⁷ made clear that it did not propose to prohibit the use of pretrial instructions for court-martial members.

The subcommittee considers that the Army has set a commendable example by prohibiting practices which might affect confidence in military justice. Furthermore, the subcommittee agrees with the Chief of Staff of the Army that the special instructions given before trial to court members are "unnecessary" and any legitimate purposes for giving them can be accomplished otherwise. Since the Air Force apparently does not plan to forbid the giving of special pretrial instructions and the Court of Military Appeals has held that such instructions are not prohibited by existing legislation, the subcommittee recommends amendment of article 37 of the Uniform Code to prevent commanding officers or their staff judge advocates from giving these instructions to court members. Of course, the law officer of a general court-martial would remain free to instruct court members concerning their responsibilities and the principles of law applicable to the cases before them, and the armed services could continue to provide general courses of instruction on military justice for military personnel.

In connection with command influence generally and any proposals to restrict the authority of commanders in the administration of military justice, the subcommittee is well aware that a commanding officer has the responsibility for maintaining discipline. In fact, failure of a commander to maintain discipline among his troops has on at least one occasion been judicially recognized as a basis for punishing the commander himself.¹⁰⁸

However, the subcommittee also considers that, in the long run, discipline will be better and morale will be higher if service personnel receive fair treatment. Therefore, it is very important to avoid, wherever possible, any action that would destroy servicemen's confidence that they are being treated fairly. Any practice, which is unnecessary and is subject to misunderstanding and misinterpretation, should be eliminated.

¹⁰⁴ *Id.*, p. 923.

¹⁰⁵ *Id.*, p. 56.

¹⁰⁶ *Id.*, p. 957.

¹⁰⁷ *Id.*, pp. 137-138, 155-157.

¹⁰⁸ *In re Yamashita*, 327 U.S. 1.

One antidote to the exercise of command influence has been the increase in the stature of the law officer since the Uniform Code took effect. This increase in stature is partially attributable to the decisions of the Court of Military Appeals which place the law officer in much the same position as the trial judge in a civilian court.¹⁰⁹ The creation by the Army of a field judiciary, to be discussed in more detail later in this report, has also materially enhanced the prestige of the law officer in that service and at the same time has freed the law officer from the possibility of influence by the commander who convenes a general court-martial.¹¹⁰ The likelihood of a fair trial seems increased under the Army's field judiciary system where a mature, experienced, independent lawyer presides over the court proceedings.

In some instances, there have been complaints of command influence exerted against defense counsel in one form or another. For instance, Judge Ferguson referred to the complaint raised in *United States v. Kitchens* (12 USCMA 589, 31 CMR 175), that the defense counsel "was put under really great pressure for conducting the defense."¹¹¹ Mr. Donald Rapson, a spokesman for the Special Committee on Military Justice, Association of the Bar of the City of New York, noted that:¹¹²

There were certainly cases that came up, however, through the Court of Military Appeals, which indicated that command influence had been exercised at the trial level on defense counsel, and the Court of Military Appeals took the necessary corrective action in those cases. There are influences, there are subtle influences, and I am sure they are still existing.

In a statement prepared for the subcommittee, Prof. A. Kenneth Pye of the Georgetown University Law Center pointed out that:¹¹³

In addition, even before a general court-martial there still exist factors, perhaps inherent in the nature of the system, which cause the reasonable observer to wonder if ever we can approach perfect justice to the same extent in the military as we do in civilian life. The members of the court are still chosen by the general who is their commander. The efficiency report of the defense counsel is still prepared by the staff judge advocate who had recommended that there was probable cause for believing that the defendant was guilty. The defense counsel is still under the command of the officer who referred the case to trial. The members of the court-martial are usually officers and during the course of their training have become aware of the fact that a case should not be referred to trial unless it has been investigated and unless competent authority has determined that there is probable cause for believing that the defendant is guilty. Yet these officers must presume that he is innocent. The staff judge advocate who prior to trial has recommended that the case be tried, has the responsibility after trial to review impartially the case to determine, among other things, if the evidence is sufficient to sustain the conviction.

I do not suggest that most commanders or staff judge advocates attempt to interfere with the faithful performance of their duties by court members and counsel. I do think, however, that the fear of causing displeasure to superiors is considered by many court members and counsel. The defense counsel who has the option of asserting a defense which will embarrass his commander or staff judge advocate appreciates that this officer may ruin him professionally simply by marking his efficiency report "satisfactory" without utilizing any letter of reprimand, transfer, or punitive measure. Perhaps this fear does not affect the courageous officer. I think, however, that there are officers who, looking forward to promotion or retirement, are not oblivious to the practical realities of military life.

¹⁰⁹ See, for example, *U.S. v. Stringer*, 5 U.S.C.M.A. 122; 17 C.M.R. 122; *U.S. v. London*, 4 U.S.C.M.A. 90; 15 C.M.R. 90; *U.S. v. Berry*, 1 U.S.C.M.A. 235; 2 C.M.R. 141.

¹¹⁰ Hearings, pp. 838-839.

¹¹¹ *Id.*, p. 191.

¹¹² *Id.*, p. 262.

¹¹³ *Id.*, pp. 567-568. See also 548-549.

Mr. Lewis Evans, attorney, gave several examples of command influence on lawyers.¹¹⁴ Mr. George S. Parish, legal consultant for the Veterans of Foreign Wars, testified:¹¹⁵

But as a commanding officer, I could not afford to have a winner on the defense side, so I would have him shipped over to my side, to the command side, and have him prosecute the cases.

When I was a commander at Fort Riley, I did that, and so did all the other regimental commanders, and I am sure that my general would not permit some bright young attorney to defend the cases.—

If I had one that was bright I would put him on the range or on my own trial team, and I am not impugning myself as being an exception to that. I am relating the facts the way I saw them in the Army up to 18 months ago.

Admiral Mott, Judge Advocate General of the Navy, denied emphatically that the more qualified lawyers in his service were assigned to prosecute, and the least qualified attorneys given defense duties. Instead, he contended that now the converse was often the case.¹¹⁶ In replies to the subcommittee's questionnaire, each armed service maintained that command influence of any kind was a rare phenomenon.¹¹⁷

Those who feared that command influence might be exerted directly, or indirectly, on defense counsel differed as to the appropriate solution. Professor Pye informed the subcommittee that:¹¹⁸

As a matter of fact, the Army has a system for this which they plan to put in operation in time of war, the so-called trial team system, by which defense counsel, trial counsel, the court reporter, and the law officer would move from one command to another trying cases, depending upon the local staff judge advocate for logistical support.

He then suggested that it would be desirable to initiate this system at the present time, so that, like the law officer under the field judiciary program, the defense counsel would be mobile, would travel on a particular circuit, would be appointed by the Judge Advocate General, and would be free from the control of a particular convening authority.¹¹⁹

Mr. Donald Rapson, a witness for the Association of the Bar of the City of New York, noted that "there have been proposals to build up a separate corps of defense counsel" but that these were proposals on which his association "has not formed a definite view."¹²⁰ He then added:

I think the proposal there that there should be a definite group of lawyers, judge advocates who do nothing but defense work, that has been thrust before the services since 1955. My own idea is, it is undesirable to build up a group of men in the Army whose sole work is defending accused persons.

In that way you build up a philosophy, an attitude, in these men which is not healthy, and I think you should not have a group of men in the service whose sole duty is opposing the Government.

Mr. Arnold I. Burns, another witness for the same bar association, commented:¹²¹

When we conducted our investigation, we did not have any specific instances of command control on defense counsel. I have heard rumors. One never

¹¹⁴ Id., pp. 506-507.

¹¹⁵ Id., pp. 377, 507-508, 557.

¹¹⁶ Id., pp. 395, 400.

¹¹⁷ Id., pp. 840-842, 905, 937.

¹¹⁸ Id., p. 548.

¹¹⁹ Id., pp. 549, 566.

¹²⁰ Id., p. 262.

¹²¹ Id.

knows whether these are rumors originated by disgruntled accused or dissatisfied attorneys who were dissatisfied with the particular result in a given case.

I would say this: that if evidence was forthcoming indicating that there has been control exerted on defense counsel, interfering with the absolute undivided loyalty and defense with the greatest vigor of a client, I, for one, would think that some attention should be given to the possibility of establishing a separate defense corps, isolating them in some way. What the mechanics are I do not know.

It was for this reason that our association pinpointed the question in our report but left the answer open.

The Department of the Army has stated to the subcommittee that it does not favor a separate defense corps, composed of lawyers whose sole duty is to defend accused persons before courts-martial.¹²² The Army apparently considers that such a program is not justified by any proven dangers of command influence on defense counsel and that performance solely of duty as a defense counsel over a lengthy period of time might prove very unattractive for the lawyers involved.¹²³ It would also appear that a defense counsel who was riding circuit might encounter problems in determining which court members he should challenge, either peremptorily or for cause, and in investigating facts relevant to the case. Certainly in civilian life a defendant often wishes to have a local counsel who is familiar with the community where he will be tried. A law officer riding circuit is not subject to the same difficulties that a defense counsel might be.

On the basis of the testimony offered at its hearings, the subcommittee considers that the feasibility and desirability of establishing a separate defense corps should be left to each service for evaluation in light of its own policies concerning legal personnel. However, the subcommittee does recognize that many possibilities exist for command influence to be exercised on defense counsel and that the mere existence of these possibilities may create suspicion concerning military justice. Each service must emphasize and reiterate that military defense counsel in courts-martial are expected to defend the accused with the same vigor that would be displayed by civilian attorneys defending criminal cases in civil courts. Efforts to influence a defense counsel in the performance of his duties should be vigorously dealt with under article 98 of the Uniform Code, 10 U.S.C. 898, or otherwise.¹²⁴

Admiral Mott, Judge Advocate General of the Navy, testified that he favors a separate Judge Advocate General Corps for the Navy, and noted that a bill had been introduced which would authorize the creation of such a corps.¹²⁵ Several other witnesses spoke in favor of such a corps for the Navy.¹²⁶ Chief Judge Quinn of the Court of Military Appeals, who served as a Navy legal officer during World War II, testified that—

it would be definitely a good thing for the Navy, for the lawyers in the Navy, for military justice, and for the country as a whole, to have a JAG Corps in the Navy.¹²⁷

A Judge Advocate General Corps for the Navy was recommended by the Hoover Commission in April 1955,¹²⁸ and the American Legion strongly favors such a corps.¹²⁹ Mr. Burns and Mr. Rapson, appear-

¹²² *Id.*, p. 885.

¹²³ *Id.*

¹²⁴ *Id.*, pp. 559-560. For an American Legion suggestion, see p. 474.

¹²⁵ *Id.*, p. 401.

¹²⁶ *Id.*, pp. 187, 263, 415, 503.

¹²⁷ *Id.*, p. 187.

¹²⁸ *Id.*, pp. 414-477.

¹²⁹ *Id.*

ing in behalf of the Association of the Bar of the City of New York, stated concerning the proposal of a separate JAG Corps:¹³⁰

But from a lawyer's point of view, and a lawyer who has served in the military in administering military justice matters, it is my opinion that it would be absolutely essential, barring some exigency of which I am now unaware.

Admiral Mott testified that pending legislation to create a JAG Corps—

has the approval of the President of the United States, the Secretary of Defense, and everybody else that you must get approval from when you go through the legislative process.¹³¹

Apart from other probable benefits, creation of a separate JAG Corps for the Navy promises to improve significantly the administration of military justice in that service, to enhance the independence of Navy defense counsel, and thus to protect better the rights of members of that service. Proposed legislation to this end should be adopted.

Although the Air Force has no Judge Advocate General Corps, Chief Judge Quinn pointed out that it does have a Judge Advocate General Department.¹³² The existence of this department helps perform the function of a separate corps in assuring the independence of attorneys in the performance of their military justice duties.

When the subcommittee hearings began, it was the practice in the Army and Air Force, but not in the Navy, for chairmen of boards of review to prepare efficiency reports on the members of their boards.¹³³ The Air Force apparently still considers this practice to be desirable.¹³⁴

However, several witnesses indicated emphatic disagreement. Chief Judge Quinn stated that he had not known before that a chairman rated members of his board of review in the Army and Air Force; but he gave his "horseback opinion" that the practice was "rather unfortunate."¹³⁵ Col. D. George Paston, chairman of the committee on military justice of the New York County Lawyer's Association, expressed his disapproval of such ratings by a board chairman.¹³⁶

The Uniform Code of Military Justice made provision for boards of review which would review convictions by court-martial in cases involving sentences to a punitive discharge or to confinement for one year or more.¹³⁷ These boards were intended as a safeguard for the serviceman to protect him from command influence or other injustice; and, apparently the boards have furnished significant relief to accused persons.¹³⁸ However, a board cannot function independently if it is under the complete domination of the board chairman. If the chairman prepares the efficiency ratings for board members—ratings which help determine their future ratings and promotions—there is at least some threat of such domination by the chairman.

The Department of the Army notified the subcommittee that, effective on March 21, 1962, the chairmen of Army boards of review would cease to prepare efficiency ratings on the junior members of their boards.¹³⁹ This action by the Army was highly desirable. The sub-

¹³⁰ *Id.*, p. 263.

¹³¹ *Id.*, p. 401.

¹³² *Id.*, p. 187.

¹³³ *Id.*, pp. 57-58, 153, 844-845, 881.

¹³⁴ *Id.*, pp. 153-154.

¹³⁵ *Id.*, p. 187.

¹³⁶ *Id.*, p. 240. For American Legion view see p. 431.

¹³⁷ 10 U.S.C., sec. 866.

¹³⁸ Hearings, p. 882.

¹³⁹ *Id.*, p. 881.

committee recommends that the Air Force also immediately change its efficiency rating practices, so that someone other than a board of review chairman will rate the efficiency of the board's junior members. In the absence of such a change on the part of the Air Force, corrective legislation should be adopted.

JURISDICTION

Some of the jurisdiction purportedly granted to courts-martial by articles 2 and 3 of the Uniform Code (10 U.S.C., secs. 802-803), has been held unconstitutional by the Supreme Court in cases such as *Toth v. Quarles*, 350 U.S. 11, *Reid v. Covert*, 354 U.S. 1, and *Guagliardo v. McElroy*, 361 U.S. 281. Professor Pye, of Georgetown, noted that these decisions had "caused a grave hiatus in our pattern of criminal jurisdiction."¹⁴⁰ He proposed that legislation be enacted to create jurisdiction in the Federal district courts over certain offenses committed by civilian employees and dependents accompanying the Armed Forces overseas or committed by former servicemen at a time when they were still in the service.¹⁴¹ In their replies to the subcommittee's questionnaire, the services also called attention to the jurisdictional "void" that has been produced by recent Supreme Court decisions concerning military jurisdiction.¹⁴²

Would there be any constitutional problems involved in adopting legislation to expand the jurisdiction of Federal district courts so that it would include offenses committed by civilian dependents and employees overseas? Mr. Frederick Bernays Wiener did not seem to anticipate any constitutional difficulty in this regard.¹⁴³ However, the subcommittee is aware that a contrary view has been suggested elsewhere.

Article 2(4) of the Uniform Code (10 U.S.C., sec. 802(4)), grants courts-martial jurisdiction over "retired members of a regular component of the Armed Forces who are entitled to pay." Occasionally, there have been suggestions that this jurisdiction be eliminated. However, it appears to be exercised quite sparingly.¹⁴⁴ General Kuhfeld stated that the Air Force policy concerning court-martial of retired Regular Air Force was that:

1. Although article II(4) of the Uniform Code of Military Justice provides that retired personnel of a regular component of the Air Force who are entitled to receive pay are subject to military law and thus amenable to trial by court-martial, charges against retired regular military personnel will be processed only under the following conditions:

(a) No retired Air Force personnel will be brought to trial without the prior personal approval of the Secretary of the Air Force; and

(b) Ordinarily, no case will be referred to the Secretary for approval unless the person's conduct clearly links him to the Military Establishment or is inimical to the welfare of the United States.

Several witnesses expressed the view that military jurisdiction over retired personnel should not be completely eliminated, and should be available for the rare case.¹⁴⁵

So long as jurisdiction to court-martial retired military personnel is exercised rarely and is restricted pursuant to a policy like that of the

¹⁴⁰ *Id.*, p. 553.

¹⁴¹ *Id.*, pp. 553-554.

¹⁴² *Id.*, pp. 848-852, 910, 946.

¹⁴³ *Id.*, p. 793.

¹⁴⁴ *Id.*, pp. 53-54, 150, 176.

¹⁴⁵ *Id.*, 54, 150, 176, 204, 240. See also p. 203.

Air Force, the subcommittee sees little reason to eliminate it completely by repeal of article 2(4) of the Uniform Code of Military Justice.

The Uniform Code authorizes courts-martial to try not only military offenses, such as unauthorized absence, desertion, and disobedience of orders, but also offenses of a civil nature, like murder, rape, burglary, and larceny. A civil offense committed by a serviceman while stationed in the United States would normally fall within the jurisdiction of either a State or Federal civil court—and sometimes would fall within the jurisdiction of both. If the offense were committed by the serviceman while stationed overseas in a foreign country, it would frequently be punishable in the courts of that country.

With respect to American servicemen stationed in Western Europe, detailed rules are prescribed by the NATO Status of Forces Agreement concerning whether a serviceman shall be court-martialed or be tried by courts of the host country for conduct which violates both the Uniform Code and the laws of that country. In other foreign countries where American troops are stationed, the rules for exercise of jurisdiction have frequently been specified by treaty or executive agreement.

Since both a Federal District Court and a court-martial are creatures of the same Government, trial by one bars trial by the other.¹⁴⁶ Therefore, the subcommittee inquired as to the criteria for determining by which tribunal a serviceman shall be tried when either would have jurisdiction.¹⁴⁷ The Air Force pointed out that:

On July 19, 1955, the Attorney General of the United States and the Secretary of Defense signed a written agreement with respect to the investigation and prosecution of crimes over which the two Departments have concurrent jurisdiction.

Generally speaking, it was agreed that the Armed Forces would have primary jurisdiction over all crimes committed on a military or naval installation if only persons subject to military law were involved. There is an exception, however, where the offense involves fraud against the Government, robbery or theft of Government property or funds, and similar offenses. In such cases, the Department of Justice has primary jurisdiction.

The NATO Status of Forces Agreement protects a serviceman from being tried by both a court-martial and a foreign tribunal.¹⁴⁸ However, a serviceman in the United States who has violated both the Uniform Code and the criminal law of a State appears to be subject to successive prosecution by court-martial and by a State court.¹⁴⁹

Some States have prohibited by statute any prosecution in their courts for conduct which has already been the subject of a Federal trial. (See, for example, ch. 38, sec. 601.1, Illinois Revised Statutes; California Penal Code, sec. 793.) The Armed Forces have no outright prohibition against prosecution of a serviceman by reason of an act or omission which already has been tried in a State court.¹⁵⁰ The subcommittee was informed by the services that such prosecutions are infrequent, although the practice in this regard does not appear to be the same in every detail.¹⁵¹

Of course, a serviceman's conviction of a serious crime in a civil court frequently results in his administrative discharge.¹⁵² And such

¹⁴⁶ *Grafton v. U.S.*, 206 U.S. 333.

¹⁴⁷ Hearings, pp. 847, 909, 945.

¹⁴⁸ Art. VII, par. 8, NATO Status of Forces Agreement.

¹⁴⁹ *Barthkus v. Illinois*, 359 U.S. 121; *Abbate v. U.S.*, 359 U.S. 187.

¹⁵⁰ Hearings, pp. 848, 909, 945.

¹⁵¹ *Id.*, pp. 848, 874, 909, 945.

¹⁵² *Id.*, p. 945.

action is specifically authorized by a Department of Defense directive.¹⁵³

The subcommittee recognizes that there has been severe criticism of the view allowing prosecution in a Federal court for the same act or omission which has already been the subject of a State criminal trial.¹⁵⁴ And there have been proposals of Federal legislation to prohibit any such prosecution. However, so long as successive prosecutions are used infrequently and with caution, and so long as no legislation applicable to Federal courts generally is passed that would prohibit successive prosecutions—and the subcommittee expresses no opinion here as to the desirability of such legislation—it does not seem appropriate to prohibit trial by court-martial for an act or omission which violated the Uniform Code of Military Justice but which has been the basis for trial in a State court. Furthermore, the subcommittee sees no objection to administrative discharge of a serviceman who has been convicted of a serious crime.

The American Legion has recommended that the Uniform Code be amended, so that civilian courts would have a priority of jurisdiction in peacetime over offenses of a civil nature committed off a military jurisdiction and so that no court-martial may try an offender for a capital offense which is a civil offense—such as rape or murder—wherever a State or Federal court is functioning.¹⁵⁵ Apparently the priority of jurisdiction which the Legion proposes would not amount to complete elimination of jurisdiction in peacetime over noncapital offenses of a civil nature.¹⁵⁶ Mr. Frederick Bernays Wiener also suggested—

that the civil courts should have primary jurisdiction over civilian offenses committed by military personnel off the post. In other words, if the soldier, if the marine from Quantico robs somebody in the District he ought to be tried in the District Court. If he robs somebody on the reservation, he should be tried by court-martial.¹⁵⁷

Professor Pye raised a question as to the constitutionality of allowing courts-martial to try military personnel during peacetime for offenses of a civil nature committed in the United States.¹⁵⁸ He also questioned the desirability of such military jurisdiction.¹⁵⁹

Mr. Wiener stated that he was aware of the constitutional argument, but believed that military jurisdiction could constitutionally be exercised as to civil offenses committed by servicemen.¹⁶⁰ In his opinion no constitutional distinction would hinge on whether an offense committed was capital or noncapital.¹⁶¹

If the armed services are constitutionally precluded from trying servicemen by court-martial for civil-type offenses committed by them in peacetime in the United States, it would also seem questionable that they could prosecute such offenses when committed by servicemen overseas. The regular State and Federal civil courts would be unavailable in a foreign country; but the opinions of the Supreme Court in recent cases like *Kinsella v. Singleton*, 361 U.S. 234, and *McElroy v. Guagliardo*, 361 U.S. 281, seem to give little weight to the unavailability of an American civil tribunal.

¹⁵³ *Id.*, p. 26.

¹⁵⁴ See dissent in *Abbate v. U.S.*, 359 U.S. 187.

¹⁵⁵ Hearings, pp. 425, 456, 485-486.

¹⁵⁶ *Id.*, p. 486.

¹⁵⁷ *Id.*, p. 786.

¹⁵⁸ *Id.*, pp. 552-553.

¹⁵⁹ *Id.*, p. 553.

¹⁶⁰ *Id.*, pp. 784-786, 797.

¹⁶¹ *Id.*, p. 797.

If the armed services may not try by court-martial any offenses of a civil nature, it becomes important to draw a distinct line between civil-type offenses and those of a military nature. Occasionally, this line may be hard to draw. For example, in a prosecution under article 92 of the Uniform Code, 10 U.S.C. section 892, for failure to obey an order, would military jurisdiction be defeated if the military order required performance of a duty as to which nonperformance would constitute a crime under State or Federal law? Article 134 of the Uniform Code (10 U.S.C., sec. 934)—and there were similar provisions in the Articles of War and the Articles for the Government of the Navy—makes punishable by courts-martial “all disorders and neglects to the prejudice of good order and discipline in the Armed Forces” and “all conduct of a nature to bring discredit upon the Armed Forces.” Would the armed services be precluded from prosecuting under article 134 if the serviceman’s conduct also violated a generally applicable State or Federal criminal law?

The difficulties that would be foreseeable if military jurisdiction over servicemen turned solely on the type of offense to be tried tend to furnish an argument in support of Mr. Wiener’s position that there is no constitutional prohibition against court-martial of servicemen for offenses that could be prosecuted in civil courts. Furthermore, similar difficulties might be anticipated if, as some of the witnesses proposed, statutory limitations were placed on the right of courts-martial to try civil-type offenses.

Mr. D. George Paston, representing the New York County Lawyers’ Association, expressed his view that:¹⁶²

I think that the discretion that we give to the military today should remain, because where a member of the force, the Armed Forces, commits some very serious crime on the outside, and he is brought before the civilian court and given a suspended sentence or a slap on the wrist, the Army, and again I use the term “Army” meaning any Armed Force, should have the right if it sees fit to try him by court-martial, and, if guilty, to mete out a proper sentence because otherwise it will reflect adversely against the Army and harm the morale of the service.

Prof. Sheldon D. Elliott, representing the American Bar Association, testified:¹⁶³

I have great confidence in the administration of military justice as it is now set up, particularly if it continues in the trend that I have just mentioned, of competent individuals doing the adjudicating, the training of personnel at Charlottesville and counterpart schools for military assistance, legal advice, and so on. I want to switch over to the other side for just a minute.

We have good civilian courts, we have mediocre civilian courts, and we have poor civilian courts. And I can’t offer a guarantee that transplanting the adjudication of the rights of individuals from one system to another would be an improvement if you put it on the civilian side.

It would have to be put in the right court.

Finally, one of our continuing complexities is congestion and delay. I am not advocating administrative tribunals as a substitute for pure judicial determination of disputes between individual and individual or between Government and individual.

I am, however, concerned that if we can provide a good adjudicative body, specialized as it may be, to take care of these things then let them do it and not add to the load which is getting tremendous, of our civilian courts.

Civilian courts in this country generally provide some safeguards—such as trial by jury—which are unavailable in courts-martial. Therefore, if a serviceman commits a crime which could be tried either by a

¹⁶² Id., p. 239.

¹⁶³ Id., pp. 352-353.

court-martial or a civil court, he may prefer trial in the latter tribunal. On the other hand, situations are foreseeable where the serviceman might wish to be tried by court-martial—for example, if he expected that there would be considerable delay before his case could be brought to trial in the civil court. In some instances, he might anticipate that a court-martial would impose a lighter sentence than a civil court, or that he would have better opportunities for rehabilitation if any confinement were served in the hands of military authorities.

At all events, the subcommittee does not favor an outright prohibition of the trial of civil offenses by court-martial, even if the prohibition were to relate only to offenses committed in the United States during peacetime. Such a prohibition would be difficult to administer, might in some instances act to the detriment of the serviceman, and would place an undue burden on military authorities in the performance of their duty to maintain discipline. Nor would the subcommittee even go so far at this time as envisaged in the American Legion's proposal that civil courts have a priority of jurisdiction over civil-type offenses committed during peacetime by servicemen.¹⁶⁴ This proposal presents some of the same difficulties that would arise if military jurisdiction over civil-type offenses were prohibited entirely. In addition, it might be troublesome to work out the detailed procedures under which the civil courts could assert their priority of jurisdiction.

Whether a serviceman should be tried by court-martial or by civil court for alleged misconduct over which both have jurisdiction, the subcommittee considers can best be left to informal arrangements between appropriate commanding officers and civil authorities. However, it is imperative to assure that military justice is administered in such a way that the serviceman will not feel that he has been deprived of the likelihood of a fair trial if his case is heard by a court-martial, rather than by a civil court.

THE FIELD JUDICIARY

The Uniform Code of Military Justice requires that each general court-martial be provided with a law officer, who must be a licensed attorney certified as qualified for such duty by the Judge Advocate General of his armed service.¹⁶⁵ During the first years under the code, law officers were appointed on a part-time basis; and, when not serving in this capacity, they might be performing other military justice duties, rendering legal assistance, processing claims, and so on. However, effective November 1, 1958, the Army created a Field Judiciary Division, to which were assigned well-qualified lawyers who were to serve as law officers on a full-time basis. The members of the field judiciary "ride circuit" within the geographical area which they serve.¹⁶⁶ Since they are not under the command of a local commanding officer, a shield exists against their being subjected to commanding influence of any type; and the Judge Advocate General of the Army has forcefully emphasized that the members of the field judiciary are expected to display complete independence.¹⁶⁷ Furthermore, officers

¹⁶⁴ *Id.*, pp. 425, 456, 483-486.

¹⁶⁵ 10 U.S.C. §26.

¹⁶⁶ Hearings, pp. 838-839.

¹⁶⁷ *Id.*, p. 839.

have been selected carefully for this assignment with a view to enhancing the prestige and independence of the field judiciary.¹⁶⁸

In every respect, the Army's specialized law officer plan appears to have been a success. As it was expressed in that Department's reply to the subcommittee's questionnaire:¹⁶⁹

A survey of data concerning appellate reversals based on law officer error in Army general courts-martial tried since January 1, 1957, shows that frequency of law officer error to total cases tried dropped from about 4 percent in 1957 to about 1.2 percent in 1960, the first year of full operation of the professional law officer plan. The decline continued in 1961.

The success of the professional law officer plan, however, cannot be measured solely on a judicial officer's "box score" appellate record. Rather, the effectiveness of the plan must be determined through reliance upon imprecise gages, such as acceptance by the Army and favorable opinion from many sources including accused persons, counsel, courts, and the public. Within the Army, commanders, members of courts, and high responsible officials—the Secretary and the Judge Advocate General—have expressed the opinion that the plan is a success. Army Judge Advocates generally share this view. The U.S. Court of Military Appeals has enthusiastically endorsed the plan.

The Navy and the Marine Corps instituted a pilot judiciary program which was patterned after the Army's field judiciary system.¹⁷⁰ In the pilot program law officer error was reduced from 8.7 percent to approximately 2 percent.¹⁷¹ Shortly after the subcommittee's hearings ended, the Department of the Navy adopted the field judiciary system on a worldwide basis. However, the Department of the Air Force made it clear to the subcommittee that it had no desire to use a field judiciary system and considered it to be unnecessary and unsuited for the Air Force.¹⁷²

With the exception of Air Force witnesses,¹⁷³ there appeared to be universal acclaim for the field judiciary program inaugurated by the Army. Mr. Finn, testifying for the American Legion, praised the program and recommended that it be enacted into law and extended to the other services.¹⁷⁴

Professor Elliott, representing the American Bar Association, testified that the Army's field judiciary system—¹⁷⁵

* * * is providing both expertise and independence in the trial of general courts-martial and is setting an example which represents high standards for counterpart civilian criminal courts.

Professor Elliott noted that, in his capacity as director of the Institute of Judicial Administration, he had "worked with judiciary systems of 50 States now" and that the field judiciary compared favorably in many respects with civilian judicial systems.¹⁷⁶ Representatives of the Association of the Bar of the City of New York recommended that the Army's field judiciary program be adopted by statute; and they testified:¹⁷⁷

This system would in our judgment (a) minimize command influence; (b) develop an experienced trial judiciary, and (c) provide the training grounds for the development of judges to sit on boards of review.

¹⁶⁸ Id.

¹⁶⁹ Id., p. 838.

¹⁷⁰ Id., p. 904.

¹⁷¹ Id.

¹⁷² Id., pp. 936, 956-987.

¹⁷³ Id., pp. 134-135.

¹⁷⁴ Id., p. 490.

¹⁷⁵ Id., p. 342.

¹⁷⁶ Id., pp. 347-348.

¹⁷⁷ Id., p. 246.

Mr. D. George Paston, a witness for the New York County Lawyers Association, stated that the field judiciary was "a very good thing," which should be "formalized by statute."¹⁷⁸ Mr. John A. Kendrick, chairman, Military Law Committee of the Bar Association of the District of Columbia, expressed the view that the circuit judge system is "very effective."¹⁷⁹

Chief Judge Quinn of the Court of Military Appeals, testified that the Army's circuit rider program—¹⁸⁰

* * * has been a very large improvement. Those men are now trained as judges. They definitely discharge their obligations as trial judges in a manner that is superior to the way they were discharged before the program was instituted.

I think it has been a very good thing for the Army. I think it would be a good thing for the Navy and the Air Force, too.

Professor Pye, of Georgetown University Law Center, commented that:¹⁸¹

This system by which a law officer is not subject to the command of the staff judge advocate or the convening authority but goes into a command completely free from the control of those officials and performs his duty is extremely desirable.

Mr. Frederick Bernays Wiener stated:¹⁸²

I think the permanent law officer program is the greatest improvement in trials since the code, and that it should be mandatorily required.

The importance which the draftsmen of the Constitution attached to judicial independence is attested by the tenure which article III grants to Federal judges. Similarly, in trials by general court-martial it is important to assure the independence of that person—the law officer—who will be the author of all legal rulings and instructions. Many witnesses informed the subcommittee that the Army's field judiciary system has made a significant contribution toward protecting the law officer's independence by insulating him from command influence. At the same time, the efficiency of the law officer was improved, so that he was less likely to make errors that would prejudice the rights of either the Government or the accused.

In comparison to the gains to be expected from the field judiciary program, the objections raised to it by the Air Force are far outweighed. Therefore, the subcommittee recommends that the field judiciary system, developed by the Army and adopted by the Navy, now be extended to the Air Force. The subcommittee also proposes that the field judiciary system be specifically required by statute, so that its continuance will be more fully assured.

The Uniform Code of Military Justice allows a law officer of one service to sit in the general court-martial of another.¹⁸³ While it is readily conceivable that, in some cases, the law officer might need to possess familiarity with the customs of the service in which a case arose, generally there would appear to be little difficulty involved in interservice use of law officers.¹⁸⁴ In instances where interservice use of law officers would reduce some of the costs of a circuit rider system, the subcommittee can perceive advantages to such use.

Under current English military law, Army and Air Force general courts-martial are assigned a civilian lawyer who serves as legal ad-

¹⁷⁸ *Id.*, p. 238.

¹⁷⁹ *Id.*, pp. 536-537.

¹⁸⁰ *Id.*, p. 186.

¹⁸¹ *Id.*, p. 548.

¹⁸² *Id.*, p. 782.

¹⁸³ *Id.*, pp. 50, 146.

¹⁸⁴ *Id.*, pp. 59, 352.

viser. In light of this precedent, the subcommittee inquired about the feasibility of using civilian attorneys as members of the field judiciary. Army, Navy, and Air Force joined in opposing any such suggestion.¹⁸⁵ Mr. Frederick Bernays Wiener doubted that it would make any difference if civilians were used as members of the field judiciary.¹⁸⁶

The field judiciary, as utilized by the Army, seems to work very effectively at the present time. In light of this fact and of the objections voiced by the armed services, the subcommittee does not consider it necessary that civilians be authorized to serve as law officers of general courts-martial. On the other hand, the subcommittee agrees with Chief Judge Quinn "that the law officer should be really built up into the stature of a judge."¹⁸⁷ (See also the position of the American Legion in this regard.)¹⁸⁸

At the present time the law officer lacks some of the powers which in civil courts would almost invariably be possessed by the trial judge. For example, he does not rule finally on challenges to court-martial members (the military jurors); and his ruling on a motion for a finding of not guilty, a motion which tests the legal sufficiency of the evidence, is subject to being overruled by the court-martial members. If the law officer of a general court-martial is to be built into the stature of a judge,¹⁸⁹ then he should be granted some of the powers normally possessed by a trial judge.

Under a proposal by the Association of the Bar of the City of New York—¹⁹⁰

* * * the law officer is given the power to (a) punish for contempt, (b) rule on challenges, (c) rule with finality on motions for findings of not guilty, (d) preside, control, direct, and regulate all proceedings, (e) supervise the preparation of the record of trial by the trial counsel, (f) rule on continuances, and (g) rule on all interlocutory questions except the question of sanity.

Gen. Alan B. Todd, Assistant Judge Advocate General for Military Justice of the Army, testified that it would help the Army in its task of building up the law officer if he were given such powers.¹⁹¹

Chief Judge Quinn recommended "that there should be such a thing in the military service as jury trial waiver."¹⁹² Such a waiver is specifically authorized in Federal district courts by the Federal Rules of Criminal Procedure.

The Department of the Army has proposed that legislation be enacted which would allow the law officer to call sessions without the attendance of the court-martial members to dispose of interlocutory motions and objections, hold the arraignment, and receive the pleas of the accused. The New York County Lawyers Association has reported that it sees no objection to such legislation.¹⁹³

Some of the proposals to enhance the powers of the law officer date back almost 10 years and were accepted then both by the Court of Military Appeals and by the Judge Advocates General of the three services.¹⁹⁴ The subcommittee's hearings revealed no opposition to increasing the law officer's powers.

¹⁸⁵ Id., pp. 839-840, 904-905, 936.

¹⁸⁶ Id., p. 797.

¹⁸⁷ Id., pp. 182, 186.

¹⁸⁸ Id., p. 456.

¹⁸⁹ Id., pp. 182, 186.

¹⁹⁰ Id., p. 246.

¹⁹¹ Id., pp. 123-124.

¹⁹² Id., p. 182.

¹⁹³ Id., p. 229.

¹⁹⁴ See joint report, June 1, 1952-Dec. 31, 1953, pp. 4-5, Court of Military Appeals and Judge Advocates General.

The strengthening of the powers of the law officer, especially when combined with development of the field judiciary program, will greatly increase the safeguards for the rights of military personnel in trials by general court-martial. However, no added burden would be placed thereby on the armed services. Therefore, the subcommittee recommends that legislation be enacted to allow the law officer to rule on challenges, rule with finality on motions for findings of not guilty, punish for direct contempt committed in his presence, preside and regulate all proceedings, rule on all interlocutory questions (with the possible exception of mental competency to stand trial), rule on continuances, supervise the preparation of the record of trial, and call sessions without the attendance of the court-martial members in order to conduct the arraignment, receive pleas, and dispose of interlocutory matters.

In accord with the practice in Federal district courts under the Federal Rules of Criminal Procedure, the subcommittee recommends that waiver of trial by the court-martial members (the jurors) be specifically authorized. Since the Uniform Code provides that the court members (the jury) shall do the sentencing, it would be necessary to authorize the law officer to sentence the accused if the accused specifically waives sentencing by the court members.

The subcommittee recognizes that, if the law officer were to be patterned completely after the Federal judge, it would be necessary to grant him all sentencing power and remove it from the hands of the court-martial members. At the present time, the subcommittee is content to recommend that the law officer have sentencing power if the accused, after consultation with his defense counsel, waives sentencing by the court members. Experience under this permissive arrangement might later demonstrate that it was desirable to transfer all sentencing functions to the law officer.

The subcommittee realizes that the prestige of the law officer might be enhanced if he had a different title. Therefore, it is sympathetic to the proposals that the law officer be renamed "Law Judge" or "Military Judge."¹⁹⁵

A special court-martial is empowered to prescribe punishment extending to a bad conduct discharge, confinement for up to 6 months, and forfeiture of two-thirds pay for up to 6 months.¹⁹⁶ Yet this court lacks a law officer or a legal adviser. The Court of Military Appeals and the Judge Advocates General joined almost a decade ago in recommending that a one-officer special court-martial be authorized as an alternative to the conventional special court-martial.¹⁹⁷ Under this proposal the one-officer special court would be manned by an experienced lawyer whom the Judge Advocate General of his service had certified to be competent for such duty. This one-officer court-martial could only be used with the consent of the accused.

The report submitted to the American Legion in 1956 by its special committee on the Uniform Code of Military Justice, took note of the proposed one-officer special court-martial but recommended—

that for the time being at least the status of the present special courts should remain as they are except that we have reached the conclusion that the president of a special court should be a lawyer and possess the qualifications for a law officer as set forth in article 26(a).¹⁹⁸

¹⁹⁵ Hearings, pp. 223, 428.

¹⁹⁶ 16 U.S.C., sec. 819.

¹⁹⁷ Joint Report, Op. Cit., p. 5.

¹⁹⁸ Hearings, p. 429.

The report of an Army committee appointed to study the Uniform Code recommend in 1960 that nonjudicial punishment under article 15 be expanded to such an extent that special and summary courts-martial could be eliminated, so that there would remain only nonjudicial punishment and the general court-martial.¹⁹⁹ The New York County Lawyers Association also recommends that special and summary courts-martial be abolished—

leaving only (a) commanding officer's nonjudicial punishment, and (b) court-martial, the said court staffed by a law officer, trial counsel, and defense counsel.²⁰⁰

Under this approach, there is removed any question of providing a legal adviser for the special court-martial, since that court would itself be abolished.

Mr. Everett A. Frohlich, chairman of the Special Committee on Military Justice, Association of the Bar of the City of New York, did not endorse complete abolition of the special court-martial:²⁰¹

* * * we think that you should have a special court, but it should be modified and not be the one that we have today. We think that there should be a special court consisting—and this at the option of the accused—of one law officer, a man trained in the law, a single judge sitting in the special court; that the accused should have the right to elect trial by that one-man court or trial by the traditional special court, knowing full well that the trial in the traditional special court will be a trial without law members, and that it will not be administered by men trained in the law.

Mr. Frohlich would also deprive the special court-martial of its power to impose a bad conduct discharge.²⁰²

In connection with this limitation on the power of a special court-martial, it is noteworthy that the Department of the Army does not at the present time allow its special courts-martial to impose bad conduct discharges. In explaining its practice to the subcommittee, the Army commented:²⁰³

The Army practice is designed to insure that in those instances where trial by court-martial may result in the imposition of a punitive discharge, the serviceman is fully protected. The presence of a law officer and qualified legal counsel guarantees maximum protection of the accused's rights. While the Air Force apparently does provide qualified counsel, information furnished by the Navy indicates that legally qualified counsel are not ordinarily furnished for trials by Navy special courts-martial. Further, the president of a special court-martial is not normally a lawyer, and he cannot be expected to provide the accuracy, control and judicial temperament which should guide judicial proceedings which may result in punitive separation of the accused.

The subcommittee is not convinced that it is either necessary or desirable to abolish special courts-martial entirely. On the other hand, it does not believe that a bad conduct discharge should be imposable by a tribunal which has no legal adviser or law officer. Even providing an accused with qualified counsel in a special court-martial, as the Air Force now does in most instances,²⁰⁴ does not cure the absence of a qualified "judge" to preside over the proceeding. Therefore, if special courts-martial are to retain the power to impose a bad conduct discharge, the subcommittee recommends that this power not be exercisable unless the court is presided over by a qualified

¹⁹⁹ See Powell committee report, pp. 4, 33, reprinted in 1960 Annual Report of Court of Military Appeals and Judge Advocates General.

²⁰⁰ Hearings, p. 212.

²⁰¹ *Id.*, p. 264.

²⁰² *Id.*

²⁰³ *Id.*, p. 884.

²⁰⁴ *Id.*

lawyer. Of course, this would necessitate amending the Uniform Code to authorize the use of a law officer in special courts-martial.

Even in special court cases where a bad conduct discharge is not impossible, the subcommittee recommends that a law officer be assigned to preside over the proceedings wherever possible. Moreover, the subcommittee believes that a single-officer special court-martial should be authorized which would try a case with the accused's consent. The subcommittee recognizes the force of the objections offered to the single-officer court by the American Legion.²⁰⁵ However, the field judiciary system was born after 1956 when those objections were made; and this innovation makes it much more likely that the accused would benefit by exercising his option to be tried by a qualified law officer. The objection that the accused might be coerced into agreeing to trial by a single-officer court could be met by a requirement that the accused be furnished an opportunity to consult with qualified counsel in order for his election of trial by a single-officer special court-martial to be binding.

The subcommittee's premise is that adequate protection of the accused serviceman's rights demands that he not suffer serious punishment at the hands of a tribunal which lacks a "judge." Even in relatively minor cases, it is desirable—although not quite so imperative—that a "judge" preside over proceedings. Elsewhere in this report the subcommittee has used a parallel approach—as did several witnesses²⁰⁶—in evaluating the necessity for a legal adviser to preside over administrative proceedings which may eventuate in an undesirable discharge.

The Army has made an immense contribution to the administration of military justice by developing its field judiciary system. The subcommittee recommends that the benefits of that system be extended to all the services and be given permanent protection by statute. The subcommittee also recommends that the essentials of this system, and especially the creation of an independent military judiciary, be made available in trials by special courts-martial and even in military administrative proceedings. Protection of the constitutional rights of military personnel will be aided by the availability of an independent body of military judges, just as in civilian life where the judiciary forms a bulwark for individual rights.

NEGOTIATED GUILTY PLEAS

Almost any attorney in civilian practice who has defended a substantial number of criminal cases has had occasion to negotiate informally with the prosecutor concerning possible entry of a guilty plea by his client.²⁰⁷ For several years the Army and the Navy, but not the Air Force, have utilized a procedure for negotiated guilty pleas in courts-martial. This procedure is considerably more formal than the bargaining for guilty pleas in civil courts.²⁰⁸ Also, unlike many civil courts, the accused apparently has an absolute right to withdraw his guilty plea at any time before sentencing.²⁰⁹

In replies to the subcommittee questionnaire, both the Army and Navy maintained that their negotiated plea programs have been

²⁰⁵ *Id.*, p. 429.

²⁰⁶ *Id.*, pp. 238-239, 256.

²⁰⁷ *Id.*, pp. 354, 568.

²⁰⁸ *Id.*, p. 880.

²⁰⁹ *Id.*, p. 102.

successful.²¹⁰ Furthermore, the Army pointed out that, although under its program the percentage of guilty plea cases had increased from 8 percent in 1952 to 58 percent in 1961, some 86 percent of the total convictions in Federal District Courts during fiscal year 1961 had rested on guilty pleas.²¹¹

The Air Force pointed to the danger that a conviction based on a guilty plea might be attacked on the grounds that the plea was improvident²¹² or that the accused had been pressured into pleading guilty.²¹³ Therefore, the Air Force policy is to require a prima facie case concerning each offense charged, regardless of a guilty plea and notwithstanding a defense request that the prosecution present no evidence. As a consequence, little useful purpose would be served by negotiating a plea, since the prosecution would still have to present a prima facie case.²¹⁴

With respect to negotiated pleas, Chief Judge Quinn commented:²¹⁵

I think under the proper protections, that it is desirable to permit negotiated pleas. I think perhaps there might be a difference of opinion in the court as to that. But, frankly, I am in favor of negotiated pleas where the defendant has the proper protections.

On the other hand, Judge Homer Ferguson indicated that he had some misgivings about negotiated pleas, since:²¹⁶

There is a great temptation to take lighter sentence, rather than contest guilt even though the accused does not believe he is guilty.

Mr. Zeigel W. Neff, civilian member of a Navy board of review, expressed the opinion that the pretrial agreement—²¹⁷

* * * has resulted in great savings in time and manpower without detracting from any of the accused's substantial rights. The few cases which have posed any problem have resulted from inexperienced counsel and this situation, to my knowledge, has always been speedily remedied by replacing the defense counsel concerned and by rectifying any injustice to the accused at the board of review level.

Mr. Arnold I. Burns, representing the Association of the Bar of the City of New York, testified that:²¹⁸

I would have no objection to a negotiated plea of guilty, and I think it serves a very useful purpose, an economy purpose, provided that there are safeguards; provided that the accused does have counsel who is fully aware of what the accused's position is, and what the facts of a given case are; and provided that this is all done under the supervision and direction of a fully qualified trial judge, the law officer.

Mr. Everett A. Frohlich, another witness for the same association, expressed his preference for the formal procedure used in military law for negotiated guilty pleas as compared with the practice in civil courts.²¹⁹ He said:

I think it is a safer procedure. I have seen too many instances in civilian life where little deals have been made and a person has been induced to plead based upon one of these deals. Then where the deal does not come through there is very little he can do about it.

I would prefer the formality of it. I think the military is right.

²¹⁰ *Id.*, pp. 843, 903.

²¹¹ *Id.*, p. 843.

²¹² *Id.*, p. 937.

²¹³ *Id.*, p. 177.

²¹⁴ *Id.*, p. 937.

²¹⁵ *Id.*, p. 189.

²¹⁶ *Id.*, p. 198.

²¹⁷ *Id.*, p. 300.

²¹⁸ *Id.*, p. 263.

²¹⁹ *Id.*

Other witnesses testified in the same vein.²²⁰

The procedure for negotiated guilty pleas used by the Army and Navy in general courts-martial appears to be fully consonant with the constitutional rights of military personnel and has considerable precedent in civilian practice. The accused has the benefit of extensive consultation with experienced counsel; he has a right to withdraw his guilty plea up to the time of sentencing; an experienced law officer—who now in the Army and the Navy would be a member of the independent field judiciary—presides over the proceedings to assure that the plea of guilty is not improvident; and the accused even remains free to seek a sentence lower than that provided for by the pretrial agreement with the convening authority.²²¹

Apparently, the negotiated plea is seldom utilized in special courts-martial, where the defense counsel may not be a lawyer and where no legal adviser presides over the proceedings.²²² Without such safeguards, the use of negotiated pleas of guilty is dangerous. On the other hand, if the accused is provided with a lawyer to advise him and if, as recommended by this subcommittee and by many others, provision is made for a law officer either to preside over a special court-martial or himself to constitute a single-officer special court, then the negotiated plea would be acceptable in special courts-martial.

The subcommittee does not criticize the Air Force for refusing to authorize negotiated pleas of guilty. However, to the extent that a service suffers from shortages of trained lawyers to assist in administering military justice, the guilty plea program developed by the Army and Navy may constitute one means for lessening that shortage.

SUMMARY COURTS-MARTIAL

The subcommittee's hearings took place prior to the enactment of Public Law 87-648, which expanded the authority of a commanding officer to impose nonjudicial punishment. However, during the hearings several witnesses indicated that expansion of this authority would render summary courts-martial superfluous. Brig. Gen. Alan B. Todd, Army Assistant Judge Advocate General for Military Justice, stated that, if commanding officers received greater authority:²²³

This would then not require that we have the summary court. Our view is that the summary court is not necessary.

General Kuhfeld, Judge Advocate General of the Air Force, indicated that he had authored the idea of expanding nonjudicial punishment under article 15 of the Uniform Code (10 U.S.C., sec. 815), and eliminating the summary court.²²⁴ Chief Judge Quinn favors increasing article 15 punishment and dispensing with summary courts.²²⁵ Mr. Zeigel W. Neff, civilian member of a Navy board of review, noted the possibility of expanding article 15 and thereby eliminating the summary court-martial and perhaps even the special court-martial. As he pointed out:²²⁶

The commanding officer needs this additional authority so that he can correct a youngster by taking him out to the woodshed, so to speak, without being forced

²²⁰ *Id.*, pp. 264, 353-354. See also p. 367.

²²¹ *Id.*, p. 880. See also *U.S. v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8.

²²² *Id.*, p. 880.

²²³ *Id.*, p. 124.

²²⁴ *Id.*, p. 161. For views of Admiral Mott, see pp. 390-391.

²²⁵ *Id.*, n. 182.

²²⁶ *Id.*, p. 299.

to give him a summary court-martial for a minor infraction. Conviction by summary court becomes a conviction of record. Two such convictions will support a punitive discharge in a special or general court and in any event will follow an accused for the remainder of his life. Before a summary court, an accused has no right to qualified counsel as such, yet he may come out with a relatively serious conviction of record, involving such derelictors as insubordination, assault, petty larceny, et cetera.

Mr. Finn, speaking for the American Legion, emphasized that—²²⁷

* * * we have stated and we are on record as being of the opinion that the summary court-martial served no useful purpose.

Prof. Sheldon D. Elliott, representing the American Bar Association, expressed his personal view that the summary court-martial might well be displaced if the scope of permissible nonjudicial punishment was expanded.²²⁸ Apparently, both the New York County Lawyers Association and the Association of the Bar of the City of New York favor abolishing the summary court-martial.²²⁹

In discussing the field judiciary, it has been mentioned that there have been proposals to abolish even the special court-martial. Although the subcommittee is not ready to recommend such abolition of the special court-martial, it does consider that the summary court-martial is obsolete and superfluous.

Furthermore, so long as the summary court-martial remains in existence, the subcommittee considers that a risk exists that the serviceman may be deprived of certain safeguards that Congress intended to provide him when it strengthened commanders' powers of nonjudicial punishment. As finally enacted, Public Law 87-648 grants a statutory right for a serviceman (unless attached to or embarked in a vessel) to demand trial by court-martial in lieu of nonjudicial punishment. This right of election was placed in the law by an amendment proposed by the Committee on Armed Services of the Senate,²³⁰ and at the legislative hearing conducted by a subcommittee of that committee the importance of this right was emphasized.

Several of the witnesses at our own hearings placed similar emphasis on the need for granting the serviceman an option to demand trial by court-martial.²³¹ Without this option a serviceman would be subject to being kept in "correctional custody" for up to 30 days, reduced one grade, and forfeiting up to one-half of a month's pay without any sort of trial. Conceivably this authority to impose nonjudicial punishment could be exercised oppressively by certain commanders.

Prior to the enactment of Public Law 87-648, which was approved on September 7, 1962, a serviceman could not be subjected to confinement as nonjudicial punishment—except that confinement up to 7 days could be imposed upon persons attached to or embarked in a vessel.²³² A summary court-martial could impose confinement up to 30 days; but, unless the accused had previously been offered nonjudicial punishment for the same offense, he had a statutory right to decline a summary court-martial, in which event trial would be by special or general court-martial.²³³ In a general or special court-martial an accused is provided with counsel and has other protections which are not available in a summary court-martial; and presumably

²²⁷ *Id.*, p. 491.

²²⁸ *Id.*, p. 349.

²²⁹ *Id.*, pp. 211-212, 249-251.

²³⁰ See S. Rept 1911, 87th Cong., 2d sess., pp. 1-2.

²³¹ Hearings, pp. 211, 299, 350.

²³² 10 U.S.C. 815.

²³³ 10 U.S.C. 820.

the election to decline summary court-martial was granted by Congress in order to give the accused serviceman a chance, if he thought it desirable, to obtain the safeguards provided in a general or special court.

By reason of Public Law 87-648, a serviceman can be nonjudicially punished with up to 30 days of "correctional custody;" but he can demand trial by court-martial. However, so long as the summary court-martial remains in existence, the possibility exists that upon demand for trial the case will be referred to a summary court-martial. Since the serviceman would already have been offered nonjudicial punishment under article 15 of the code, he would have no right under article 20 of the Uniform Code to demand trial by special or general court-martial—a right which would exist had the case been sent to a summary court-martial in the first place. Thus, the accused must submit to trial by a single officer, "who need not be and usually is not a lawyer," who acts as "judge, jury, trial counsel, and defense counsel," but who nonetheless is deemed to constitute a U.S. court.²³⁴ Under these circumstances, the accused has lost the benefit both of the statutory election given him by article 20 of the Uniform Code and of the new statutory election created under Public Law 87-648.

Thus, the expansion of nonjudicial punishment, taken together with the continued existence of the summary court-martial, creates a threat that the serviceman will be deprived of important rights which Congress intended him to retain. Indeed, aside from furnishing commanders with a weapon to use against the rights of service personnel, the summary court-martial has no role left to play. Accordingly, the subcommittee recommends the elimination of summary courts-martial.

BOARDS OF REVIEW

The Uniform Code of Military Justice provides for boards of review, whose jurisdiction includes all cases where the sentence extends to a punitive discharge or confinement for 1 year or more.²³⁵ The Army and Air Force use only military personnel on their boards of review; the Navy uses both civilians and naval personnel.²³⁶

Mr. Wiener gave his opinion:²³⁷

I will say this, the existence of the board of review does not help an accused substantially, and I feel so strongly about that that I no longer take retainers before boards of review because it is a waste of my time and of my client's money. Any case that a board of review sets aside would be set aside in the examination branch. You get only built-in delay, and built-in expense.

The boards had other critics at the hearings.²³⁸

The Department of the Army has pointed out that its statistics show that the Army boards of review have helped the accused substantially.²³⁹ Chief Judge Quinn of the Court of Military Appeals commented that "in the last 10 years there has been a marked improvement in the quality of the output of the boards of review."²⁴⁰

The subcommittee does not favor abolishing the boards of review provided for in article 66 of the Uniform Code. Instead, it seems more

²³⁴ Hearings, p. 249.

²³⁵ 10 U.S.C., 866.

²³⁶ Hearings, pp. 844, 907, 942.

²³⁷ Id., p. 782.

²³⁸ Id., pp. 248, 431, 459, 551, 561-562.

²³⁹ Id., pp. 845, 882.

²⁴⁰ Id., p. 188.

desirable to follow the direction indicated by Chief Judge Quinn, who testified: ²⁴¹

I would be of the opinion, Mr. Chairman, that the boards of review should have tenure, and perhaps greater stature. They are actually an intermediate appellate court, and I think it might be well for the Congress to recognize that fact and to give them greater tenure and broader powers.

Mr. Neff, a civilian member of a Navy board of review, made this suggestion to the subcommittee: ²⁴²

Although the following might appear to be more properly the concern of the Armed Services Committee, it has been brought to their attention by the annual report of the Court of Military Appeals, and I believe it is a matter certainly falling within the purview of this subcommittee; that is, the administration of military justice and a more uniform protection of an accused's constitutional rights would result from consolidating the various service boards into one court of review, with panels appointed by the respective services. The name "board" is a misnomer. Boards of review are, in fact, appellate courts in the military and they should be so designated.

The civilian members should be appointed during good behavior and the military members for a definite term of, say, 5 years. All members should be known as military judges while so serving. The court of review would hear all military cases irrespective of service in the same fashion as the Court of Military Appeals. It is felt that this would do much to increase the prestige of these tribunals and, besides insuring a uniform administration of military justice, would effect savings in time and money. It should make the jobs among the most esteemed in the military justice picture, which is what such a position should demand. It should be noted in this connection that changing the boards into courts has been recommended by the Court of Military Appeals in its last three annual reports.

However, Mr. Neff did not believe that it is necessary at the present time to have all civilians on the boards of review. ²⁴³

The armed services do not favor having a joint board of review composed of members of all three services. ²⁴⁴ They are untroubled by the apparently substantial interservice variance between sentence reductions in general court-martial cases by boards of review. ²⁴⁵ And they argue that— ²⁴⁶

the diversity of service problems and the respective areas unique to each of the services render lawyers of each service best qualified to review cases pertaining to his service.

Insofar as use of civilians on boards of review is concerned, the services apparently consider that military members of these boards have a better basis than civilians for understanding and evaluating military offenses, that they can be more readily reassigned to other duties if they prove unsuitable for their tasks, and that the position of board members represents a career opportunity which should not be taken from the uniformed lawyer. ²⁴⁷

The subcommittee is unconvinced that effective administration of military justice—under a purportedly Uniform Code—would be hindered by having a joint board of review. Presumably any need for familiarity with the problems of a particular service could be satisfied by a requirement that at least one member of the interservice board reviewing a particular case should be from the same service as the accused. Whether or not the boards of review are consolidated on an interservice basis, they must be granted prestige and power.

²⁴¹ *Id.*, p. 183, compare American Legion view at p. 431.

²⁴² *Id.*, p. 298.

²⁴³ *Id.*, p. 308.

²⁴⁴ *Id.*, pp. 872, 924, 959.

²⁴⁵ *Id.*, pp. 872-873, 924, 960.

²⁴⁶ *Id.*, p. 959.

²⁴⁷ *Id.*, pp. 905, 924. For a contrary view see p. 489.

Commensurate with the importance of their task, it probably would be desirable to rename the boards and call them courts.

The military personnel of boards of review should have a rather prolonged tour of duty in that position, since otherwise they will lack the experience requisite for accomplishing an adequate review of the cases before them. Moreover, the independence of the board members must be assured. The information supplied to the subcommittee indicates that these criteria are now being satisfied to a considerable extent.²⁴⁸ As has already been emphasized in this report in the discussion of command influence, the subcommittee disapproves of the efficiency rating procedures used until recently by the Army and apparently still in use in the Air Force.²⁴⁹

Through the development of their field judiciary, the Army and the Navy have demonstrated that, under suitable conditions, military lawyers can adequately perform judicial tasks. Therefore, the subcommittee does not believe that there is any inherent difficulty in using military personnel as members of boards of review. Moreover, service on a board of review may provide a valuable career opportunity and incentive for members of the field judiciary which the Army and Navy have developed. Accordingly, the subcommittee does not recommend that any statutory limitation be placed on using military personnel on boards of review if the military members are granted the same sort of judicial independence that the Army and Navy now grant to their law officers in general courts-martial. Of course, the subcommittee in no way wishes to criticize the use on boards of review of civilian members—either alone or in conjunction with military members.

COURT OF MILITARY APPEALS

Although one witness criticized the Court of Military Appeals as being unnecessary for the protection of the rights of military personnel,²⁵⁰ most of the information furnished to the subcommittee indicates the contrary. For example, Mr. Frederick Bernays Wiener pointed out to the subcommittee a "list of horrors"—"shocking cases that weren't caught by the board of review."²⁵¹ According to him, "it is impossible to expect the services without the supervision of the Court of Military Appeals to stamp out the endemic existence of command influence."²⁵² The Court of Military Appeals has been described by an American Legion committee on military justice as "a splendid creation of the Congress" and "the most salutary advancement ever made in the field of military law."²⁵³ Professor Elliott, representing the American Bar Association, noted that—²⁵⁴

going back to the early decisions of Court of Military Appeals, the code as interpreted and applied has come to achieve to a large degree the objectives with which the American Bar Association was concerned before its adoption. I am thinking particularly of the command control problem, and I go back to some of the opinions, more particularly the late Judge Brosman,

The subcommittee is convinced that the Court of Military Appeals has made, and is making, an invaluable contribution to the adminis-

²⁴⁸ *Id.*, pp. 298, 845, 872, 881, 907, 924, 942, 959.

²⁴⁹ *Id.*, pp. 881, 959.

²⁵⁰ *Id.*, pp. 166-167.

²⁵¹ *Id.*, p. 780.

²⁵² *Id.*

²⁵³ *Id.*, n. 439.

²⁵⁴ *Id.*, p. 346.

tration of military justice and the protection of the constitutional rights of service personnel.

There have been various proposals for modification of the role or powers of the Court of Military Appeals. For instance, an Army group recommended that the membership of the court be increased from three to five members, with two of the members to be retired military lawyers.²⁵⁵ Mr. Wiener described this as "just a court-packing plan."²⁵⁶ There is no question that at the present time the court's three members are discharging their obligations satisfactorily.²⁵⁷ Thus, the subcommittee finds no need to add to their number.

Life tenure has been urged for the court's members. The New York County Lawyers' Association has referred to such tenure "as an obviously meritorious need."²⁵⁸ Chief Judge Quinn of the Court of Military Appeals testified:²⁵⁹

I do believe we have recommended to the Congress time and time again that the court be given life tenure. I think that would be the only ultimately satisfactory solution. We are the court of last resort of the Military Establishment, having jurisdiction now over some 3 million men and women, and in time of war, of course, would have jurisdiction of perhaps 17 or 18 million or maybe 20 million or more men and women.

I believe the court should have life tenure, and I think perhaps that, to some extent, the boards of review should be made into intermediate appellate courts with a substantial tenure.

In view of the excellent work being done by the court, the importance of that work to the rights of servicemen, and the provision made in article III of the Constitution for life tenure of Federal judges, the subcommittee considers that life tenure for this court would be desirable. In practice, the 15-year terms currently authorized for members of the Court of Military Appeals by article 67 of the Uniform Code (10 U.S.C. 867) will often amount to life tenure. However, a specific grant of life tenure to the judges of the court would tend to enhance its prestige and emphasize congressional intent to provide a strong, independent tribunal to protect the rights of military personnel.

A committee of the American Legion has recommended that the judges of the Court of Military Appeals be authorized by statute to weigh the evidence, resolve conflicts therein, and judge the credibility of witnesses.²⁶⁰ Of course, the court now has the power to reverse any conviction which, in its opinion, lacks a basis of "substantial evidence" in the record.

As the American Legion acknowledged, the members of the Court of Military Appeals have not asked for this factfinding power—and apparently do not want it.²⁶¹ Obviously, it would increase their workload. And, since the boards of review now possess this factfinding power, the court would presumably be redoing a job which the boards should already have accomplished. The subcommittee does not recommend that the jurisdiction of the Court of Military Appeals be extended to include review of factual issues.

Earlier in this report, mention was made of proposals that the Court of Military Appeals have the right to review legal issues arising

²⁵⁵ *Id.*, pp. 225, 781.

²⁵⁶ *Id.*, 781.

²⁵⁷ *Id.*, pp. 185-186, 226.

²⁵⁸ *Id.*, p. 226.

²⁵⁹ *Id.*, p. 186.

²⁶⁰ *Id.*, p. 439.

²⁶¹ *Id.*

in connection with administrative discharges. Perhaps, as Professor Pye suggested, the court could be granted "supervisory jurisdiction similar to certiorari on points of law that might arise in a proceeding."²⁶² Chief Judge Quinn indicated he had no objection to such a proposal, even though it would increase the court's workload.²⁶³ He added:²⁶⁴

I think perhaps it might be a desirable protection to American citizens. I mean it is a very severe penalty to be given administratively, and I think there should be some additional protections thrown around people who get undesirable discharges.

The subcommittee reserves judgment as to whether the Court of Military Appeals should be asked to shoulder this additional burden. However, it does favor enactment of a statute to provide some simple, expeditious procedure for judicial review of administrative discharges.

NONJUDICIAL PUNISHMENT

Under current practice, "minor offenses" not disposed of nonjudicially pursuant to article 15 of the Uniform Code are usually referred to a summary court-martial. There the accused receives little more protection in many instances than would be available from his commanding officer; and, if convicted by summary court, he has a conviction by a Federal court on his record. Thus, a number of witnesses at the hearings suggested that it would be desirable, both from the standpoint of the armed services and of the accused, to expand the authority of the commanding officer and eliminate the summary court-martial. In light of the testimony received by the subcommittee, it would appear that the recent increase by Public Law 87-648 of commanding officers' nonjudicial punishment authority should not impair the rights of military personnel.

BOARDS FOR THE CORRECTION OF MILITARY (AND NAVAL) RECORDS

Mr. Donald J. Rapson, representing the Association of the Bar of the City of New York, brought to the subcommittee's attention an area of uncertainty concerning the authority of the correction boards created by the Army, Air Force, and Navy under the authority of title 10, United States Code, section 1552. Mr. Rapson testified:²⁶⁵

One of the earliest questions to arise with respect to the authority of the boards concerned their power to take corrective actions in court-martial convictions which are final and conclusive * * * [and] binding upon all departments, courts, agencies, and officers of the United States * * * under article 76 of the code. In a vastly important opinion, the Attorney General concluded that article 76 does not affect the authority of the Secretary of the military department acting through the Board for Correction of Military Records to correct any military record where in his judgment such action is necessary to correct an error or remove an injustice arising from a court-martial conviction.

As may be expected, the boards receive a huge volume of petitions for review of courts-martial, and have been responsible for affirmative relief in many cases. In some of the cases calling for corrective relief, it has been apparent that the accused should never have been convicted, e.g., the facts showed that he was clearly innocent, or the court had no jurisdiction or the act was not an offense, etc. In these cases, the question has arisen whether the Secretary of the department, acting through the boards, had the authority to take corrective action by removing the fact of the conviction itself.

²⁶² *Id.*, p. 559.

²⁶³ *Id.*, pp. 188-189.

²⁶⁴ *Id.*, 189.

²⁶⁵ *Id.*, pp. 251-252.

Unfortunately, the services have taken divergent approaches on this question. The Army and Navy hold that the boards are limited to removing the "punitive consequences" of a conviction, and may not eradicate the conviction. In other words, forfeitures may be returned, grades may be restored, and the discharges may be recharacterized, but the conviction remains. The rationale is that article 76 still precludes any change in the findings of courts-martial and that the board's authority only extends to clemency with respect to the sentence.

On the other hand, my understanding is that the Air Force is understood as taking the position that the authority "to correct any military record when * * * necessary to correct an error or remove an injustice" clearly includes the power to remove the fact of conviction and its board will take such action in an appropriate case.

Without commenting upon whether the Army and Navy view, or the Air Force interpretation of the present law is correct, the association believes that the boards ought to be empowered by statute to remove the fact of conviction in appropriate cases. That is the only meaningful corrective action in a case in which an accused has been unjustly convicted.

Each armed service commented to the subcommittee with respect to the same matter.²⁶⁶ As the Army noted:²⁶⁷

It is not believed that a diverse interpretation of the authority of the correction boards should exist, since all of the boards derive their statutory authority from the same state and operate under regulations approved by the Secretary of Defense.

At the present time the review of a summary court-martial record of trial is very limited.²⁶⁸ Special courts-martial are also only subject to limited review in cases not involving a bad conduct discharge. Petitions for new trial are unavailable.²⁶⁹ In such instances, the only forum where the convicted serviceman can seek relief will be the correction board. The subcommittee believes that these boards should have the authority completely to set aside a conviction and not merely to mitigate its effects. A serviceman should not have the stigma of a conviction on his record if the correction board determines that, for some reason, it was erroneous and unfair.

In pursuit of the ideal of "equality under the law" for soldiers, sailors, marines, and airmen, the subcommittee inquired concerning the feasibility of consolidating the correction boards into a single interservice board.²⁷⁰ The services took the position that, while uniformity is desirable, the present decentralized system is working well.

On the other hand, Mr. Neil B. Kabatchnick, secretary of the Military Law Committee of the District of Columbia Bar Association, vigorously criticized the manner in which the correction boards are now operating.²⁷¹ Mr. Kabatchnick pointed out that the correction boards, unlike the discharge review boards, do not grant applicants for relief a hearing as a matter of right, that they usually convene once a week, and that they apparently adjudicate an average of 40 cases on 1 calendar day.²⁷² He suggested that, if the correction boards were composed of full-time members, they could hear cases continuously.²⁷³

The armed services furnished the subcommittee with detailed information concerning the composition and workload of the various correction boards.²⁷⁴ Examination of this information does not

²⁶⁶ *Id.*, pp. 865, 920, 954. See also pp. 397-398.

²⁶⁷ *Id.*, p. 865.

²⁶⁸ *Id.*, p. 249.

²⁶⁹ 10 U.S.C., 873.

²⁷⁰ Hearings, pp. 46, 864, 920, 954.

²⁷¹ *Id.*, pp. 513-517, 527-528, 802-804.

²⁷² *Id.*, p. 803.

²⁷³ *Id.*

²⁷⁴ *Id.*, pp. 833-834, 862-863, 899, 918-919, 931, 953-954.

suggest uniformity. For example, the 13 members of the Army Correction Board apparently average less than 8 hours per week in their duties, while the 12 members of the Air Force Correction Board average 16 hours weekly in Correction Board duties.²⁷⁵ During the calendar year 1961 the Board for Correction of Naval Records granted relief in 22.6 percent of its 313 discharge cases, while the Air Force Correction Board granted relief in 3.9 percent of its 1,078 cases.²⁷⁶

Since the correction boards are composed of civilians, rather than military personnel, the objections to unification would be less weighty than in the case of boards composed of military personnel.²⁷⁷ Moreover, if a unified correction board were created, the workload might be sufficient to justify making service on the board a full-time duty—with perhaps some increase in the prestige of the board. In that event, the authority of the unified correction board might be expanded, so that it ceased to be merely a board making recommendations to the Secretary of the respective service²⁷⁸ and acquired power to take action in its own right. Ultimately the unified correction board, composed solely of civilians, might even be given stature like that of the Court of Military Appeals.

The subcommittee is favorably disposed toward suggestions that the correction boards be unified on an interservice basis. Short of that, the staff and members of the three existing correction boards should develop greater coordination with one another in order to provide more uniformity of treatment for personnel of the different armed services.

RIGHT TO COUNSEL

The sixth amendment guarantees the defendant in a Federal criminal case the right to the assistance of counsel in his defense. The Supreme Court has interpreted this constitutional guarantee as including a requirement that an indigent defendant be provided with a lawyer if he so desires.

The Uniform Code of Military Justice authorizes a special court-martial to impose a bad conduct discharge, and apparently this authority is not dependent on the accused's being provided with a qualified attorney to defend him:

In the Air Force, legally trained counsel are almost invariably made available to airmen whose cases have been referred to special courts-martial.²⁷⁹

In the Army—

because of the critical shortage of judge advocate personnel, convening authorities seldom detail legally trained counsel for the Government or defense before special courts-martial.²⁸⁰

However, in the Army, special courts-martial are not allowed to impose a bad conduct discharge. In the Navy lawyers are utilized under some circumstances in special courts-martial, but apparently legally trained counsel generally are not furnished to the accused.²⁸¹

A question has been raised as to whether it is unconstitutional to allow an accused to receive a bad conduct discharge in a proceeding

²⁷⁵ *Id.*, pp. 862-863, 953.

²⁷⁶ *Id.*, pp. 899, 931.

²⁷⁷ *Id.*, p. 261.

²⁷⁸ *Id.*, p. 517.

²⁷⁹ *Id.*, p. 935.

²⁸⁰ *Id.*, p. 838.

²⁸¹ *Id.*, p. 903.

where he has not been furnished with legally trained counsel.²⁸² Whatever the correct answer may be to that question, the subcommittee considers it undesirable that servicemen receive a bad conduct discharge without being provided an attorney, if the accused desires a lawyer's aid and if there is any feasible method for the services to provide him with a legally qualified defense counsel. It will be recalled that the subcommittee takes a similar position with respect to the need for providing legally qualified counsel to represent servicemen before administrative discharge boards.

Since the problem of unavailability of legally trained defense counsel for special courts-martial seems greatest in the Navy, the subcommittee inquired whether a requirement of legally trained counsel would create an undue burden for that service and lead to lengthy delays in bringing the accused to trial. Mr. Zeigel W. Neff, civilian member of a Navy Board of Review, suggested that the problem might be lessened by establishment of "the dockside court" and by "assigning lawyers to the large task forces, the large carriers, and whatnot that operate."²⁸³ According to him, the problem "is not insurmountable because I do not believe the ships are out that long that they could not get back to port, and in the large operating units you could have lawyers aboard these large ships who could take care of the problem."²⁸⁴ Mr. Neff explained that the "dockside court" to which he referred—

* * * is a court set up in various shore installations who are in the business of trying cases and who would have counsel, qualified counsel, available, so that when the ships come in they would be able to turn these individuals over to this court, which would be in operation and would be able to afford the man the right of counsel.

Apparently it also would be feasible to have a dockside administrative board for the purpose of processing administrative discharges, in lieu of having them processed at sea.²⁸⁵

The right to the assistance of a legally qualified counsel frequently hinges on a determination by a commander that a lawyer is "reasonably available." The standard for ascertaining reasonable availability, is deemed by the services not to be limited to physical availability, but includes as well consideration of such factors as follow:²⁸⁶

- (1) Functions and duties imposed on the requested counsel by law.
- (2) Operational considerations.
- (3) Existing responsibilities of the officer requested.
- (4) The nature and complexity of the case.
- (5) Statutory and administrative provisions relating to the qualifications and availability of counsel; e.g., grade, experience, training, appeal from determination, etc.
- (6) Relevant workload of the requested counsel.
- (7) Availability of a replacement for the requested counsel.
- (8) Seriousness of the possible consequences of the proceedings to the individual making the request.
- (9) Disqualification of requested counsel from performance of subsequent functions in the case.
- (10) Time and space factors in relation to the location of the requested counsel and the respondent, witnesses, and place of hearings.
- (11) Expense to the Government.
- (12) Period of time the services of requested counsel will be required.

²⁸² Id., p. 306. See also decision of Navy Board of Review in *U.S. v. Harpster*, SPCM, NCM58 00139, dated Apr. 4, 1958.

²⁸³ Hearings, p. 306.

²⁸⁴ Id.

²⁸⁵ Id.

²⁸⁶ Id., pp. 860-861, 952-953.

With so many criteria to be considered, few commanders could fail to justify the unavailability of a lawyer to aid the accused if the commander did not wish to provide him with legally trained counsel. Therefore, the subcommittee considers that, to the greatest extent permitted by the number of lawyers in the armed services, rules should be made to the effect that lawyers must be made available when requested by an accused in connection with either a special court-martial case or an administrative proceeding. Further the subcommittee recommends more extensive interservice use of legal personnel in order to make available the requisite number of lawyers required for such duty.

In some instances, there is confusion with respect to the meaning of the right to counsel that is granted by the armed services. For instance, Mr. Kabatchnick, secretary of the Military Law Committee of the District of Columbia Bar Association, emphasized that frequently in military administrative proceedings and in lesser court-martial proceedings, the counsel provided may be "military counsel," who is not a member of the bar and may not even have much experience.²⁸⁷ Mr. Parish, a witness for the Veterans of Foreign Wars, testified:²⁸⁸

We also had a form, sir, we would push this under the accused's nose, it says: "I have been offered counsel." Now, to you that may mean an attorney, or to somebody else it may mean somebody in the orderly room that is not busy. And of course the accused would sign saying, "I do not desire counsel," because he didn't know whether he was going to get Lieutenant Dumbjohn or some busy captain that had 10 minutes to prepare the case.

Obviously, it is important for a person to be informed clearly what the right to counsel signifies in his particular case; specifically the accused should be told whether he can have the aid of a military lawyer or whether the "counsel" being offered him is a nonlawyer.

Judge Ferguson of the Court of Military Appeals, pointed out to the subcommittee that, under the present provisions of the Uniform Code of Military Justice, a serviceman accused or even suspected of a major crime is not furnished legally qualified counsel until a formal investigation is begun pursuant to article 32 of the code.²⁸⁹ Judge Ferguson then added:²⁹⁰

We have held that he is entitled to know that he can consult counsel. But then he would have to hire his own unless the military wishes to furnish him one. Lawyers, I think, are well aware of the facts that the time when a man really needs a lawyer is when he is arrested rather than after or at the time he is brought before the commissioner in a Federal court for examination.

Mr. Kabatchnick agreed strongly with Judge Ferguson that an accused should either be automatically furnished with legally trained counsel when he is first being investigated or should be advised that he has the right to consult with a lawyer.²⁹¹

The Uniform Code of Military Justice in article 31²⁹² already provides a protection for the accused that is not paralleled in either State or Federal civil courts. It is our understanding from the testimony at the hearings that, under present law, military investigators must inform the suspected serviceman of his absolute right to remain silent during the investigation, and also that they cannot prevent him from

²⁸⁷ Id., pp. 519, 812. See also pp. 501, 508.

²⁸⁸ Id., p. 379.

²⁸⁹ 10 U.S.C. sec. 832.

²⁹⁰ Hearings, p. 195.

²⁹¹ Id., p. 810.

²⁹² 10 U.S.C., sec. 831.

consulting with legally qualified counsel, if he so requests. Furthermore, an involuntary statement is inadmissible in a court-martial.

The subcommittee recognizes that subtle pressures exist in military life which require special safeguards. However, we do not consider that sufficient need has yet been demonstrated for providing any further limitations on the opportunity for investigators to obtain statements from suspected servicemen.

Defense counsel is not furnished for the accused in summary courts-martial; and the Uniform Code does not contain any express permission for the accused to retain his own civilian counsel to represent him in such a court. According to the Department of the Air Force:

There is no prohibition against an accused being represented before a summary court-martial by civilian counsel employed by him.²⁹³

However, the subcommittee has been informally advised that this view has not been universally followed by the other armed services. We recommend²⁹⁴ that the summary court-martial be entirely abolished, in which event the issue would become moot. If, however, the summary court-martial remains in existence, the subcommittee recommends that the uniform code be amended so that specific authorization is given for accused servicemen to retain civilian counsel without expense to the Government to represent them before summary courts-martial. So long as the summary court-martial is deemed to be a "court" in any sense, it seems unthinkable to prohibit the accused from obtaining legal representation.

CONFINEMENT

Since military law makes no provision for bail²⁹⁵ it is especially important that pretrial confinement not be utilized indiscriminately. Each service indicated to the subcommittee that it was well aware of the problem and had taken steps to minimize pretrial confinement.²⁹⁶ In some instances, commanders order that no person be put in pretrial confinement without prior approval of the staff judge advocate,²⁹⁷ this "screening" device appears highly desirable to the subcommittee.

In instances where a serviceman is in pretrial confinement, it becomes especially important that he receive a speedy trial. Although the subcommittee has been apprised of some instances where the period of pretrial confinement seems to have been excessive, it appears that generally the armed services have sought to avoid any unnecessary delays in trial; and the Court of Military Appeals also has moved to prevent such delays. The situation requires continuous monitoring, but the subcommittee does not consider that statutory action is called for at this time. Perhaps, as the stature of the law officer is enhanced, it will be possible to give him the discretion to delay the commencement of the sentence to confinement at the request of the accused and pending the appeal by the accused of some legally doubtful issue.

Prof. A. Kenneth Pye, of Georgetown University Law Center, noted that "there is no formal statutory authority to my knowledge, by

²⁹³ Hearings, p. 935. As to appointment of trial counsel in such instances, see p. 160.

²⁹⁴ *Supra*, p. 34.

²⁹⁵ *Id.*, p. 190.

²⁹⁶ *Id.*, pp. 847, 908-909.

²⁹⁷ *Id.*, pp. 100, 847.

which a court-martial could sentence a defendant under the Youth Correction Act." ²⁹⁸ He then added: ²⁹⁹

The vast majority of servicemen being tried by court-martial are within that age group where if they committed crimes in civilian life they would be sentenced under the Youth Correction Act with a general rehabilitative program in the Federal penal system.

This would be true even for serious offenses where in the opinion of the judge the particular offender can be salvaged. Too often, I am afraid, in the military system the court-martial simply sentences him to confinement and what happens to him later depends upon the prison to which he is sent.

If he is sent to Fort Leavenworth, then he may be treated just as a confirmed criminal would be treated because he has a long sentence; this may be true even where this same individual, if he were tried in a Federal civilian court would have been sentenced under the Youth Correction Act and sent to a Federal prison such as Lewisberg.

The report submitted in 1960 by the Powell committee, a committee of experienced Army officers appointed to study military justice, also recommended that the Uniform Code of Military Justice be amended to authorize transfer of "selected military prisoners to the Attorney General for further treatment as youthful offenders." ³⁰⁰ The same committee also pointed out that, in substance, military sentences to confinement are indeterminate and recommended conversion of this system to an easily identifiable system of indeterminate sentences in order to "increase public recognition of the achievements of the Army in this field" and to "make possible improvements in the system of appellate review of court-martial cases." ³⁰¹

The subcommittee believes that, insofar as feasible, accused servicemen should have the benefit of any rehabilitative measures found suitable for defendants in Federal civil courts. Therefore, it recommends that appropriate amendments be made in the Uniform Code of Military Justice to permit youthful military offenders to be transferred to the Attorney General for further treatment under the Federal Youth Corrections Act. ³⁰² Also, the subcommittee sees no objection to amending the Uniform Code to authorize the imposition of an indeterminate sentence, that is, a sentence not to exceed a fixed period of time, but without any prescribed minimum to be served.

At one time, military prisons and confinement facilities were the source of numerous complaints. The subcommittee has been alert for similar complaints during the course of its investigation of the rights of military personnel. So far as we can determine, military confinement facilities are being operated efficiently and with due regard for the rights of the prisoners. In fact, the Armed Services have pioneered in the field of penology; and the Air Force's retraining group at Amarillo, Tex., is a model minimum custody, rehabilitation installation. ³⁰³ The Air Force commented: ³⁰⁴

We feel that the Amarillo retraining program has paid dividends. We not only have given many errant airmen another chance, after receiving the benefit of correctional treatment, to earn honorable separation—we have also salvaged considerable manpower and recouped a considerable amount of the cost of training these airmen.

²⁹⁸ Id., p. 547.

²⁹⁹ Id.

³⁰⁰ See pp. 6, 137-138 of Powell committee report, reprinted in annual report, U.S. Court of Military Appeals, and Judge Advocates General of the Armed Forces, 1960.

³⁰¹ Id., at 134.

³⁰² 18 U.S.C., secs. 5005-5026.

³⁰³ Hearings, pp. 943-944.

³⁰⁴ Id., p. 944.

Although the Air Force facilities at Amarillo cannot feasibly be utilized at the present time by the other Armed Services,³⁰⁵ the Air Force has provided there an excellent example for the other Services.

FEASIBILITY IN WARTIME

Gen. Reginald C. Harmon (retired), formerly Judge Advocate General of the Air Force, made clear his view that the Uniform Code of Military Justice is "unwieldy and cumbersome in peacetime, and would probably be unworkable in the event of a major large-scale war."³⁰⁶ He recommended repeal of the code in its entirety.³⁰⁷ When asked whether there should be entirely different procedures in administering military justice in wartime, as opposed to peacetime, General Harmon testified:³⁰⁸

No, I do not think there should be any difference. I can give the reasons for that. The protection of the rights of the individual and the necessity for discipline are both important ingredients, and they are just as essential one time as another.

I think we ought to have a system that works well in peacetime to reach both of those goals and to give us an opportunity to train our personnel to administer military justice in time of war.

As we shift from a peacetime system to a wartime system, it means that when war starts, we are going to have a system that we do not have anybody trained to administer.

Gen. A. M. Kuhfeld, the current Judge Advocate General of the Air Force, also stated that he did not believe the Uniform Code would operate in wartime, if the war were widespread like World War II, rather than limited to a single theater, like the Korean conflict.³⁰⁹

Chief Judge Quinn disagreed emphatically with this position, and testified:³¹⁰

I suppose the obvious answer to that would be, Mr. Chairman, that it already worked satisfactorily through the Korean war, which was, after all, no picnic. I mean we had several divisions committed over there, and it was a pretty bitter war, and certainly it worked satisfactorily through that war.

Now, maybe that is not war in the sense of a worldwide war, but it was a pretty bitter war, and we had very many casualties and we had very many troops committed. It worked completely satisfactorily.

I see nothing that would indicate that the Uniform Code of Military Justice would not work satisfactorily in any war.

Now, of course, we come to the atomic age, and perhaps unheard of or even undreamed of destruction, and that might be a horse of another color. We just do not know what would happen if atomic bombs began to drop on us.

But, as far as satisfactory operation in the sense of war as we have known it up to date, it seems to me that the uniform code would work satisfactorily.

On the same point, Mr. Zeigel W. Neff, civilian member of a Navy board of review, testified:³¹¹

I do not agree that it would not operate in wartime. Admiral Radford made a study after Korea. He came up with the conclusion that it worked very well during Korea.

I do think in the case of an all-out war that you would perhaps, need to streamline some of the procedures. I think you would have to increase the number of boards of review and probably disperse them in the field.

I think you would probably have to add to the number of the judges on the U.S. Court of Military Appeals. But I see no insurmountable problem; no.

³⁰⁵ *Id.*, pp. 845-847, 908, 943-944.

³⁰⁶ *Id.*, p. 165.

³⁰⁷ *Id.*, p. 167.

³⁰⁸ *Id.*, p. 176.

³⁰⁹ *Id.*, p. 154.

³¹⁰ *Id.*, p. 185.

³¹¹ *Id.*, p. 308.

Admiral Mott, Judge Advocate General of the Navy, also noted that:³¹²

The conclusion of Admiral Radford was that the code would work in wartime, judged by the test it was given in the Korean war.

Mr. Arnold I. Burns, representing the Association of the Bar of the City of New York, commented:³¹³

First, the Uniform Code of Military Justice did operate effectively during the Korean war, and I think that is, in large measure, a complete answer to the suggestion that it won't work.

Second, as we sit here today, the people of New York City are according Colonel Glenn a tremendous welcome for circling the globe.

In this day and age, it seems to me it ill behooves those to say that military logistics cannot be worked out to handle the effective administration of military justice. It is an important part of a democracy.

Mr. Frohlich, of the same bar association, pointed out:³¹⁴

We can understand where the military would find problems in the administration of justice under the code because of the exigencies of the military mission. But we do not think that they are giving it, the critics or anyone who would suggest going back, we do not think they are giving it a fair appraisal.

Mr. Rapson, also testifying for this association, suggested:³¹⁵

I would think that there must be somewhere a parcel of emergency legislation designed to be enacted in the event war does break out, and I would suspect if it is not already the case, that this legislation would include proposals to expand the Court of Military Appeals so that it need not be centralized here in Washington.

In another connection, Professor Pye, of Georgetown, informed the subcommittee that the Army has a trial team system "which they plan to put in operation in time of war."³¹⁶

With respect to the possible need for different procedures for wartime as opposed to peacetime, Hon. Paul B. Fay, Jr., Under Secretary of the Navy, testified:³¹⁷

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

An especially helpful analysis of the entire problem is contained in the following colloquy between the chairman and Prof. Sheldon D. Elliott, representing the American Bar Association:³¹⁸

Senator ERVIN. Now, during the course of our testimony one or more witnesses, have expressed the view that the Uniform Code of Military Justice should be repealed because, in the opinion of such witnesses, it may not operate in an all-out war. It seems to me—and I would like to know whether you agree or disagree with me—that, assuming most of the testimony indicates that the Uniform Code of Military Justice has operated very well under present conditions, which can be described either as peacetime or cold war, it is a very unsound argument that we should abolish something which works very well in peace merely because it may not work very well in war.

MR. ELLIOTT. Mr. Chairman, in the event of an all-out war, will any code of procedure work? It depends on how all-out it is, but if anything will work, including our Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure, then I feel equal confidence in the workability of the Uniform Code of Military Justice.

³¹² Id., p. 57.

³¹³ Id., p. 254.

³¹⁴ Id., p. 253.

³¹⁵ Id., see also p. 437.

³¹⁶ Id., p. 548.

³¹⁷ Id., p. 53.

³¹⁸ Id., pp. 350-351.

Senator ERVIN. Even if this assumption on the part of these particular witnesses were true, it seems to me that it would not be wise to abolish it in peacetime for fear it might not work in war?

Mr. ELLIOTT. Speaking as an individual, Senator, I concur with your views.

In several of its articles, the Uniform Code makes special provision for wartime conditions, in the recognition that some of the safeguards otherwise provided for service personnel may then have to be curtailed.³¹⁹ It may be desirable to make further preparation at this time for administration of military justice under emergency, wartime conditions; and, in that event, it will be necessary to train both active duty and Reserve personnel with respect to the wartime procedures. However, the subcommittee agrees wholeheartedly with the chairman's observation that existing or proposed safeguards for the rights of military personnel should not be rejected in peacetime merely because it is possible, or even likely, that they will not be satisfactory in time of war.

CONCLUSIONS

The subcommittee has arrived at the following conclusions:

1. The safeguards provided by the Uniform Code of Military Justice have generally proved to be desirable and should not be repealed.

2. Uncertainties as to how the present system of military justice would operate in a period of all-out war do not constitute a sufficient reason to discard protections for servicemen which are feasible under present conditions.

3. Not only punitive discharges, imposed by courts-martial, but also administrative discharges should be subject to procedures which will protect the constitutional rights of service personnel.

4. The serviceman should be fully informed about the serious consequences of receiving an undesirable or a general discharge, so that he will have greater incentive to conform to the standards required by the military.

5. Criteria for administrative discharges should, so far as possible, be uniform among the armed services; and these criteria should be clear and specific, so that both the serviceman and his commanding officer will know what type of conduct will lead to issuance of an administrative discharge; a simple, expeditious judicial review of these discharges is advisable.

6. Waiver of rights to a hearing in connection with an administrative discharge should not be accepted until the respondent serviceman has been afforded the opportunity to consult with legally qualified counsel.

7. Authority to court-martial or discharge administratively for alleged nonpayment of debts should be exercised with great caution, so that the armed services do not become a collection agency for creditors.

8. An undesirable discharge should not be allowed to stand if based on a civil court conviction which is set aside on appeal.

9. It would be unwise to attempt at this time to consolidate the discharge review boards with the correction boards of the respective services; but interservice consolidation of the discharge review boards, the correction boards, or both, deserves further consideration.

³¹⁹ See, e.g., arts. 35, 43, 71, 85, 90, 99, 105, 106, 113, 10 U.S.C., 835, 843, 871, 885, 890, 899, 905, 906, 913.

10. When it is proposed to eliminate an officer by reason of alleged misconduct, which he denies, military authorities should give greater consideration to trying the officer for this misconduct by general court-martial, where he will have available all the safeguards provided by the Uniform Code.

11. Any efforts, from whatever source, to influence a defense counsel in the performance of his duties should be vigorously dealt with under article 98 of the Uniform Code, or otherwise.

12. Chairmen of the boards of review established under article 66 of the Uniform Code should not prepare efficiency ratings of other board members.

13. The negotiated guilty plea practice used by the Army and Navy has not infringed on the constitutional rights of their personnel.

14. The independence and prestige of the boards of review established under article 66 of the Uniform Code should be assured, and consideration should also be given to their interservice consolidation.

15. The use of military, as well as civilian, members of boards of review is desirable.

16. The Court of Military Appeals has made, and is making, an invaluable contribution to the administration of military justice and the protection of the constitutional rights of service personnel.

17. There is no necessity for extending the jurisdiction of the Court of Military Appeals to review factual issues.

18. The boards for the correction of records should develop greater coordination with one another in order that the possibility of consistency in treatment of personnel be enhanced.

19. To the greatest extent possible, a serviceman should have available legally trained counsel to represent him in any court-martial or administrative proceeding that may result in a discharge under other than honorable conditions.

20. So long as the summary court-martial exists—and its immediate elimination is recommended—an accused serviceman should be completely free to be represented by civilian counsel, without expense to the Government, in a trial before such a court-martial.

21. Pretrial confinement should be avoided wherever possible; and appropriate “screening” devices should be used to assure that such confinement is minimized.

22. There is no need for prohibition of trial by court-martial for offenses or omissions which are in violation of the Uniform Code of Military Justice but which have been the basis for a trial in a State court.

23. A revision of the Uniform Code of Military Justice which would prohibit court-martial for civilian offenses is not desirable.

24. Informal arrangements between commanding officers and appropriate civil authorities can best determine the type of trial for an offense that would fall under both military and civilian jurisdiction.

RECOMMENDATIONS

On the basis of the hearings and field investigation discussed in this report, the subcommittee makes the following recommendations:

1. Subpena power should be provided for administrative discharge boards; and specific authority should be granted for the taking and

use of depositions in connection with administrative discharge proceedings.

2. Except in wartime or where unusual conditions exist, the respondent in an administrative discharge proceeding should be furnished legally trained counsel; where counsel is not provided by the commander, a written explanation should be submitted detailing the reasons.

3. In the absence of significant additional evidence, a commanding officer should not have the authority to convene an additional discharge board to evaluate a respondent's fitness to remain in the service, if the first board recommends that he be retained.

4. Article 37, which proscribes command influence on courts-martial, should be extended to apply to those boards considering administrative discharges.

5. Any board which has the authority to recommend an undesirable discharge should have a legal adviser, whose duties should be clearly defined.

6. A serviceman should not be issued an administrative discharge under other than honorable conditions on the basis of alleged misconduct, if he has requested and been denied a court-martial for the same misconduct.

7. The scope of the hearings granted applicants by the discharge review boards and the correction boards should be expanded to allow confrontation, cross-examination, subpoena, and taking of depositions.

8. Legislation to authorize, but not require, rehabilitation certificates for servicemen discharged under other than honorable conditions is desirable.

9. Elimination procedures for officers should be uniform for all the services; and a field board considering an officer's elimination should have the power to subpoena and take depositions in order to obtain relevant evidence.

10. The wording of article 37 of the Uniform Code should be expanded to prohibit specifically any censure, reprimand, or admonition of court-martial personnel by persons other than a commanding officer.

11. Article 37 of the Uniform Code should be revised to prohibit commanding officers or their staff members giving pretrial instructions to court-martial members.

12. Legislation to create a separate JAG Corps for the Navy should be adopted.

13. Legislation should be enacted to establish the field judiciary system for all the services; and, once established, interservice use of these officers might be utilized.

14. The powers of the law officer in general courts-martial should be expanded in several respects, so that his authority will more nearly approximate that of a Federal judge in criminal cases.

15. A special court-martial should not have the authority to sentence an accused to a bad conduct discharge, so long as such courts-martial are not presided over by a trained law officer.

16. A single-officer special court-martial, consisting of a trained law officer, should be authorized to try an accused with his consent.

17. The summary court-martial should be abolished immediately.

18. Life tenure should be granted to the judges of the Court of Military Appeals; but there is no occasion at this time to extend the court's jurisdiction to include review of factual issues.

19. The boards for the correction of military (or naval) records should be specifically authorized to set aside a conviction and not merely to mitigate the effects of the conviction.

20. The Uniform Code should be amended to permit youthful offenders to be transferred to the jurisdiction of the Attorney General for treatment under the Federal Youth Corrections Act (18 U.S.C. 5005-5026).

21. Waiver by the accused of sentencing by court-martial members should be authorized. The law officer would in that event pass sentence.

22. "Law Judge" or "Military Judge" would be a more suitable title for the present law officer.

These recommendations may be put into force in some cases by legislation, in others by departmental regulations.

