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AN APPRAISAL OF PROPOSED CHANGES IN THE UNIFORM CODE OF MILITARY JUSTICE

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THIS discussion will encompass all the significant changes proposed to the Uniform Code of Military Justice, and especially those presently under consideration. This subject could conceivably be developed into a complete course; it is not surprising to find that volumes of material have been written on this subject. This brief discussion, therefore, will limit itself to a discussion of the philosophy of the various changes, and comments concerning their feasibility and desirability in general.

At the outset, it should be stated that no change in the law should be favored unless there is a pressing need for the change recommended. This need is, however, not as clearly perceived as one might imagine, for need is always relative. Involved may be considerations of saving manpower, conserving funds or supplies, effecting better justice, or—and this is the facet of military justice that is too often overlooked by civilian groups—avoiding the adverse impact of a complicated and drawn out judicial procedure on discipline and justice in time of war. It is hardly necessary to point out that, no matter how desirable an ideal system of justice may be, if it impedes or hampers the efficient performance of the military function to protect our country, we may lose all in an attempt to be absolutely protective of the rights of individuals.

As a preliminary comment, it may be said that our present Uniform Code of Military Justice is, in general, working well. It has recognized the needs of discipline, operational efficiency, and conservation of manpower on the one hand, and the indispensable requisites of fairness and justice on the

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other. This is not to say, however, that it is perfect. Congress expressly recognized the possibility that this new, complex and comprehensive Code would require amendment based on experience. A provision was therefore written into the Code establishing a Code Committee which is required to make annual reports to Congress concerning the workability of the Code and to suggest amendments.

This logically brings us to the first recommendations for amendment to the Code. The Code Committee, which, incidentally, is composed of the Judge Advocate Generals of the several services as well as the Court of Military Appeals, proposed in 1953, seventeen changes to the Code designed to improve its workability and effectiveness. These seventeen changes, with little modification, were formalized and approved by the Secretaries of the several services, the Court of Military Appeals, the Secretary of Defense and the Bureau of the Budget. They were introduced in the last session of Congress in the form of a bill commonly referred to as the "Omnibus Bill". The philosophy of this proposed legislation was (1) to simplify certain procedures without depriving the accused of rights accorded in the Code, and (2) to increase commanding officers' nonjudicial punishment powers slightly, to improve discipline and to avoid the necessity of trial in certain minor cases. Incidentally, the identical proposal is now awaiting its transmission as an Executive Communication for introduction in the current session of Congress, having been reaffirmed by the present administration.

Basically, this is a sound piece of proposed legislation. The streamlining provisions, if enacted, would result in considerable savings in manpower without any restriction on the safeguards presently accorded an accused. The increase in nonjudicial punishment powers (a senior officer would have the additional power of imposing confinement for seven days and forfeiture of one-half of one month's pay) would go far towards the improvement of discipline through prompt and sure punishment of minor offenders without the intervention of a court-martial.

As a matter of interest it may be pointed out that there is almost universal agreement among all persons interested

in the Code that the commanding officer's nonjudicial punishment powers ought to be increased. The disagreement that exists is not whether these powers should be extended, but how much. On the one hand, any increase would have the desirable result of effecting a decrease in courts-martial, which are, after all, federal convictions; but on the other hand, a greater possibility might exist of arbitrary or unfair action by a commander who may be too closely associated with the offense to render a completely impartial judgment.

Let us move on, however, to the next significant piece of legislation that has been proposed. In January of 1959, the American Legion sponsored a bill that would effect sweeping changes in the Code. It was introduced as H.R. 3455 in the first session of the 86th Congress. The philosophy of this bill was the removal of every vestige or possibility of command influence upon the decisions of courts-martial, and the placement of the administration of military justice more nearly in line with civilian practice. Among the specific changes recommended were: prohibiting trials in time of peace for purely civilian type felony offenses; requiring lawyers on all inferior courts, the lawyers to be under the rating authority and command of the Judge Advocate General; authorizing the U. S. Court of Military Appeals to prescribe rules of procedure for all courts-martial; granting law officers of courts-martial the full status of a judge; and placing all boards of review under the Secretary of Defense.

The principal objection to this bill was that it was based on the premise that drastic measures were needed to eliminate command influence from courts-martial. This premise is faulty. While it cannot be denied that command influence is occasionally encountered, it is invariably corrected when it comes to the surface. Furthermore, no more than an extremely small percentage of commanders, either directly or indirectly, attempt to influence the actions of courts-martial. Thus, this bill in effect proposes sweeping changes to correct a relatively minor evil. It has been estimated, moreover, that its enactment would require up to 3,600 additional lawyers in uniform—at a time when we are having extreme difficulty

in recruiting and retaining enough lawyers to keep abreast of present workloads.

It is interesting to note that the American Legion proposal did not recommend any increase in commanding officers' nonjudicial punishment powers. No one close to the problem of administering military justice can fail to appreciate the need for such an increase.

The next proposed legislation is the so-called "Powell Committee Report". In 1959, the Secretary of the Army convened a committee composed of nine general officers of the Army to study the Uniform Code of Military Justice as well as order and discipline in the Army. That committee, early last year, proposed sweeping changes to the Uniform Code of Military Justice, which are presently under study by the other services. The philosophy of this proposed legislation is difficult to put in a few words. Many of the proposed changes are intended to overrule decisions of the U. S. Court of Military Appeals. All of the provisions of the "Omnibus Bill" are adopted. Certain other changes are recommended which would move military justice back toward the old "paternalistic" system. The most significant changes, however, were these: an increase of commanding officers' nonjudicial punishment powers to the imposition of a maximum of ninety days "correctional custody" (a euphemism for confinement) and a forfeiture of one-half of three months pay; abolition of all courts but the general court-martial; removal from convening authorities of the power to act on findings; removal from boards of review of the power to act on sentences; creation of a new "sentence control board" which would have plenary power over all activities related to convicted persons; and increase of the membership of the U. S. Court of Military Appeals to five. The stated philosophical bases for the proposed changes were "fairness, decentralization, simplicity and stability".

The Navy Department has not yet formalized its position on all the changes recommended. In this connection, a poll of all senior Naval and Marine Corps commanders in the field was taken so that the impact of the changes upon command efficiency could be evaluated. The comments of these com-

manders are now under study. Thus, the official position of the Navy cannot be stated. However, this author is of the opinion that the proposed increase in commanding officers' powers is far too extensive; the abolition of the special court-martial will considerably complicate the administration of justice in the Navy, and there is no real need for many of the other conceptual changes proposed. In short, the Powell Committee report has placed idealism over practicability, and while the aims of the committee are to be admired, many of the evils cited can be overcome by better administration, better training of personnel, or by executive action correcting errors that were built into the Manual for Courts-Martial—the presidential regulations which were promulgated to implement the Uniform Code of Military Justice. Those of us in uniform are sometimes too prone to seek changes rather than trying to operate efficiently with what we have.

The final piece of proposed legislation within the scope of this article is the report of the Special Committee on Military Justice of the Association of the Bar of the City of New York, dated March 1, 1961. This report concludes that the "Omnibus Bill" is fine as far as it goes, but that its chief defect is in failing to recognize needs for reform and improvement in certain limited areas. Concerning the American Legion Bill, this report comments that its reflection of dissatisfaction with the administration of the present system of military justice and general lack of faith in the integrity and competence of military lawyers is unfounded. The report proposes no sweeping changes; instead it proposes corrective legislation within the existing framework of the Code. For example, the most significant changes recommended are: an increase of commanding officers' powers to the same extent as recommended in the Omnibus Bill; the abolition of the summary court-martial; the creation of a single-officer special court-martial consisting of a specially designated lawyer; the removal of the power of a special court-martial to adjudge a bad conduct discharge; an increase in the qualifications and stature of law officers of general courts-martial; and the qualification of the statute prescribing finality of courts-martial judgments to empower the Board for the Correction

of Military Records to remove the fact of a conviction in appropriate cases.

No real objection to the proposals contained in this report can be found, with the possible exception that the slight increase in commanding officers' powers is insufficient to compensate for the loss of the summary court-martial. Insofar as the Navy is concerned, the removal from special courts-martial of the power to adjudge bad conduct discharges would also be objectionable. The services must rid themselves of undesirable members, and the fairest way to do this is judicially, not administratively. If special courts-martial did not have this power, resort would have to be made to administrative processes, for general courts-martial would not be appropriate in many cases, such as those of repeated minor offenders.

When the Uniform Code of Military Justice was enacted in 1951, this author was Commanding Officer of the School of Naval Justice in Newport, the Navy's only law school. The drastic changes which the Code effected on the Navy's previous judicial system created many problems, for it was so new that in many areas we had to grope our way. Now, when sweeping changes to the Code are being proposed, the author is the Judge Advocate General of the Navy and as such, is intensely concerned for the adoption of the best possible system. In the ten intervening years, our people have adapted to, accepted and finally favored the safeguards and fairness built into the present system of justice which Congress has given us. This author would, therefore, retain the system as it exists, with only minor reforms or improvements as indicated by experience over the years. This is essentially the same position as that taken by the new Secretary of Defense with respect to organizational problems. I think it is a sound one.