New York County Lawyers Association
Office of the Secretary

November 19, 1948

Felix Larkin, Esq.
Special Assistant to Secretary of
Defense Forrestal
The Pentagon
Washington, D.C.

My dear Felix:

At the request of Richard H. Wels, Esq., Chairman of our Committee on Military Justice, I am forwarding herewith six (6) copies of the report of that Committee, which report has not yet been acted upon by our Board of Directors. When action thereon has been taken, you will be formally notified.

I hope things are going well with you in Washington, that you like your new job and with all good wishes, I remain

Cordially yours,

/s/ Terence J. McManus

Secretary

TJM:b
Enclosure

NEW YORK COUNTY LAWYERS' ASSOCIATION

SUMMARY OF REPORT OF THE COMMITTEE ON MILITARY JUSTICE

The Committee finds that:

1. The basic reform necessary is the separation of the control of the courts-martial systems from command. Although this is reported in the press to have been accomplished by the Elston Bill, that is not the fact. The Elston bill provides for a Judge Advocate General's Department in the Army, but leaves complete control of the courts-martial system in the hands of command. This should be corrected by placing the power of review in the Judge Advocate General rather than in the officer convening the court, and by requiring that law members of courts, and defense counsel be qualified lawyers assigned by the Judge Advocate General. Such officers should have their assignments, promotions, fitness reports, and leaves controlled by the Judge Advocate General.

2. The provisions of the Elston Bill establishing a Judge Advocate General's Department presently relate only to the Army. The creation of such departments and legal corps for the Navy and Air Force should be provided for.

3. The reforms which have been proposed should be applicable to summary courts-martial in the Navy and to special courts-martial in the Army as well as to general courts-martial.

4. A uniform terminology and code should be adopted for all of the armed services.

5. Officers should be made responsible for the commission of lesser offenses (as they now are not) and should be triable by the inferior courts.

6. A co-ordination of the courts-martial systems of all the services should be made a specific responsibility of the Secretary of Defense.

REPORT OF THE COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Earlier this year Secretary of Defense James V. Forrestal appointed a committee consisting of Professor Edmund M. Morgan, Jr., of the Harvard Law School as chairman, Under Secretary of the Navy W. John Kenney, Assistant Secretary of the Army Gordon Gray, Assistant Secretary of the Air Force Eugene M. Zuckert, and Felix E. Larkin, assistant general counsel of the Department of Defense, as executive secretary, to draft a Code of Military Justice uniform in substance and uniform in interpretation and application to all of the armed services. In his precept establishing this committee, the Secretary indicated that this uniform code should protect the rights of those subject to the code without impairing the performance of military functions.

Having noted the previous activities of this Association in the field of military and naval justice, the Morgan Committee on September 27, 1948, invited the Association to submit our recommendations with respect to deficiencies in the present Articles of War and Articles for the Government of the Navy. Upon referral of Professor Morgan's letter to our committee, we have carefully reveiwed our earlier reports on military justice, the changes effected by the Elston Bill enacted in the closing days of the second session of the Eightieth Congress, and the proceedings before the House and Senate Committees on the Armed Services, and have generally studied the problems of military and naval justice.

The limitations and inadequacies of our systems of military and naval justice were graphically portrayed to the public and to members of Congress during and after World War II by many service men and women, lawyers and laymen alike, who had had first hand experience with the operation of such systems, and found that resemblance between them and the courts which they knew as civilians was largely coincidental. It was disturbing to them to find that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed. They were shocked to learn that an offense committed by an officer was subject to different treatment and punishment than the identical offense committed by an enlisted man. They were surprised to find that many of the judges, prosecutors, and defense counsel participating in courts martial were neither lawyers nor trained in the law, and that, in the naval services, there was not even the minimum requirement that a single law member be on a court.

The reports that came back of these things to the civilian community, together with specific instances of abuse in the court martial process, initiated a flow of bills into the Congressional hopper and an expression of aroused public opinion which gave promise that reforms would be accomplished. The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court martial systems of their respective services, and to make recommendations for a thorough-going revision of military and naval justice. The famous Vanderbilt Report, made to Secretary Patterson, and the Ballantine and Keeffe Reports, made to Secretary Forrestal, all found substance to the charges which had been levelled at the court martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

The jugular vein at which all such Boards aimed their recommendations was the domination and control of the courts-martial systems by command. All such boards concluded that amendments to the Articles of War and the Articles for the Government of the Navy which correct other inadequacies of military and naval justice, but which fail to check command control, effect only secondary reforms which become meaningless in the absence of the rooting out of the major sources of abuse and injustice. As to this, the Vanderbilt Committee said:

> "The system of military justice laid down in the Manual for Courts-Martial not infrequently broke down because of the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgements; and who conceived it the duty of command to interfere for disciplinary purposes. Indeed, the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly, there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale, and that it is necessary to take steps to guard against the break-down of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution."

Implementing this finding, the Vanderbilt Committee recommended (a) the appointment of courts by the Judge Advocate General's Department, instead of by command; (b) the assignment of defense counsel by the Judge Advocate General's Department, and the requirement that defense counsel be a trained lawyer; and (c) that the initial review of decisions, except for purposes of clemency, be in the hands of the Judge Advocate General's Department, instead of in the commanding officer who initiated the proceedings and convened the court. Corollary proposals provided that the officers in the Judge Advocate General's Department should be qualified lawyers insulated from the indirect influence of command by having their promotions, assignments, leaves, and fitness reports emanating from the Judge Advocate General's Department rather than from command.

It was felt that once command had filed its accusations and placed a man on trial, the judicial machinery should be in the hands of an independent judicial system within the service which, not subject to pressures and influence from command would insure the accused the same fair trial be competent personnel that he would receive in our criminal courts if he were a civilian. In this recommendation and belief our Association concurred, as well as the American Bar Association, the Association of the Bar of the City of New York, The War Veterans Bar Association and many other veterans and bar groups.

On February 20, 1947, the War Department completely rejected these recommendations. The position of the Army with respect to them was summarized by Secretary of the Army Kenneth Royall in the Virginia Law Review for May, 1947, where he said:

> "The War Department feels that the Committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts-martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and over-stepped the bounds of propriety."

Extended hearings on the bills relating to the Army court-martial system were held by the House Committee on Armed Services, but no House hearings have been held on the Navy Bills. No hearings at all have been held by the Senate Committee. The House Committee reported out H.R. 2575, introduced by Representative Elston of Ohio at the request of the Army, and this bill in amended form was passed by the House. In the closing days of the second session of the Eightieth Congress, the entire Elston Bill was introduced by Senator Kem of Missouri as a rider to the Selective Service Act of 1948, and, without the benefit of any Senate hearings, was accepted by the Senate, and signed by the President as Public Law 759 of the Eightieth Congress. It becomes effective on February 1, 1949.

The passage of the Elston Bill was hailed on the floor of Congress and in the press as the accomplishment of the reforms in military justice which had been sought by our Association, among others. A label of "Court Martial Reform" was placed upon the bill which was scarcely indicative of its contents. Such labelling was highly dangerous in that it gave the public and the press the impression that substantial reforms had been accomplished, and thus reduced the possibility of further Congressional action to effect the real reforms which are still lacking. Accordingly, it is important to make clear just what the Elston Bill accomplished.

First of all, it must be noted that even such reforms as are affected by the Elston Bill have no application to the Navy, the Marine Corps, the Coast Guard, and, probably, the Air Force. Just as the changes in military justice which were adopted in 1921 were restricted in their application to the Army, so the Elston Bill is piece-meal legislation.

The most important phase of the Elston Bill to our mind is such change as it has effected in the relation of command to the courts-martial systems. Such change is reflected by Section 246 of the bill, amending Section 8 of the National Defense Act (10 U.S.C. 61) to provide for a Judge Advocate General's Corps. This provides for a separate corps, headed by a Major-General and three Brigadier-Generals, which shall have a strength of not less than 1½% of the authorized active commissioned officer strength of the Army, together with such warrant officers and enlisted personnel as may be assigned by the Secretary of the Army. This corps is given its own promotion list, similar to that of the Medical Corps and Chaplains Corps, independent of the line. This was vigorously opposed before Congress by the Army on the ground that thereby too great a preference was given to officers performing legal duties over line officers. It may be significant that the Army has not yet moved to put into operation this or other provisions of the Elston Bill.

The establishment of such a corps, with its own promotion list, has been widely hailed as having established "an independent Judge Advocate General's Department," but this is far from the fact. As was said in an editorial appearing in the August, 1948, issue of the American Bar Association Journal:

> "The new statute accomplishes some desirable improvements in military justice, supplementing those which the Secretary had power to introduce by his own action, along lines recommended by the Vanderbilt Committee nominated by our Association and appointed by the War Department. The Elston Bill creates a Judge Advocate General's Department which is independent in the sense that it has authority to handle its own administrative matters, but, as has been

> pointed out several times in these columns, (33 A.B.A.J. 40, 45, January 1947; 33 A.B.A.J. 319, April 1947; 33 A.B.A.J. 898, September 1947), command remains completely in control of the operation of the Army's courts-martial system."

Under the Elston Bill the power to appoint courts remains in command. Under the Elston Bill the power to review, in all its aspects, the decisions of courts-martial remains in the commanding officer who convened the court. Under the Elston Bill prosecutors and defense counsel are required to be members of the Judge Advocate-General's Department or otherwise qualified lawyers only "if available" -- a qualification which realistically leaves the situation in status quo. We believe that in all instances and in all the services, the prosecutor and defense counsel should be members of the Judge Advocate General's Department or otherwise qualified lawyers. So far as the basic fundamental matters at which the movement for court martial reform has been aimed, little is accomplished by the Elston Bill.

We have reviewed the history and background of these provisions to clear away the confusion that has been created as a result of the enactment of the Elston Bill. We come now to our recommendations with respect to the position of command in the court-martial system.

We do not question that discipline is a proper concern of command, just as the commissions of crime in the civilian community is a concern of the executive authority, represented by the District Attorney and the Governor. We believe that where a commanding officer has reason to believe that an individual has committed an offense, he must have the authority to file charges against that individual and to order him tried by a court of competent jurisdiction, and to be responsible for the prosecution of the offense, such responsibility including designation of a qualified prosecutor. We believe that it should continue to be the prerogative of command to evaluate the seriousness of the crime, and determine whether the case shall go before a general court-martial, or a court with lesser powers of punishment. We further believe that, just as the civilian executive, the commanding officer should have the power of clemency.

But once the judicial proceedings have been placed in motion, we agree with the opinion expressed by Hamilton in Number 78 of The Federalist that "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

We feel that, once the case has been referred by command for trial, the powers and control of command must end, save for the right to exercise clemency. Accordingly, we recommend

that (1) the power of appointing the court, and the defense counsel must rest with the Judge Advocate General's Department; (2) that the personnel serving in such capacity must be free from the authority of command directly, or indirectly in matters of appointment, fitness reports, promotions, leaves, etc.; and (3) that judicial review of court-martial proceedings shall be in higher echelons of the Judge Advocate General's Department.

A practical problem of major proportions arises with respect to these recommendations. By law a Judge Advocate General's Department exists in the Regular Army, and the Judge Advocate General, as well as the other officers in the Department, are professional lawyers. Such is not the case in the naval services or in the Air Force.

While there is a Judge Advocate General of the Navy, neither he nor other officers performing legal duties are required to be lawyers. Traditionally, officers assigned to legal duties in the naval services are line officers whose tour of duty in the Judge Advocate General's office generally comes between other assignments.

If there is to be a real system of military or naval justice, it must be administered within each of the services by a corps of legal specialists from whom each Judge Advocate General shall be required to be appointed, and which will provide the law members of the courts, the prosecutors, and the defense counsel, all of whom ought to be trained lawyers. Such a corps is already established by law in the Army, but it has never existed in the Navy and the Air Force, since its division from the Army, has followed Navy practice in this regard.

Establishment of such a specialist corps in the Navy and in the Air Force is not such a departure from precedent as might be imagined. While the legal systems of those services are today administered by officers who, notwithstanding their distinguished records and high professional competence as line officers and aviators, are generally not trained and experienced in the technical duties assigned them, other specialist functions are performed only by specialists. The Bureau of Medicine and Surgery of the Navy and the Office of the Air Surgeon General are manned and headed by physicians and surgeons, who may not be so appointed without a civilian license, and whose life work lies in medicine. The dental corps of the services are composed of dentists, and the Chaplains Corps are headed and manned by ordained ministers. There are doctors, dentists, and chaplains who are Major-Generals, Rear Admirals, and are accepted as an integral part of the service without ever having commanded a regiment or a naval vessel. In addition, as the result of the specialization which comes from modern warfare, in all services there are specialists such as

communicators who are trained throughout their careers for a particular specialty. Only in the specialties of law and of intelligence has there been some hesitancy in providing for a specialist corps. Those two specialties have been largely considered as part time jobs to which senior officers, regardless of their lack of professional training as lawyers or intelligence experts, may be assigned for a brief tour of duty, to return to sea or to aircraft after a few years.

The Navy has never seen fit to establish a legal corps, although in recent years it has taken tentative steps in this direction. During wartime it had a group of reserve officers classified as legal specialists. Commendably, since the end of World War II it has sent a selected group of regular naval officers to first line law schools for legal education, and has made such officers the nucleus of its post-war legal program.

If the Navy's hesitation to create such a legal corps stems from a desire, with which we could concur, to have its legal officers deeply imbued with its traditions and needs, the obstacle is not insurmountable. We would endorse a program which would insure that the Navy's lawyers have duty with Fleet units, and be as cognizant of and sympathetic with the problems and requirements of the service as its general duty officers. Such has, in fact, been the history of medical officers, chaplains, and other specialists. We can see no reason why such a program would not be practicable with respect to legal specialists. But we are firmly convinced of the necessity in all services of having billets concerned with legal duties filled by trained and competent personnel. If there is to be any uniformity in the courts-martial systems of the various services, the professional lawyers of the Army must be balanced by professional opposite numbers in the Navy and in the Air Force. Accordingly, we recommend that amendments to the law be adopted providing for a truly independent legal corps within each of the services. The chiefs of such corps should be appointed from the corps, and not, as at present, from general duty officers. The assignments, leaves, promotions, and fitness reports of officers in such corps should emanate from their superiors within the corps, and the decisions of the courts on which they sit should be reviewed by higher echelons within the corps and not by command. To our mind, such provision is the basic need of military and naval justice. Once it is accomplished, other reforms become mere refinements.

The Elston bill largely restricts its application to general courts-martial, and not special courts, which are the Army equivalent to summary courts-martial in the Navy. It is our experience that the greater part of the abuses which have occurred in military and naval justice have occurred in Navy summary and Army special courts, rather than in general courts martial. This is so because the commanding officer who has convened the summary or special court does so not because he has any doubt as to the guilt of the accused; but because he feels that

he cannot impose a sufficiently severe punishment at mast or company punishment. Frequently, this is conveyed to the court which the commanding officer appoints from his own command and whose decision he reviews. Too often the court is told that it is ecpected to find a verdict of guilty, and to impose a particular sentence, regardless of the oath that it takes "to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the Government of the Navy, and your own conscience." The result is that, although the court is by statute required to enter upon its duties with an open mind as to the guilt of the accused, its judgment is foreclosed in advance, and there is little question as to the ultimate result. This is much less likely to happen in a general court-martial, which is not ordinarily convened by the commanding officer who has instituted the proceedings and is not subject to his control. General courts-martial are normally under the control of a general or flag officer senior to the commanding officer who has initiated the proceedings, and the officers at his headquarters who participate in the proceeding are unlikely to be affected by the views of the subordinate commander who has recommended the court.

We are strongly of the opinion that all that we have said before as to the necessity of independent, competent lawyers serving as law members, prosecutors, and defense counsel on general courts martial is equally as applicable to Navy summary and Army special courts martial. Those who oppose this find it particularly impracticable in the Navy, where commanding officers of smaller units and ships have the power to convene summary courts martial. Actually, however, a large percentage of such courts are convened on larger vessels such as battleships, cruisers, and aircraft carriers (all of which have several thousand personnel aboard) and on bases where there are many thousands of men. In such ships and on such bases there should be no difficulty about providing adequate legal specialists, just as other specialist officers are provided in the allowance list.

At first blush, it sounds convincing that smaller vessels such as landing craft, minesweepers, destroyers, and other vessels which may have no more than half a dozen officers aboard cannot provide and cannot justify such legal specialists. If such smaller craft normally travelled alone, that might well be so. Normally, however, they travel and function in squadrons and divisions, each of which has a flagship aboard which is a squadron commander with a staff duplicating the staff of a fleet commander in miniature. There is no reason why legal specialists cannot be attached to such staffs as are other specialists, and be available for duties in all units of the squadron. We believe that any reform of military and naval justice will be incomplete if it is not applicable to the inferior courts, as well as to the general courts, to the fullest extent practicable.

In the development of a uniform code for all the services, we recommend that a uniform terminology be adopted. Only confusion results from the fact that an Army special court is known to the Navy as a summary court-martial; that an Army trial judge advocate may find as his opposite number a recorder. Adoption of a common terminology will do much towards the development of a uniform appraoch. Similarly, we recommend that uniform definitions of offenses, and a uniform system of punishments be adopted which will be applicable to all the services.

The Elston bill, in Section 210, has made it possible to discipline an officer who has committed an offense by trying him at a special court martial, as well as at a general court martial. This is not as yet true in the Navy where the only punishment that can be meted out to an officer is trial by a general court-martial or a private reprimand from his commanding officer. The effect of this is that where an officer commits a monor offense, he in effect goes unpunished, although an enlisted man committing the same offense is subjected to punishment. Similarly, in the Navy as an administrative measure courts-martial are cautioned against confining a petty officer, although a seaman committing an identical offense may and frequently does receive punishment of confinement. We believe that these practices negative our basic concept of "Equal Justice Under Law," and we recommend that the law be amended so as to equalize punishments for all service personnel. Such a provision would improve morale and discipline.

The Elston bill has set up a comprehensive and tortuous system of review insofar as Army courts-martial are concerned. That system is defective in that it preserves the right of review as to all phases of the case in the commanding officer who convened the court. This is completely at odds with American concepts of justice.

We recommend that a uniform system of review be established within all of the services, under which the commanding officer shall retain the right to review the case only for the purposes of exercising clemency. This, of course, parallels our civilian procedures under which the right of clemency is exercised by the President in Federal offenses, and by the Governor in State offenses. The initial review of the case as to legality and as to all aspects other than clemency should vest in the theatre area or Fleet representative of the Judge Advocate General. Thereafter, further review should be had by a Board of Review established in the office of the Judge Advocate General and appointed by him, as provided in the Elston Bill.

Under present practice, in none of the services do the accused or his counsel participate as a matter of right in review of courts-martial decisions. They rarely file briefs, and rarely do they have an opportunity to argue their case on review.

They have no knowledge of the questions that are being raised and discussed by the reviewing officers, and have no opportunity of presenting their point of view.

We recommend that the record of proceedings in any court martial shall include, when forwarded for review, a summary of all objections prepared by defense counsel, and that defense counsel be permitted to submit briefs or other argument to the reviewing authority. If the accused desires, at his own expense, to present oral argument through civilian counsel to the reviewing authority, he should be permitted to do so.

The goal of a uniform code uniformly applied and interpreted in all of the services is obviously difficult of achievement without some to-level co-ordinating agency. Ideally, when real unification of the military services is finally accomplished, there should be a single Judge Advocate General performing all legal duties for the Army, Navy, Air Force, Marine Corps, and Coast Guard. Unification as provided in the National Defense act falls far short of the unification under which such ideal can be realized. We must gear our recommendations accordingly to the existing situation, and to the advances that are realistically possible.

Accordingly, we recommend that there be established a Board of Review in the office of the Secretary of Defense, which shall have final power of review in all court-martial cases in all the services, and which will be charged with the development of uniform practices and procedures, much as the Supreme Court of the United States controls the decisions of the Federal Courts of Appeals. The Secretary of Defense should have the further duty of closely supervising the operations of the various Judge Advocate General Departments, and should have the power of recommending legislation to the Congress and of issuing directives to the services in matters pertaining to military and naval justice. He should have the specific responsibility of advancing unification of the legal functions of the armed services.

Today our country has for the first time a peacetime draft. Large numbers of our young men will in the years ahead serve in a peacetime army, navy and air force whose mission is the preservation of our American democracy. Under such circumstances it seems to us that there is a paramount obligation to those young men, to their anxious families, and to the basic principles of that American democracy to make full provision for the protection of those young men and to insure that their right to fair trials before qualified and independent courts is not impaired. We have every confidence that the adoption of the proposals made by us will strengthen the morale and discipline of our armed services, in time of war as well as in peace time.

Respectfully submitted,
RICHARD H. WELS, Chairman
LOUIS C. FIELAND
JOHN M. MURTAGH
SIDNEY A. WOLFF
INZER B. WYATT