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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

Professor Morgan
3 (6)

January 5, 1949

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Points of difference within the Committee

In line with my conversation with you of yesterday, I have, at Professor Morgan's request, arranged for a conference between the entire Committee and Secretary Forrestal on Friday, January 7, 1949. I am not sure of the hour of the meeting as yet, and will notify you as soon as possible.

As you know, the purpose of the meeting is to formally present to the Secretary the varying views of the members of the Committee on the major proposals in dispute.

For the purpose of giving the Secretary a brief statement of the facts, I have supplied him with papers on each issue, copies of which are attached for your information.

FELIX E. LARKIN
Executive Secretary

Attachments (4)
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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

January 5, 1949

MEMORANDUM FOR THE SECRETARY

FROM: Felix E. Larkin

SUBJECT: Uniform Code of Military Justice

You will recall that when Professor Morgan, Mr. Leva and I gave you a progress report several weeks ago, we informed you that the Committee was nearing the completion of its work in drafting a Uniform Code of Military Justice, and that it was unanimous on all but a few provisions. We briefly mentioned the points of difference at that time, and I stated that I would set them forth in greater detail so that you would have more facts before you in resolving them.

In none of the differences which exist is Professor Morgan in single dissent. He is either on the side of the majority in the three to one votes, or is supported by one of the Services on the split votes. Inasmuch as you indicated that you plan to look to Professor Morgan for guidance in resolving the differences, we have gone forward and are drafting the disputed provisions based on the side taken by Professor Morgan.

You will further recall that Senator Gurney desired that we have a Uniform Code ready for the opening of the 81st Congress. The complexity of the problem and the volume of the work have been so great that we, unfortunately,

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will be several weeks late. Senator Gurney, however, understands this and has given us an extension of time. However, he is very desirous that we have the bill ready before the end of this month, and I am confident that we can clear up the large number of technical details which remain if the four or five major points of difference are resolved now.

I am attaching to this paper individual briefs on each of the points in dispute. I would not bother you further with these disputes and would proceed on the basis that you had resolved them in favor of Professor Morgan's position if it were not for the fact that I believe Mr. Gordon Gray would like to bring to you the Army's dissent on the proposed appellate system. The appellate system, as now drafted, was worked out by Professor Morgan and is supported by the Navy and the Air Force.

Professor Morgan requests that you meet with the entire Committee on Thursday or Friday of this week, so that a final decision may be made on all the disputed points.

In connection with the whole Uniform Code, you will be interested to know that I have spent several days with the Bureau of the Budget in an effort to prevent delay in clearing the bill. They are extremely enthusiastic about the proposed bill and are so impressed with it that they are thinking of making arrangements for the President to send it to Congress with a special message. They think it is one of the best examples of unification to date, and a progressive and modern penal law.

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They do object to several provisions, the most important of which is the proposal that the civilians on the Judicial Council be appointed by the three Secretaries. They believe the appointment should be by the President. In addition, they believe that all regulations to be promulgated by the three Secretaries should be subject to the approval of the Secretary of Defense.

I believe that, if the President would submit the bill, our chances of getting it passed by the Congress would be materially enhanced. It is my recommendation that this Office foster the idea of submission by the President in every way.

You have probably noticed the continuing newspaper interest in military justice. A recent example is the Washington Post editorial of January 3, 1949. I attach a copy.

Felix E. Larkin

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

SUBJECT: Points of difference within the Committee

ITEM: Appellate System

In attempting to arrive at a uniform system of appellate review for the Armed Services, the Committee was faced with two widely varying systems now in use by the Army and the Navy. The Army system is a very complex one, and, as recently amended by Public Law 759, was made more complicated. In addition to the review by the Convening Authority, the review by the Board of Review, the review by the Judge Advocate General himself, there was added a Judicial Council. This Judicial Council was a further agency of review which would be staffed by three General Officers.

The system of review in the Navy differs from both the present and prospective Army systems, both in organization and in approach. It is less complicated than the Army system, but very much more informal, with the ultimate authority for decision, both as to law and fact, residing in the Secretary of the Navy.

Neither the Army nor the Navy like each other's system and no agreement could be reached on a compromise until Professor Morgan proposed a plan of review.

Professor Morgan's plan, which would apply on a uniform basis to all three Services, provides for full military review by the Convening Authority in the same fashion as exercised by both the Army and Navy at the present time.

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It also provides for a Board of Review in the Judge Advocate General's office, similar to the proposed Army system. It retains the Judge Advocate General in the system, taking away some of the functions of the Judge Advocate General in the Army, but increasing the functions of the Judge Advocate General in the Navy.

Professor Morgan's system abolishes the departmental Judicial Council of three General Officers, as found in the new Army system and sets up, instead, a Judicial Council in the National Military Establishment, which will act as a supreme court on law only for the three Services. This Judicial Council would consist of civilians who would have final authority on the law of the case. Mr. Kenney and Mr. Zuckert have voted in favor of Professor Morgan's plan.

Mr. Gray, on behalf of the Army, dissents from the whole plan, although, in essence, the dissent centers around the single Judicial Council staffed by civilians. Mr. Gray's views on this matter are set forth in a memorandum prepared by him, and I attach it hereto.

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

SUBJECT: Points of difference within the Committee

ITEM: Enlisted Men on the Courts

On this question, Professor Morgan, Mr. Gray and Mr. Zuckert voted to include in the Code a provision similar to that enacted by the Congress at the last session in the amended Articles of War, which applies to both the Army and Air Force as of February 1, 1949. Mr. Kenney voted in dissent on this subject and stated that he was also reflecting Secretary Sullivan's views on this question.

As pointed out above, the provision in the Uniform Code agreed upon by Professor Morgan, Mr. Gray and Mr. Zuckert follows the substance of the recently enacted provision in that it leaves with the enlisted man being tried the option of requesting enlisted men on his court. In recognition of possible Navy problems at sea, the proposed uniform provision modifies the recent enactment of Congress by permitting any Service to try an enlisted man without enlisted men on his court if enlisted men from outside the defendant's company, unit or ship are not available. This modification was written in in recognition of the Navy's problem, although within their general dissent on the whole proposal.

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

SUBJECT: Points of difference within the Committee

ITEM: Law Officer

A major difference in composition of Army and Navy courts martial was encountered by the Committee on the question of providing for a legal arbiter during the trial of a case. Prior to 1919, neither the Army nor the Navy had a Judge or Law Member on their courts, and the members of the court itself decided all legal questions.

The amendments to the Articles of War in 1919 provided that all Army General Courts Martial have what was called a Law Member, who would act as a Judge in ruling on a large number of legal questions, but would also act as a member of the court in that he retired with them and voted as a member on the findings and the sentence. The duties of the Law Member have been further spelled out in the recent amendments passed by Congress last year for the Army.

The Navy has recognized that the lack of a Judge or Law Member is a defect in its system and desires that such an officer be provided for its courts. It wishes to go further than the Army system, however, and wants the so-called Law Member to act as a Judge in the same fashion as a civilian Judge in that he will rule on questions of law and not vote with the other members of the court on findings or sentence and that he will also give instructions on the law of the case on the record.

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Professor Morgen strongly supports the Navy view, while Mr. Zuckert and Mr. Gray desire that the so-called Judge still have the right to vote with the court, although Mr. Zuckert is willing to modify the present practice whereby the Law Member instructs the court in closed session, off the record and to provide that instructions be on the record. As indicated above, the vote is as follows: Mr. Gray and Mr. Zuckert are in favor of the Law Member continuing to vote on the sentence and findings, while Professor Morgan and Mr. Kenney oppose such function.

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

SUBJECT: Points of difference within the Committee

ITEM: Option by the Defendant

The Committee encountered a difference in practice between the Army and Navy systems in connection with the options granted to refuse trial at Mast - Company Officer punishment, and in the Summary Court (Army) and Deck Court (Navy). At the present time, no accused in the Navy has the right to refuse punishment at Mast, although everyone has the right to refuse a Deck Court and may demand trial by the next higher court. The Army practice is almost the reverse. Everyone may refuse Company punishment, but only the first two grades of non-commissioned officers may refuse Army Summary Court punishment.

The Navy feels strongly that the punishment imposed at Mast by the Commanding Officer should not be subject to refusal, and that this is one point where the prerogatives of the Commanding Officer should not be interfered with, since, in their view, it extends fundamentally to discipline and morale, particularly on very minor offenses. They are willing, however, to permit the accused to refuse the Deck Court (a one-man court appointed by the Commander) and permit the accused to be tried by the next higher court (consisting of three officers).

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The Army, on the other hand, feels that the right to refuse Company punishment is a protection to the accused in that it prevents capricious punishment at the will of the Commander. They do not feel, however, that anyone but the top grades of non-commissioned officers should have the right to refuse Summary Court punishment, and they reserve that right for the first two grades of non-commissioned officers in recognition of the prestige they feel they are entitled to.

Professor Morgan supports the Navy view, and, as a result, the vote is split two to two on this question.

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

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January 31, 1949

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

➤ Professor Edmund M. Morgan, Jr.
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Redraft of a proposed letter of transmittal to the Secretary
of Defense.

Attached is a redraft of the proposed letter of transmittal to Mr. Forrestal. It differs from the previous draft in that I have added a paragraph setting forth the fact that the Committee's action was not unanimous on all provisions of the Code and that certain of the provisions are drafted in accordance with the decisions of the Secretary of Defense.

This phraseology is pursuant to the memorandum to me from Mr. Zuckert, who stated that he and Mr. Gray feel strongly that language of this type should be included in the letter of transmittal.

I have spoken with Professor Morgan, who does not object.

Please let me know at your earliest convenience if the additional language is satisfactory.

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FELIX E. LARKIN
Executive Secretary
Committee on a Uniform Code of
Military Justice

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Dear Mr. Secretary:

In accordance with the instructions contained in your precept dated August 18, 1948, I submit herewith a draft of a Uniform Code of Military Justice.

The Code is in the form of a bill consisting of _____ Articles. Each Article is accompanied by notes and commentary which indicate the source from which it was derived.

You will note that the proposed Uniform Code applies equally to the Departments of the Army, Navy and Air Force. This desirable result has been possible only by the general cooperation of the three Services and the members of the Committee. The Department of the Treasury and the Coast Guard have also made a valuable contribution and, with their consent, the Code, by its provisions, applies to the Coast Guard in time of peace as well as war.

The provisions of the proposed Code were unanimously adopted by the members of the Committee with the exception of the provisions submitted to you on January 7, 1949. These provisions, on which the members of the Committee were divided, have been drafted in accordance with your decisions.

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Attached hereto is a summary of some of the more important provisions of the Code.

Respectfully,

EDMUND M. MORGAN, JR.
Chairman
Committee on a Uniform Code of
Military Justice

GORDON GRAY
Department of the Army Member

W. JOHN KENNEY
Department of the Navy Member

EUGENE M. ZUCKERT
Department of the Air Force Member

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OFFICE OF THE SECRETARY OF DEFENSE

February 8, 1949

Memo. for Professor Morgan

Attached is a copy of my letter to General Ansell forwarding a copy of the Code.

As a matter of interest, I have learned that General Ansell will take part as judge in a forum discussion sponsored by the American Bar Association's Special Committee on Military Justice.

You will recall that this is the program on which George Spiegelberg, Governor Gibson and Fritz Weiner will appear.

The program will be televised by the American Broadcasting Company from the WJZ studios in New York City on Thursday evening, February 10, and re-broadcast over the radio by ABC on Monday evening.

I thought you might be interested in seeing or hearing the program.

Felix

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

February 8, 1949

Dear General Ansell:

Professor Morgan asked me to take particular care to see that you received a copy of the proposed Uniform Code of Military Justice as soon as it was available for distribution.

It was submitted to the Congress by Secretary Forrestal today and, accordingly, I am enclosing a copy.

Very truly yours,

FELIX E. LARKIN
Assistant General Counsel

Enclosure
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Brigadier General Samuel T. Ansell
1957 Biltmore Street, N. W.
Washington, D. C.

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

February 8, 1949

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

→ Professor Edmund M. Morgan, Jr.
Chairman

Honorable Gordon Gray
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Honorable W. John Kenney
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Honorable Eugene M. Zuckert
Department of the Air Force Member

Upon obtaining the signatures of the members of the Committee on the letter of transmittal, I gave it, plus the summary, plus the final draft of the Uniform Code, to Secretary Forrestal and immediately proceeded to get clearance from the Bureau of the Budget.

As you know, I have been working with representatives of the Bureau of the Budget for some period of time, and they had informally indicated that they would clear the bill except for the provision in Article 66 which provided for appointment of the members to the Judicial Council by the Secretaries of the Departments and the inclusion of a clause giving the President authority to delegate and subdelegate powers given him by the Code. I had satisfied them on all of the other points which they had raised, including the provision they suggested which would have given the Secretary of Defense the right to approve departmental regulations.

Secretary Forrestal and Mr. Pace discussed the two provisions named above, and Mr. Forrestal thereafter instructed me to add a provision giving the President power to delegate (which is now Article 140) and to change the text of Article 66 to provide that the civilian members of the Judicial Council be appointed by the President. I followed Mr. Forrestal's instructions and, as a result, the Bureau of the Budget declared the bill to be fully in accord with the President's program.

Thereafter - this morning - Mr. Forrestal transmitted a copy of the bill as amended to the Speaker of the House of Representatives and to the Chairman of the Senate Committee on Armed Services, and this Office released the attached press release. I also attach a copy of the bill as submitted to the Congress.

Felix

FELIX E. LARKIN
Executive Secretary