

74  
.Ar 5/3  
P 96/2

1034

P 96/2  
Ar 5/3  
8774

# NONJUDICIAL PUNISHMENT

## HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES UNITED STATES SENATE EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

### H.R. 11257

AMENDING SECTION 815 (ARTICLE 15) OF TITLE 10, UNITED STATES CODE, RELATING TO NONJUDICIAL PUNISHMENT

JULY 17, 1962

Printed for the use of the Committee on Armed Services

KSU LIBRARIES



A11900 478659 ✓



AY  
Ar 23  
p 209

NONJUDICIAL PUNISHMENT

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON ARMED SERVICES

COMMITTEE ON ARMED SERVICES

RICHARD B. RUSSELL, Georgia, *Chairman*

HARRY FLOOD BYRD, Virginia

JOHN STENNIS, Mississippi

STUART SYMINGTON, Missouri

HENRY M. JACKSON, Washington

SAM J. ERVIN, Jr., North Carolina

STROM THURMOND, South Carolina

CLAIR ENGLE, California

E. L. BARTLETT, Alaska

HOWARD W. CANNON, Nevada

ROBERT C. BYRD, West Virginia

LEVERETT SALTONSTALL, Massachusetts

MARGARET CHASE SMITH, Maine

PRESCOTT BUSH, Connecticut

J. GLENN BEALL, Maryland

BARRY GOLDWATER, Arizona

HARRY L. WINGATE, Jr., *Chief Clerk*

SUBCOMMITTEE ON H.R. 11257

SAM J. ERVIN, JR., North Carolina, *Chairman*

HOWARD W. CANNON, Nevada

BARRY GOLDWATER, Arizona

T. EDWARD BRASWELL, Jr., *Professional Staff Member*



## CONTENTS

---

Statements of—	Page
Ackroyd, Col. Gilbert G., Chief, Military Justice Division, Office of the Judge Advocate General of the Army-----	25
Bitte, Sp4c. Lawrence F. (letter submitted by Senator Maurine B. Neuberger, of Oregon)-----	38
Greenberg, Capt. Mack K., Assistant Judge Advocate General for Military Justice, Navy-----	10
Kuhfeld, Maj. Gen. Albert M., the Judge Advocate General of the Air Force-----	4
Olsen, Clarence H., director of the Legislative Commission, the American Legion-----	30
Scherr, Lt. Col. Robert A., staff legal officer, Headquarters, U.S. Marine Corps-----	30
Speiser, Lawrence, director, Washington office, American Civil Liberties Union-----	33



## NONJUDICIAL PUNISHMENT

TUESDAY, JULY 17, 1962

U.S. SENATE,  
SUBCOMMITTEE OF THE  
COMMITTEE ON ARMED SERVICES,  
*Washington, D.C.*

The subcommittee (composed of Senators Ervin (chairman), Cannon, and Goldwater) met, pursuant to notice, at 10:30 a.m., in room 212, Old Senate Office Building.

Present: Senators Ervin, Cannon, and Goldwater.

Also present: T. Edward Braswell, professional staff member.

Senator ERVIN. The subcommittee will come to order.

The subcommittee is meeting today to consider H.R. 11257, which passed the House on May 14.

(H.R. 11257 follows:)

[H.R. 11257, 87th Cong., 1st sess.]

AN ACT To amend section 815 (article 15) of title 10, United States Code, relating to nonjudicial punishment, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled*, That section 815 (article 15) of title 10, United States Code, is amended to read as follows:

**“§ 815. Art. 15. Commanding officer's nonjudicial punishment**

“(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

“(b) Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

“(1) upon officers of his command—

“(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

“(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

“(i) arrest in quarters for not more than 30 consecutive days;

“(ii) forfeiture of not more than one-half of one month's pay per month for two months;

“(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

“(iv) detention of not more than one-half of one month's pay per month for three months;

“(2) upon other personnel of his command—

“(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

“(B) correctional custody for not more than seven consecutive days;

“(C) forfeiture of not more than seven days' pay;

“(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

“(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

“(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

“(G) detention of not more than 14 days' pay;

“(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

“(i) the punishment authorized under subsection (b)(2)(A);

“(ii) correctional custody for not more than 30 consecutive days;

“(iii) forfeiture of not more than one-half of one month's pay per month for two months;

“(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

“(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

“(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

“(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, 'correctional custody' is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

“(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2) (A)–(G) as the Secretary concerned may specifically prescribe by regulation.

“(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

“(1) arrest in quarters to restriction;

“(2) confinement on bread and water or diminished rations to correctional custody;

“(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

“(4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been

imposed initially under this article by the officer who imposed the punishment mitigated.

"(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

- "(1) arrest in quarters for more than seven days;
- "(2) correctional custody for more than seven days;
- "(3) forfeiture of more than seven days' pay;
- "(4) reduction of one or more pay grades from the fourth or a higher pay grade;
- "(5) extra duties for more than 14 days;
- "(6) restriction for more than 14 days; or
- "(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

"(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

"(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing."

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

Passed the House of Representatives May 15, 1962.

Attest:

RALPH R. ROBERTS, *Clerk*.

Senator ERVIN. The purpose of this legislation is to amend article XV of the Uniform Code of Military Justice by giving increased authority to certain commanders in the Armed Forces to impose nonjudicial punishment.

Under existing law the maximum punishment article XV authorizes for officers and warrant officers is 2 weeks' restriction and forfeiture of one-half of 1 month's pay, and for enlisted men, 2 weeks' restriction and reduction to the next lower grade. Generally, the increased authority proposed by the bill would permit commanders to impose punishment which may be given as a result of conviction in a summary court.

The legislation has been urged on two separate grounds—first, on the premise that military commanders are in need of greater authority for nonjudicial punishment for the purpose of discipline and morale in the Armed Forces, and second, that the use of the nonjudicial authority should serve to reduce the number of courts-martial by avoiding the use of the summary court system. Such a reduction would also affect the matter of discharges under other than honorable conditions, which many times are based on the number of courts-martial received.

The Chair might note that this bill was amended by the House and incorporated the recommendations of the American Legion on this subject. We are glad to have with us today General Kuhfeld who

will testify for the Department of Defense on the bill. Following General Kuhfeld, we will hear from Mr. Speiser of the American Civil Liberties Union. General Kuhfeld, you may proceed in your own way.

**STATEMENT OF MAJ. GEN. ALBERT M. KUHFIELD, THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, DEPARTMENT OF THE AIR FORCE; ACCOMPANIED BY COL. HAROLD P. VAGUE, CHIEF, LEGISLATIVE DIVISION, AIR FORCE JUDGE ADVOCATE GENERAL; COL. ARNOLD LEBELL, CHIEF, MILITARY JUSTICE DIVISION, AIR FORCE JUDGE ADVOCATE GENERAL; COL. G. G. ACKROYD, CHIEF, MILITARY JUSTICE DIVISION, OFFICE OF THE ARMY JUDGE ADVOCATE GENERAL; CAPT. MACK K. GREENBERG, ASSISTANT JUDGE ADVOCATE GENERAL (MILITARY JUSTICE) OFFICE OF THE NAVY JUDGE ADVOCATE GENERAL; CAPT. ARTHUR G. ESCH, DIRECTOR, POLICY DIVISION, BUREAU OF NAVAL PERSONNEL; LT. COL. ROBERT A. SCHERR, PERSONNEL DEPARTMENT, STAFF LEGAL OFFICER, HQ, U.S. MARINE CORPS**

General KUHFIELD. Thank you.

Mr. Chairman and members of the committee, I am Major General Kuhfeld, the Judge Advocate General of the U.S. Air Force. I appreciate the opportunity of appearing before you today in support of H.R. 11257, and as the chairman said, I am appearing on behalf of the Department of Defense and not the Air Force alone. The principal purpose of the bill is to amend article 15 of the Uniform Code of Military Justice, to give designated commanders in the Armed Forces increased authority to impose nonjudicial punishment upon members of their commands.

Serious problems, adversely affecting discipline and morale, have been found to exist due to inadequacies of corrective powers of commanders under the present article to deal with behavioral infractions without resort to the processes of criminal law.

As you and the members of this committee know, Mr. Chairman, and as you stated, a bill embodying the subject matter of H.R. 11257 was introduced in the House of Representatives on June 14, 1961, by the chairman of the Armed Services Committee, as H.R. 7656. Prior to the time that hearings were held on that bill by the House Committee on Armed Services, Mr. John Finn, chairman of the Special Committee on the Uniform Code of Military Justice and the U.S. Court of Military Appeals of the American Legion, communicated with the committee. He stated that although the American Legion concurred with the basic principles of H.R. 7656, it opposed the form of the bill because it left to Presidential and Secretarial regulations many of the safeguards which the American Legion believed should be fixed in the statute itself. Committee amendments were thereafter made to the bill, expressly placing the safeguards mentioned in the proposed statute, and thereby embodying changes that met in substance the objections of the American Legion. These committee amendments were incorporated in a clean bill, which was reported out as H.R. 11257 and passed by the House of Representatives, and is now before this committee. I might say, Mr. Chairman, that the

changes that were made by committee amendments in the House of Representatives incorporated into the proposed statute the same matters that the military services and the Department of Defense had contemplated would be incorporated in Presidential and Secretarial regulations under the original bill.

H.R. 11257 therefore has the full approval of the Department of Defense, each of the Armed Forces, the Coast Guard, and the Court of Military Appeals.

The principle embodied in this bill has also received the endorsement of leading bar associations, including the Association of the Bar of the City of New York, the Judge Advocates Association, and the American Bar Association, and of leading veterans' associations, including—in addition to the American Legion—the American Veterans Committee.

In brief explanation of the bill, H.R. 11257 proposes to effect the following major changes:

(a) Designated commanders in the grade of major (lieutenant commander), or above, will be empowered to impose increased punishments substantially the same as those now within the punitive authority of a summary court-martial. Designated commanders below the grade of major (lieutenant commander), including warrant officers exercising command, will be empowered to impose a lesser degree of the same punishments.

(b) In the case of enlisted personnel, commanders in the grade of major (lieutenant commander) or above will be authorized to impose the following maximum punishments: correctional custody for not more than 30 days, forfeiture of not more than one-half pay per month for 2 months, reduction to the lowest pay grade (except that those in pay grade above E-4—that would be a staff sergeant and above in the Air Force—may not be reduced more than two pay grades), extra duties for not more than 45 days, restriction for not more than 60 days, and detention of not more than one-half pay per month for 3 months. Commanders in a grade below major (lieutenant commander) and warrant officers exercising command will be authorized to impose the following maximum punishments: correctional custody for not more than 7 days, forfeiture of not more than 7 days' pay, reduction to the next inferior pay grade, extra duties or restriction for not more than 14 days, and detention of not more than 14 days' pay. In the special case of persons attached to or embarked on a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days is also authorized. And I might say in connection with this, Mr. Chairman, that H.R. 11257 continues the authority of an "officer in charge" which was brought into the old article 15. This is a category of officers in the Navy and Coast Guard who exercise limited command functions. As I say, this continues the authority of such an "officer in charge" to impose punishment upon enlisted men assigned to his unit.

In this connection, then, the phrase "assigned to the unit of which he is in charge," which is used on page 5 at line 24 of the bill, is intended to have the same meaning as the words "of his command" which is used on page 2 at line 18 and on page 3 at line 10.

(c) In officer cases, the imposition of restriction for not more than 30 days is authorized, and when imposed by a commander exercising general court-martial jurisdiction, or one of general or flag rank in

command, the following punishments are authorized: arrest in quarters for not more than 30 days, forfeiture of not more than one-half pay per month for 2 months, restriction for not more than 60 days, and detention of not more than one-half pay per month for 3 months.

H.R. 11257 also makes provision, in cases of reductions in grade imposed pursuant to article 15, for the suspension and vacation of such punishments.

A survey, with respect to Army, Navy, and Air Force commanders' views concerning proposed amendments to the Uniform Code of Military Justice, revealed that the granting of additional powers under article 15, Uniform Code of Military Justice, was of prime concern. A paramount consideration in this regard is the stigma of criminal conviction which results when resort must be had to summary court-martial trial. H.R. 11257, by increasing the powers of a commander, will effect a marked improvement upon discipline by permitting commanders to mete out punishment for minor infractions without initiating court-martial proceedings.

These considerations are also reflected in the views of the U.S. Court of Military Appeals. In its annual report to the Committees on Armed Services of the Senate and of the House for the year 1960, the court, in May 1961, stated that utilization of article 15 with increased authority granted to commanders will—

\* \* \* assure effective disciplinary sanctions for infractions of the rules. It will not constitute a previous conviction for any purpose nor time lost nor a permanent blot on the individual's military record which will follow him into civilian life.

In April 1962, in a joint report submitted by the court with the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury for the year 1961, the position of the court was reiterated with the following statement:

The proposed legislation \* \* \* is within the spirit of the Uniform Code of Military Justice. Enactment thereof would be most beneficial to the sound administration of military justice and is recommended.

Under the proposed legislation, a commander imposing punishment under this article would be authorized at any time to suspend probationally any part or amount of the unexecuted punishment imposed, and to suspend a reduction in grade or forfeiture, whether or not executed. He could also remit, mitigate, or set aside any punishment, whether or not executed, and restore all rights, privileges, and property affected.

The person punished would have the right to appeal his punishment to the next higher commander. The commander to whom an appeal is made would have the same powers with respect to the remission, suspension, or mitigation of the punishment imposed as the officer originally imposing the punishment. Provision is also made for legal review of cases appealed.

And I would like to add to the statement another explanation I think is of consequence. Although the appeal would be made to the next higher commander any authority superior to the officer imposing punishment may remit, suspend or mitigate the punishment imposed. It is recognized that it may not always be feasible for the immediate superior of the officer imposing punishment to take action on appeal. For example, certain commanders, such as those commanding purely

tactical units may not have on their staffs officers qualified to make the legal reviews authorized or required by this bill in processing an appeal. In such cases, it would be necessary for the commander to whom an appeal is made to forward the appeal to a superior authority in the chain of command having qualified legal personnel on his staff. To take care of these and similar situations, the words, "the superior authority" as used on page 7 at lines 15 and 16 of the bill we are considering are intended to mean "any superior authority in the chain of command."

And this, as I explained, is necessary so that the person passing upon the appeal does have a staff judge advocate or legal specialist on his staff to perform the functions that this bill requires be performed by a legal specialist or a staff judge advocate.

So far as the provisions of H.R. 11257 contemplate increased punishment of officers, the 1-month limitation on forfeitures as provided for in the existing article has proved unsatisfactory to commanders in the field and is not cured by the fact that an officer may be tried by a special court-martial. An officer's present and future value within his command is seriously and permanently impaired by the publicity attendant to trial by court-martial. When such an event occurs, prompt transfer of the officer after trial is imperative, regardless of the outcome. Such a procedure is costly in time, money, and manpower. It is believed to be essential that commanding officers retain their present power to try officers by special court-martial as exceptional circumstances warrant. However, it is considered desirable to increase the punitive powers of article 15 so that an adequate punishment can be imposed upon an officer for a relatively minor offense without resorting to any sort of court-martial trial.

In providing for suspension and vacation of punishments which impose reductions in grade, the bill seeks to remedy the restrictive implications of the Comptroller General's decision (B-131093, June 1957). This decision holds that a reduction imposed pursuant to article 15, Uniform Code of Military Justice, is complete immediately upon imposition, thus precluding suspension thereof. Such harsh limitation of authority seriously impairs the power of superior commanders on appeal to effect rehabilitation by reinstating offenders to their former grades in deserving cases.

I have tried to summarize the urgent requirement for this legislation. If any of the members of the committee have any questions, I will be happy to attempt to answer them.

Senator ERVIN. General, I think the committee would appreciate it if you would elaborate to some extent for the purpose of the record on the need of this bill to achieve better discipline and morale in the Armed Forces. You have alluded to that, but I think it would be well to elaborate on it.

General KUHFIELD. Mr. Chairman, I have traveled all over the world and talked to commanders as to what they thought was the most important thing needed for the improvement of the Uniform Code of Military Justice. When they spoke about article 15, I said "Why?"

Almost invariably the answer that I received—and I think it is perfectly justified—is that with the restrictive limitations in the present article 15, if an airman committed an offense that was too grave,

although a minor offense, too grave to be handled under the present article 15, the commander was left with only two recourses: either he had to refer the case to a court-martial—and they point out, and my experience justifies this, that if an airman or a soldier or a sailor has been convicted by court-martial, his morale goes down, he feels he can't get along in the service. He says, "I am not going to get along, I have been convicted by court-martial." This is damaging to morale and hurts the discipline of the unit. The commander had that recourse or he had to utilize the general regulations which allow reduction for misconduct or inefficiency. And if you reduce, according to the commanders—and our experience would show this is true—if you reduce, for instance, a man that is a staff sergeant, down to airman second class under the reduction regulation, he has been used to living on noncommissioned officer's pay, and his reduction injures his morale. It causes him to have difficulties in living, he may write bad checks, and he runs into debt, his morale is shot, and pretty soon you have this man up for some kind of a board proceeding.

The commanders all feel that if you place with the commander who is responsible for the maintenance of discipline the authority to enforce discipline, he will be able to do a better job, and he will be able to nip these things right in the bud when a man first gets off on the wrong foot, and get the man straightened out by utilization of these powers under article 15, and thus keep this man as a productive member of the force. And after all, in my business in the military we are not just trying to court-martial people to eliminate them; we are in the business to try to prevent courts-martial in order to get a good job and good service out of these people who have vital duties to perform.

This is why, I think, it is necessary.

Senator ERVIN. You have stated that the main purpose, the overall objective of this bill is to allow nonjudicial punishment for the offenses which essentially now fall within the jurisdiction of a summary court.

General KUHFIELD. Right.

Senator ERVIN. Could you outline briefly how the punishments prescribed by this bill coincide with the offenses of which the summary court has jurisdiction, and how they differ?

General KUHFIELD. Well, from the standpoint of offenses, Mr. Chairman, there isn't any list of punishments that should be tried by summary court.

General KUHFIELD. Well, a summary court in the case of an airman can sentence him to be reduced to the lowest enlisted grade. Actually if a summary court sentences an airman to hard labor with or without confinement, and that is approved by the convening authority, that under the law automatically reduces him to the lowest enlisted grade, as applied now in the Army and the Air Force.

This bill provides for correctional custody for 30 days. Now, we don't propose that this be confinement at hard labor for 30 days, that isn't the idea. But correctional custody for 30 days is commensurate with the confinement at hard labor for 30 days which can be imposed by a summary court. A summary court can reduce an airman all the way down to the lowest enlisted grade. This bill provides that the officer who is exercising his authority under article 15 may reduce an enlisted man to the lowest enlisted grade except with regard to airmen or enlisted men above the fourth pay grade, and he can reduce them not more than two grades.

And incidentally, with respect to a summary court, the Executive order—not the statute but the Executive order—now provides that in the case of a petty officer or a noncommissioned officer above the fourth pay grade, the summary court is limited to a one-grade reduction. That is provided now. This bill says a two-grade reduction.

Senator ERVIN. The committee has received some letters questioning the distinction between the reductions in grade that could be made—this limitation upon the reduction in grade as to those in pay grade above E-4, as to those in grades below it, there is no limitation—in other words, the person in the lower ranks could be reduced all the way to E-1.

General KUHFIELD. That is right, sir. But you see, in a summary court-martial he could too. And what we are trying to do is to eliminate the necessity of the court-martial conviction, and to have the punishments imposable under this statute, under article 15, commensurate with what could happen in a summary court-martial. In other words, if you maintain the limitation here, or put in a limitation as we have in the present article 15, that an airman, sailor, or soldier could be reduced only one grade, then you wouldn't be eliminating the necessity for a summary court. And what we want to do is eliminate the necessity for this conviction rather than get into a conviction by court-martial.

Senator ERVIN. In the old article when it came to giving non-judicial punishment, the enlisted man was given his choice between receiving nonjudicial punishment—they used to call it company punishment—and a summary court. And it is my understanding that that practice has been continued in the Army, and also has been put in effect in the Air Force under the regulations which apply under article 15.

Now, the Navy, as I understand it, has never given that option.

General KUHFIELD. That is correct, Mr. Chairman.

Senator ERVIN. General, would it be the purpose of the Army and the Air Force to continue the regulations giving the man the option between taking nonjudicial punishment and taking a summary court as the regulation now provides?

General KUHFIELD. Yes, sir; both the Army and the Air Force. In the departmental regulations and in the manual itself and in the Presidential Executive order, it is intended to provide for this election on the part of a man offered punishment under article 15. The Navy, because of its difference in command structure, feels that this is not workable insofar as the Navy is concerned; they feel that in an on-board-ship situation, for instance, it is always the commander—the man is brought before the mast—it is the commander who is the highest authority on that ship who hears both sides of the problem, decides the issue, and decides whether punishment is going to be given, and if so, what punishment.

And so it is the Navy's view that it is a rather anomalous situation to be in a position where the man can say, "I demand trial by court-martial," and then the captain of the ship, who is the only one on that ship who could have imposed punishment under article 15 anyway, must appoint somebody as a summary court to hear the thing. Then that summary court would give the punishment, and the captain would approve it and the punishment would be imposed on that basis.

Captain Greenberg from the Navy is here, and if you want some more detail on it he can give it.

Senator ERVIN. I might state for your benefit, and also Captain Greenberg's benefit, that in connection with these investigations and hearings before the Subcommittee on Constitutional Rights, the subcommittee received a number of complaints from lawyers to the effect that the Navy should be compelled to give the same option which the Army and the Air Force gives in this field.

General KUHFIELD. I realize that there would be those complaints. The peculiar thing is, in my experience—and I have been connected with the administration of justice in the Air Force since we had a separate Air Force, and I was in the Army Judge Advocate's Corps before that—the cases where a man says, "Wait a minute, I demand trial by court-martial in lieu of punishment under article 15," are extremely rare; it doesn't happen very often. If they were given a choice between punishment under article 15 and a court-martial, practically everyone would say, "Give me punishment under article 15."

Senator ERVIN. I was wondering if it would hurt the Navy to be in at least as generous an attitude.

Senator GOLDWATER. I think the Navy is in a different situation.

Senator ERVIN. I realize that, especially in a small ship.

But what about on land? Captain Greenberg?

Captain GREENBERG. I am Capt. Mack Greenberg, Assistant Judge Advocate General for Military Justice in the Navy.

As General Kuhfeld has pointed out—and you, Senator Ervin, have indicated that you do understand the difference in command relationships that exist between the Army and the Air Force on the one hand and the Navy and the Coast Guard on the other hand. As you know, in the Army, if I may take the Army as an example, the company commander who does not himself have court-martial power is the man who imposes article 15 punishment. And the man can say to the company commander, "I want a court-martial, I don't want your company punishment."

In that situation the company commander who does not have court-martial jurisdiction refers this matter up to the next echelon of command, to the battalion commander. The battalion commander does have court-martial jurisdiction. He can appoint a court-martial from some members on his staff or from some other company, who is normally senior to the company commander who originally brought this to the attention of the battalion commander.

Now, let's move over into the Navy and the Coast Guard.

In the Navy the commanding officer, as General Kuhfeld mentioned, is the captain of the ship, he is the senior officer on board. He normally is a lieutenant commander or a commander or a captain with many years of experience. He has primarily a great sense of fairness and justice, because he needs this if he is to maintain morale and discipline on board ship. He has the welfare of the crew as well as the ship at heart, because he knows if he doesn't exercise fairness, he doesn't have an efficient command, and he is soon relieved.

Now, to allow this seaman who, for the most part, is a nonrated man—and these are the ones who get into trouble, they are youngsters under 21—to allow this individual to step up at the mast and say to the captain of the ship: "No, Captain; I refuse your commanding officer's punishment," puts the captain in the position, as General Kuhfeld indicated, of appointing a junior officer who can in fact give

more punishment than the commanding officer. This is in direct conflict with the concept of command and the responsibility of the commanding officer.

And we should avoid this.

Senator ERVIN. I can accept that very well where the ship is at sea. But what would prevent the same practice that the Army and the Air Force have from being effective on shore?

Captain GREENBERG. Even on shore stations it is the commanding officer of the activity that imposes nonjudicial punishment: it is not an executive officer or a division officer, it is the commanding officer. So even at a shore installation we have a similar situation. Of course, I will agree it is more acute at sea.

Senator ERVIN. What about the Marines? The Marines are pretty much the same as the Army.

Captain GREENBERG. We shouldn't have one rule for the Marines and one for the Navy.

Senator ERVIN. They also have an organizational situation which is strikingly similar to the Army.

Captain GREENBERG. That is true. But as to the Marines—I have just come back from a tour of the Far East and southeast Asia, and I have talked to many commanding officers—I got down to South Vietnam and talked to commanders right there—and they are really right there where everything is going on at this point—and to the commanding officers, the feeling was that they need increased power under article 15.

I talked to the 7th Fleet Commander, Admiral Schoech, and he felt exactly the same way—that this would enhance the prestige of command and really improve discipline, because we are dealing with a nonjudicial approach, and not a court-martial. We really should try to save these youngsters from this criminal record if we can. And one way of saving them is to give this power to the commanding officer and not permit the offender to thwart command by saying, "I refuse your punishment."

Senator Ervin, if you remember when we were talking about the UCMJ, we made a pretty definite distinction between the judicial process and the disciplinary process. And we said at the time—and it is in the legislative history—that in the area of discipline this is the commanding officer's responsibility. We gave him certain powers under article 15. And then we went on to say, once the commanding officer refers the matter to a court-martial, he is proscribed from interfering with the judicial process. I think we should retain this distinction. We should recognize that we are speaking now of discipline rather than the penal aspects of punishment.

Senator ERVIN. In Vietnam you have your Marines there, and you have your Army, both of them discharging exactly the same function. You have a procedure in one organization, and exactly the right which is given in one is denied in the other. I have never seen anything to indicate that giving this option to a man has substantially affected morale in either the Army or the Air Force.

And I think that there is a feeling on the part of the public and a feeling on the part of the bar that it ought to be granted, subject, perhaps, to the exclusion of punishment which is nonjudicial punishment which is given on shipboard.

Captain GREENBERG. Then I suggest, sir, that we have many Marine detachments that are on board ship, and we are going to have two sets of rules for Marines.

Senator ERVIN. My observation was applying to the Navy as well as to the Marines. I can conceive where there would be different conditions on the ship than other conditions, and it should perhaps be excluded in that particular case. But I can understand why the commanders would prefer to have absolute authority.

Captain GREENBERG. This is an essential. If they are charged with the responsibility of maintaining discipline, which means responding to orders and learning to obey—because when the chips are down this may be very vital—then we think that even in the Marine Corps we should have the same rule as we have in the Navy.

Senator ERVIN. But that argument, carried to its logical conclusion, would demand the outlawing of this practice in both the Army and the Air Force where it apparently has had no detrimental effect on the morale or discipline, at least very little.

Senator GOLDWATER. Would the Senator yield?

Senator ERVIN. Yes, sir.

Senator GOLDWATER. I think if we could relate the Army and the Air Force's units more to the Navy we might get an understanding. To begin with, it is tradition in the Navy, and I think that is very important.

Let's take a case in the Air Force. Let's say that a crew commander of an airplane had an enlisted man on board that goofed up, he wouldn't do what he was told to do. If the commander didn't have the ability to get rid of that crew member, morale would be shot in that crew. And I would reduce it to this level, because we do have a similar situation in the Air Force, and you would have it on the ground with a tank commander. Any commander that has a unit under him, whether it is 4 or 5 men or 400 or 500 men, that comprises a working unit, working for one purpose only, which is the operation of a ship or an airplane or a tank, I think has to have this, because if the enlisted man in the Air Force who refused to obey his crew commander got away with it, and continued on with that crew, you might as well forget about that crew.

I think the Navy has a good point.

Captain GREENBERG. Thank you, sir.

Senator CANNON. I don't quite agree with that. I don't see why it necessarily follows—if they say that this is something which would not be used, this is a technical uniform point, then why would it be disadvantageous to make this same provision apply to the Navy when, as they say, if the man elects court-martial, he is going to be court-martialed by the man whom the commander of the ship appoints? It is obvious, then, that he probably would accept the article 15 punishment in lieu thereof at any time. And just the fact that you would say that he wouldn't accept a court-martial, or wouldn't ask for a court-martial, I don't think, would be a valid argument for saying that this shouldn't be a uniform procedure through all the services.

Senator GOLDWATER. I want to get back to the argument, not necessarily the legal argument, but the commander problem—and this I take it is the naval argument—the commander's problem—if it is an Army unit instead of a ship, the procedures are established, and

they are working—but if you are able to flaunt a commander of a ship, your morale immediately starts to deteriorate. It has always worked that way. It works in the Air Force that way. It works in business that way. If the manager doesn't have the right to discipline, if the employee can stand up and flaunt the manager, he has disciplinary troubles right away. And the same thing in the Air Force and the Army and the Navy. But the Navy, I think, is more conscious of this particular problem than any other unit here.

Senator CANNON. That is the point that I don't follow. How can he flaunt it? He is simply saying he is going to accept article 15 punishment or a court-martial. How does that flaunt the authority of the captain of a ship? Maybe I don't understand it here.

Senator GOLDWATER. I am looking at the historic condition of the captain of a ship being in effect the captain of his ship. Say you have not one but a dozen offenders, and they all take the attitude that the captain hasn't the authority to punish them—

Senator ERVIN. In that case you would have a mutiny, and then you would have a general court-martial.

Senator GOLDWATER. But you want to prevent that mutiny.

Captain GREENBERG. Senator Goldwater and Senator Ervin, may I talk about that for a moment?

We have another problem involved here. We are now coming to a point where the commanding officer's power is approximately equivalent to the summary court-martial, and whereas before the individual might say, "Well, I can't get hurt by taking the captain's mast, and I may get hurt by going to a court-martial," at this point we have sort of equalized the amount of punishment that both can give. It is approximately the same.

And then I would add one more point. Let's not forget that this summary court-martial officer that the commanding officer of a ship designates to hear the case is a young junior grade who himself is fresh caught. He is really not a police court judge as Senator Ervin contemplates a police court judge—a man who has been a judge for many years and knows the pulse of the community. He is just appointed for an isolated case. He doesn't have the feel of command as does the commanding officer himself. And we should not destroy this.

Senator ERVIN. Would that be true of a summary court in the Army?

Captain GREENBERG. We are talking about a summary court, a young officer. On a destroyer you would have no others.

Senator Cannon, I think what Senator Goldwater has said is pretty much the answer to the thing. It is tradition, and traditionally in the Army, and since we have had an Air Force, we have had the procedure where you may refuse to accept punishment under article 15 and demand trial by court-martial. That has worked. We have no problem with it, and we intend both the Army and the Air Force to have it in the regulations under this bill if it is adopted.

From the standpoint of the Navy the tradition has been—and this is true under the old articles for the government of the Navy—that the captain of the ship was the final word, that he personally would listen to the man who was brought before him at the mast and hear the offense committed and determine the punishment to be imposed. And I think the difference is important here. I think

what you had in mind, Mr. Chairman, was that some consideration be given to providing that except when an individual was attached to or embarked on a vessel he could demand it.

Senator ERVIN. Yes.

General KUHFIELD. There, I think, you get down into your tradition proposition as far as the Navy is concerned.

Senator ERVIN. If we hadn't abandoned a lot of traditions when we established this country we would have an awfully sorry country.

Senator GOLDWATER. We continued to have a lot of them.

Senator ERVIN. And the good ones are enshrined permanently and the bad ones we change.

General, another thing that gives me certain pause about this bill is that you have a provision for appeal. And I just wonder how practical that provision is, because there would be no record on which to appeal like we would have for an appeal ordinarily in the court.

General KUHFIELD. This is one of the things, Mr. Chairman, that is left—the kind of record is left, right at the beginning of the bill, to departmental regulations. And the proposal, so far as all the services are concerned—and I think that the House Armed Services Committee report leaves it in a position where the Secretary of Defense is going to have to participate in getting something that is uniform.

But we do propose that there will be a record of this article 15 punishment, not in a book, but similar to what is used now in an officer case, where the man would be advised that they were going to give him punishment, that it is proposed to punish him under article 15, and what they proposed to punish him for. Then what the punishment is, and what if anything the man being punished has said about the situation. And this will be the record. It will be set up in some detail in the departmental regulation. This will be the record that goes forward when a man appeals.

Now, the regulations—all of us propose that our regulations will say that the man who has been punished under article 15 will have the right to attach to his appeal—to state the reason why he is appealing, and to attach to it—any statement he may care to make, any supporting statement which he may get from somebody else, anything that he feels should be taken into consideration by the officer to whom the appeal is taken.

Then the appeal provisions here contemplate that before the commander to whom the appeal is taken can act, he must refer—if punishment is more than could have been given by an Army captain or below—I don't mean a Navy captain—an Army captain or below, it must be referred to a judge advocate or a legal specialist; that judge advocate or legal specialist is going to be required—and this is indicated in the bill itself—to prepare for his commander an analysis of the entire matter, what is involved, the procedure, and his recommendation, so that the commander will have that for his consideration before he can pass on the appeal whenever the sentence is of a kind that can be given only by a major or above.

Senator ERVIN. Now, there is another thing I would like to have an explanation of that gives me a little trouble, and that is, the bill provides expressly that not only can they impose that sort of nonjudicial punishment or this form or that form, but it also says they can prescribe a combination of these punishments. It seems to me that that is getting pretty—

General KUHFIELD. We are getting again, Mr. Chairman, to an analogy with a summary court. In a summary court—if we bring up an airman first class, and the charges against him are referred to a summary court—that summary court could sentence him to confinement at hard labor for 30 days, to reduction to the lowest enlistment grade, to forfeiture of two-thirds of his pay for 1 month. So that there are three things that the summary court could have sentenced this individual to all in one sentence. And if that is approved by the commander, the man is immediately reduced to the lowest enlisted grade and he has to carry out those different punishments.

So we carry this over into article 15, and bear in mind that what we are trying to eliminate is the convictions by courts-martial and the fact that when a man goes out into civilian life he is asked, "Have you ever been convicted," and he says, "Yes, he was convicted by court-martial," that is on his military record—we are trying to eliminate that. What we are getting to is that the commander under article 15, the commander who is imposing those punishments that are of any material consequence, has to be a man of discretion and experience; he has to be a field grade officer—he can impose in effect the same thing that could have been done by a summary court.

Now, you might say, we are getting into hard labor without confinement, or we are getting into detention of pay. We are getting into restriction. All of these are inherent right now in what a summary court can do, because in addition to the table of maximum punishment that you have in the Uniform Code of Military Justice, which is paragraph 127 in the manual, you have what is called a table of equivalents. And those equivalents could be used—for instance, under the present situation, for 1 day's confinement at hard labor, 1½ days hard labor without confinement could be imposed. In other words, a summary court could give 45 days hard labor without confinement, or 2 days restriction to the limits of the base for each day of confinement authorized.

And these are the very things that are incorporated into this present bill. Those are things that a summary court could do now, and that a commander could do based upon the table of equivalents that is in the manual. We have been very careful in the preparation of this bill, and the House committee was very careful in the preparation of this bill, to make it clear that you couldn't give different punishments relating to deprivation of liberty in combination so that you used the maximum of each and stretched this thing out. It was very carefully pointed out that if you were using a combination you had to use it on the basis of equivalents and couldn't give it on the basis of each of these punishments.

So the commander is limited definitely to what he can do even in this combination area.

Senator ERVIN. Why is that limit imposed on him? Is it imposed on him in the bill?

General KUHFIELD. It is in the bill, yes.

Senator ERVIN. I think you had a very lucid explanation in the material which you furnished the committee, which I think it would be helpful to put in the record. I refer to those pages which are called explanation of changes that would be made in the present law. In the consideration of the bill before the Senate I am satisfied that that would be very helpful to anyone who didn't have the benefit of previous study or sitting on the subcommittee.

General KUHFIELD. I have tried to set out there in detail what the differences are. And I think, too, Mr. Chairman, that this comparison chart that we submitted is very helpful in showing just what is done, because we have taken the existing article 15 and H.R. 11257 and compared them subsection by subsection all the way down the line in this table that we have furnished you.

Senator ERVIN. That is very good.

We will put in the record at this point the section of the data furnished the subcommittee entitled "Explanation of Changes and Comparison Chart."

(The information mentioned above is as follows:)

#### EXPLANATION OF CHANGES THAT WOULD BE MADE TO THE PRESENT LAW

(By proposed amendments to art. 15, Uniform Code of Military Justice)

H.R. 11257 would amend article 15 of the Uniform Code of Military Justice (10 U.S.C. 815) by giving increased authority to designated military commanding officers to impose punishment on military offenders for minor offenses, without resorting to court-martial.

##### A. MAXIMUM LIMITS OF PUNISHMENT

Under the present provisions of article 15, Uniform Code of Military Justice, military commanding officers may impose one of the following maximum punishments, in addition to or in lieu of admonition or reprimand, upon members of their commands:

1. Upon officers and warrant officers:

(a) Withholding of privileges, or restriction to specified limits, for 2 weeks.  
 (b) Forfeiture of one-half of 1 month's pay (if imposed by an officer exercising general court-martial jurisdiction).

2. Upon enlisted personnel:

(a) Withholding of privileges, restriction to limits, or extra duties (not exceeding 2 hours a day), for 2 weeks.

(b) Reduction to the next inferior grade.

(c) For persons attached to or embarked in a vessel, confinement for 7 days, or confinement on bread and water or diminished rations for not more than 3 days.

Under the proposed amendments to article 15, designated commanding officers would be empowered to impose, in addition to or in lieu of admonition or reprimand, one or more of the following maximum punishments upon members of their commands:

1. Upon officers and warrant officers:

(a) Restriction to specified limits (with or without suspension from duty) for not more than 30 days.

(b) If imposed by a general or flag officer in command, or officer exercising general court-martial jurisdiction, arrest in quarters for not more than 30 days, restriction to limits for not more than 60 days, forfeiture of one-half of 2 months' pay, or detention of one-half of 3 months' pay.

2. Upon enlisted personnel:

(a) If imposed by a commanding officer in the grade of major (lieutenant commander) or above:

(1) Correctional custody for 30 days, extra duties for 45 days, or restriction to specified limits for 60 days.

(2) For persons attached to or embarked in a vessel, confinement on bread and water or diminished rations for 3 days.

(3) Reduction to the lowest pay grade; however, enlisted personnel above grade E-4 could not be reduced more than two pay grades.

(4) Forfeiture of one-half of 2 months' pay, or detention of one-half of 3 months' pay.

(b) If imposed by a commanding officer in a grade below major (lieutenant commander):

(1) Correctional custody for 7 days, extra duties for 14 days, or restriction to limits for 14 days.

(2) For persons attached to or embarked in a vessel, confinement on bread and water or diminished rations for 3 days.

(3) Reduction to the next inferior pay grade.

(4) Forfeiture of 7 days' pay, or detention of 14 days' pay.

The term "correctional custody" is defined in the proposed amendments as physical restraint during duty or nonduty hours, and may include extra duties, fatigue duties, or hard labor. Detention of pay must be for a stated period, not exceeding 1 year or expiration of the offender's enlistment, whichever is earlier.

#### B. COMBINATION OF PUNISHMENTS

The present article 15 does not authorize a combination of punishments to be imposed. The proposed amendments authorize punishments to be combined, but require that when this is done punishments involving deprivation of liberty, or forfeiture or detention of pay, be apportioned.

#### C. SUSPENSION OF PUNISHMENT

Under the present article 15, the officer imposing punishment, his successor in command, or superior authority, is authorized to suspend, set aside, or remit all or any part of the punishment imposed. Under the proposed amendments, the officer imposing the punishment, or his successor in command, is authorized to suspend probationally, mitigate, or remit any unexecuted punishment, and to suspend a reduction in grade or forfeiture of pay whether or not executed. Express authority is given to mitigate reduction in grade to forfeiture or detention of pay. Restrictions are placed on mitigation authority to insure that the mitigated punishment does not exceed in time or amount the punishment originally imposed, or in the case of mitigation of reduction in grade, does not exceed the amount of forfeiture or detention originally imposable.

#### D. RIGHT TO APPEAL

Under both the present article 15 and the amendments proposed in H.R. 11257, persons punished are authorized to appeal punishments that they consider unjust or disproportionate to the offense to the next superior authority, and such authority has the same power with respect to suspension, setting aside, mitigation, or remission of punishments as the officer originally imposing the punishment. However, under the proposed amendments, the authority to whom an appeal is made must refer the case to his legal adviser for consideration and advice before taking action, if the punishment involves arrest in quarters or correctional custody of more than 7 days, forfeiture of more than 7 days' pay, reduction from the fourth or higher pay grade, extra duties or restriction for more than 14 days, or detention of more than 14 days' pay. In all other cases, he may so refer the case before taking action. Under both the present article 15 and the proposed amendments, the person punished may be required to undergo the punishment imposed pending the outcome of his appeal.

#### E. EFFECT OF PUNISHMENT

Under both the present article 15 and the proposed amendments, the imposition and enforcement of punishment is not a bar to trial by court-martial for a serious crime or offense growing out of the same transaction. However, the fact that punishment has been enforced may be shown by an accused upon trial and considered by the court in determining the measure of punishment to be adjudged.

The proposed amendments do not affect the present law that punishment under this article is nonjudicial and hence is not considered to be a conviction of a crime.

#### F. AUTHORITY TO PRESCRIBE REGULATIONS

Under both the present article 15 and the proposed amendments, the President or the Secretary concerned may, by regulations, place limitations on the powers granted in the article with respect to the kind and amount of punishment authorized, the categories of commanding officers or warrant officers in command authorized to exercise those powers, and the applicability of the article to those demanding trial by court-martial. The proposed amendments to article 15 further authorize Presidential or secretarial regulations to place limitations on the kinds of courts-martial to which a case may be referred upon a demand for trial, to prescribe rules regarding suspension of punishments, to authorize an officer of general

or flag rank to delegate his powers to a principal assistant, and to provide for the keeping of records of proceedings under this article.

#### G. AUTHORITY OF OFFICERS IN CHARGE

Under both the present article 15 and the proposed amendments, an officer in charge (a category of persons in the Navy and Coast Guard exercising limited command functions) is authorized to impose such punishments as may be prescribed by the Secretary concerned. Under the proposed amendments, an officer in charge is further limited in authority to imposing only such punishments as could be imposed by a commanding officer below the grade of major (lieutenant commander).

## COMPARISON CHART

*Existing law (10 U.S.C. 815)*

H. R. 11257

## I. AUTHORITY TO PROMULGATE REGULATIONS

## SEC. 815

(b) The Secretary concerned may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise those powers, and the applicability of this article to an accused who demands trial by court-martial.

## SEC. 815 (sec. 1 of bill)

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank, in command may delegate his powers under this article to a principal assistant.

## II. PUNISHMENTS IMPOSABLE

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—  
(A) withholding of privileges for not more than two consecutive weeks;

(B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not more than one-half of one month's pay; and

(b) Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension from duty for not more than thirty consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

(i) arrest in quarters for not more than thirty consecutive days;

*Existing law (10 U.S.C. 815)*

- (2) upon other military personnel of his command—
- (A) withholding of privileges for not more than two consecutive weeks;
  - (B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks;
  - (C) extra duties for not more than two consecutive weeks, and not more than two hours per day, holidays included;
  - (D) reduction to next inferior grade, if the grade from which demoted was established by the command or an equivalent or lower command;
  - (E) if imposed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or
  - (F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days.

*H.R. 11257*

- (ii) forfeiture of not more than one-half of one month's pay per month for two months;
  - (iii) restriction to certain specified limits, with or without suspension from duty, for not more than sixty consecutive days;
  - (iv) detention of not more than one-half of one month's pay per month for three months;
- (2) upon other personnel of his command—
- (A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;
  - (B) correctional custody for not more than seven consecutive days;
  - (C) forfeiture of not more than seven days' pay;
  - (D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;
  - (E) extra duties, including fatigue or other duties, for not more than fourteen consecutive days;
  - (F) restriction to certain specified limits, with or without suspension from duty, for not more than fourteen consecutive days;
  - (G) detention of not more than fourteen days' pay;
  - (H) if imposed by an officer of the grade of major or lieutenant commander, or above—
    - (i) the punishment authorized under subsection (b)(2)(A);
    - (ii) correctional custody for not more than thirty consecutive days;
    - (iii) forfeiture of not more than one-half of one month's pay per month for two months;
    - (iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who

imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades.

(v) extra duties, including fatigue or other duties, for not more than forty-five consecutive days;

(vi) restriction to certain specified limits, with or without suspension from duty, for not more than sixty consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount impossible for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

### III. DEFINITIONS OF AND RESTRICTIONS ON PUNISHMENTS

#### IV. AUTHORITY OF OFFICERS IN CHARGE

##### (Navy and Coast Guard)

(c) An officer in charge may, for minor offenses, impose on enlisted members assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary concerned may by regulation specifically prescribe, as provided in subsections (a) and (b).

H.R. 11257

V. SUSPENSION, MITIGATION, AND REMISSION OF PUNISHMENTS

(d) The officer who imposes the punishment, his successor in command, and superior authority may suspend, set aside, or remit any part or amount of the punishment and restore all rights, privileges, and property affected.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

- (1) arrest in quarters to restriction;
- (2) confinement on bread and water or diminished rations to correctional custody;
- (3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or
- (4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

VI. RIGHT TO APPEAL

(d) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same

powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

- (1) arrest in quarters for ore than seven days;
- (2) correctional custody for more than seven days;
- (3) forfeiture of more than seven days' pay;
- (4) reduction of one or more pay grades from the fourth or a higher pay grade;
- (5) extra duties for more than fourteen days;
- (6) restriction for more than fourteen days; or
- (7) detention of more than fourteen days' pay.

the authority who is to act on the appeal shall refer the case to a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article, and may also prescribe that certain categories of those proceedings shall be in writing.

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

(See pt. V, above, for power of "superior authority" on appeal.)

#### VII. EFFECT OF PUNISHMENT

(e) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

#### VIII. RECORDS

#### IX. EFFECTIVE DATE OF AMENDMENTS



Senator ERVIN. Senator Goldwater, do you have some questions?

Senator GOLDWATER. This is just a technical question. Article 15, paragraph (a), now states: "Under such regulations as the President may prescribe." Your language would amend that under paragraph (a). And I read from H.R. 11257: "Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned."

Why did you want to change the language to include the Secretary?

General KUHFIELD. The reason, Senator, is that what we contemplate is this: we put into the manual which is the action of the Executive, which would be the President, those things which are more or less uniform with regard to the three services. Now, when you get into your secretarial regulations, such as where we are going to make provisions for recordkeeping, we are going to be using different command nomenclature, we are going to be using different structure in connection with the service itself. And we are going to have to make the procedures through which this article 15 is handled dovetail in with the procedure that we have in the several services.

So that what is contemplated is that the secretarial regulations, the departmental regulations, will be the ones that set up the procedures to be followed, will dovetail into the language of the particular service involved. And even these regulations, in order to conform with what was requested in the House Armed Services Committee, will have to be considered in DOD, so that we get uniformity of result by fitting this into our classifications, categories, and nomenclature. We won't have the problem we would have in the manual if we tried to write it covering all of the services.

Senator GOLDWATER. Would this give the Secretary the power to make substantive changes in the regulations prescribed by the President?

General KUHFIELD. Well, you say "substantive." We might very well set forth in the Air Force regulation and the Army regulation, this same matter that we are discussing here—depending on how this law comes out—the rule on this matter of demanding trial in lieu of court-martial. The Navy would say that you don't have a right to demand court-martial in lieu of punishment under article 15, because the bill itself indicates that that will be covered by regulation. And this is what is contemplated in this area.

Senator ERVIN. Let me ask one question right here.

As I construe subsection (a) on page 1 of the bill, the regulations at present are such that the respective Secretaries can place limitations or conditions under the statute, but that they cannot expand what can be done?

General KUHFIELD. That is absolutely right. There is no contemplation, and it would be utterly illegal, for a Secretary to try to increase the authority of any commander of any kind.

Senator ERVIN. I will ask Captain Greenberg this question. Under this the Navy could, if it should be converted to the conviction that perhaps it has erred in failing to give this option that we have been discussing between a trial and a nonjudicial punishment, it could by regulation modify its previous tradition in that respect, couldn't it?

Captain GREENBERG. When the Uniform Code of Military Justice was enacted—

General KUHFIELD. The answer to that is "Yes," Mr. Chairman.

Captain GREENBERG. This became part of the Presidential Executive order, the President in effect said that the Navy and Coast Guard does not have to give the election. And this came as the result of long hearings on this very subject in which both the House and the Senate agreed in substance with what Senator Goldwater is now saying, that the Navy does have a different problem and should be allowed to continue.

Senator ERVIN. It has been suggested by some that perhaps the reduction of those above pay grade E-4 should be restricted to one reduction in pay grade by them too.

General KUHFIELD. Here, Mr. Chairman, I think we again—I am in a rather anomalous position. I am speaking for the Department of Defense, but there are little differences between the services here that we are faced with. In this area of a one-grade reduction we find that the Air Force and the Navy are in the same corner. Here the Navy and the Air Force will provide, in the area of limiting reduction authority under article 15, that in the case of noncommissioned or petty officers above the fourth enlisted pay grade, they cannot be reduced more than one grade in peacetime, or except in time of emergency declared by the Congress, or a state of war. In other words, from the standpoint of the Navy and the Air Force, we take the position that a one-grade reduction in the case of noncommissioned officers above E-4—and I am talking about staff sergeant and above in the Air Force—is adequate in peacetime, is an adequate punishment in peacetime when it is difficult to make the rating. In wartime or the time of an emergency declared by the Congress, we are in a different area entirely, because then, as Senator Goldwater and Senator Cannon both know, your noncommissioned ratings come much easier, because of the war situation. In wartime, then, we feel that a two-grade reduction would be used; in peacetime, one grade.

The Army feels, however, that they would not be putting a limitation on it there. And I think if the Senator wants to have an explanation of the Army's position, he can ask Colonel Ackroyd about that, because he is espousing that position.

Senator ERVIN. Colonel, would you help me on that point?

Colonel ACKROYD. Let me identify myself. I am Col. Gilbert G. Ackroyd, Chief of the Military Justice Division, Office of the Judge Advocate General of the Army.

Now, we have considered this problem long and carefully in the Army over quite some period of time. And one of the purposes, one of the main purposes we seek to achieve in this bill, is to reduce the number of convictions by court-martial that we have in the Army. At the moment roughly 60 percent of our courts-martial are summary courts-martial, and we expect to reduce that by about 75 percent if this bill is enacted into law. Not only would we like to reduce the summary court-martial convictions, but we would also like to reduce the number of convictions by special court-martial. As General Kuhfeld has mentioned, under the present regulations implementing article 20, which is the article dealing with summary courts-martial, the summary court-martial is restricted to reducing a noncommissioned officer above the fourth enlisted pay grade one grade. So consequently if that individual commits an offense, and we might call it a minor offense in the sense that it is not a general court-martial offense, but

it is felt that a one-grade reduction is too lenient and that he should be reduced more than one grade, that man's case gets referred to a special court-martial. We feel that if we had this authority to reduce two grades, that man would escape trials by a special court martial and would be handled under article 15. We would therefore reduce greatly, we feel, the number of cases which are now referred to special courts-martial.

Now I might point out in this connection the history behind this whole thing. I think it might serve to bring the whole matter into focus.

Prior to the Uniform Code of Military Justice, the summary court-martial could reduce all noncommissioned officers below the first two grades all the way, if the authority competent to appoint a special court-martial referred the case to a summary court-martial. That was true, as I say, prior to the uniform code. That was the Elston Act. It was also substantially the same under the old Articles of War prior to the Elston Act. When the uniform code was passed there were no limitations at all in this respect in the summary court-martial statute, which is article 20, none whatsoever. So consequently a person could be reduced all the way under the law as it now stands.

But the Executive order in the 1951 Manual for Courts-Martial contained this one-grade limitation, because prior to the uniform code the Navy had that provision in the articles for the government of the Navy. And at that time the services adopted the Navy practice as a matter of compromise.

So during the last 10 years under the uniform code the Army has been living under this provision, and it just has not worked out, we think, very well.

There is nothing, really, when you come right down to it, sacred about this one-grade limitation in the manual, it is simply an Executive order. And our people would prefer to keep the two-grade limitation that is now in H.R. 11257.

This one-grade limitation has caused some confusion, we think, in the Army, because, to go back in history again, under article 15 itself, forgetting the summary court-martial altogether for the moment, the very first time there was any mention of reductions under article 15 was under the Uniform Code. The old article 104 of the Articles of War didn't mention reduction at all, and nobody during World War II, for example, was ever reduced under article 104, the predecessor of article 15. They were always reduced under the Army regulations as an administrative matter.

And they still are. We now have article 15 with the one-grade limitation on the one hand, and then on the other hand we have the Army regulations for reduction for inefficiency where a person can be reduced all the way under these regulations.

So a distinction has been drawn or has endeavored to be drawn, I should say, between misconduct and inefficiency. If it is misconduct you can only reduce the man one grade under article 15. But if it is just plain inefficiency, he can be reduced all the way under the administrative regulations.

Well, you have to be very sharp indeed to draw that distinction; it is quite difficult. The Army regulations have attempted to do it, and I think not too successfully, to the point where now it is considered

under the regulations that misconduct does show inefficiency, and a man who misbehaves himself really isn't very efficient. So people are inclined to use the administrative regulations. We feel that the reduction authority now in H.R. 11257 would clarify this area, and that there would be less confusion, and that it is altogether a desirable thing.

Now, what are we talking about here? We are only talking about one thing. We are talking about a two-grade reduction in the case of those people who are above pay grade E-4. And the only commanders who can impose this kind of punishment under H.R. 11257 are the superior commanders. The act says, majors or lieutenant commanders or above. But in our case this will mean normally lieutenant colonels, it will mean separate batallion commanders, it will mean battle group commanders, and higher commanders. These are the commanders who are going to consider this thing, the commanders with much experience who know that they are doing.

In addition to that, the type of reduction we are talking about here is the kind that always must be reviewed by a judge advocate and which may be cut down on review. And we have a provision in the bill whereby a reduction may be mitigated to forfeiture or detention of pay. We feel there is no danger to anybody involved in the reduction provisions of the bill at all. And we would like to see those reduction provisions remain in the bill.

I would like to add that what I have said is the Army position on the bill. I am not expressing this merely from the point of view of the Judge Advocate General, for the personnel people expressed this view as late as last Friday when I indicated that this might come up. However, we will say that we do not feel so strongly about this position that it should inhibit favorable consideration of this bill. And if the committee decides there should be in the manual some limitation such as General Kuhfeld has expressed, then of course naturally we will go along with that.

I just wanted the Chairman to know how the Army feels on the matter.

Senator ERVIN. Thank you, Colonel.

Senator CANNON, do you have any questions you would like to ask?

Senator CANNON. I will ask you this, General Kuhfeld, on the matter of forfeiture or detention of pay. Is detention just enforced savings, a man doesn't get all of his pay during that period of time?

General KUHFIELD. That is right, Senator. The forfeiture is going to be very important in connection with punishment for minor offenses. We might have the situation where an individual just goes out and blows his money and the commander can then say, "I am going to detain one-half of your pay for 3 months, and I am going to hold it for you for a year," whatever time you might specify—he can change his mind and give it to him much sooner if he wants to—on the basis that this will get him in line and ultimately the money will go back to his family. What I visualize is that if the 3 months' pay is retained then mamma and the sergeant will come in together and the money will be used for milk instead of going down to the bar. And that is what we are trying to get at here; he gets the money back.

Senator CANNON. Even though the detention is, for example, 3 months, as you said, the authority then, the administering authorities can retain it for a longer period before releasing it to the man?

General KUHFIELD. When the detention is imposed, the officer imposing the punishment must say how many months' pay, for not more than 3 months, will be detained and how long he is going to detain it. He cannot detain it for more than a year, or beyond the termination of the man's enlistment. But he can say, "I am going to detain a half a month's pay per month for 3 months, and I am going to hold it for 4 months." He can change his mind and give it back in 3 months, but if he said 4 months he couldn't hold it for 6.

Senator CANNON. Who actually holds the money? Is it not paid on the payroll records and shown as a detention there?

General KUHFIELD. This is one of the things, Senator, that our people are working on now to put in this implementing regulation. What we contemplate is that the money—that the pay will be red-lined, the payroll will be red-lined to that extent, and then the finance officer will hold back that money in his finance account for the period specified in the detention, and then it will be put on as accumulated pay on the payroll at the time the man is supposed to get it.

Senator CANNON. Thank you. I have no more questions.

Senator ERVIN. And to make it clear, you stated that the pay could be detained for not over a year or at the expiration of enlistment—it is whichever occurs first?

General KUHFIELD. Yes, sir.

Senator ERVIN. In other words, the maximum period of detention would be for 1 year in any event?

General KUHFIELD. That is right, sir.

Senator ERVIN. I think that is a very good provision that could be used very well, because it has a very excellent combination, you have got the punishment during the time it is being withheld, and you have the reward to encourage a man to behave to get the money back.

General KUHFIELD. That is right, sir.

Senator ERVIN. Do you have no questions of Captain Greenberg?

Senator CANNON. No.

Senator ERVIN. I overlooked two questions here. General, the bill on page 2 provides authority whereby the commanding officer exercising general court-martial jurisdiction or general, or admiral may delegate his power under the new article 15 to "a principal assistant." Since the word "a" rather than "the" is used, this could mean almost anyone, could it not?

General KUHFIELD. It could. But in the contemplation of all of us, what we propose is that generally this principal assistant would be the officer who would assume command if the commander weren't there. So that nobody has any idea of delegating this down except to a senior officer who is a principal assistant of the commander. For instance, we say a principal assistant. We might have said the deputy. However, you might conceivably have a situation where he has a vice commander. Different terminology is used in the different services, so it was decided to say a principal assistant, which means, generally speaking, the man who would assume command in the absence of the commander.

Senator ERVIN. Now, this bill provides that any member of the Armed Forces who serves nonjudicial punishment under this can later be tried for a serious crime or offense growing out of the same matter.

General KUHFIELD. Yes, sir.

Senator ERVIN. Of course, nonjudicial punishment wouldn't bring up the question of double jeopardy. But I would appreciate it if you would elucidate to some extent what you consider would be a serious crime or offense within the purview of this language, which is somewhat general.

General KUHFIELD. We have the same provision now. The provision in the present bill that we are considering is exactly the same as in the present article 15. As the chairman says, we are not involved with former jeopardy because this is nonjudicial, and former jeopardy comes in a court-martial.

However, article 15 itself points out that if the punishment is for a minor offense you can't try the man by court-martial for that same minor offense; he has been punished before. However, if you had a situation where two airmen got into a fight, and one of them struck the other, and the commander decided to impose punishment on the airman A for his participation in the fracas and the punishment is imposed, as far as the airman A is concerned he can't be tried by court-martial for this assault.

However, if it should develop that out of this assault the airman B died as a result of being struck, it was a much harder blow than had been thought in the first instance, then you have a manslaughter case. And under the provisions of this statute he could be tried for manslaughter. That is the serious offense that followed from this minor offense. If he is tried for manslaughter, involuntary manslaughter, and is convicted, then under the terms of article 15 and under this bill he can show the punishment that he received under article 15 in mitigation or to diminish the punishment that he could get under a conviction for involuntary manslaughter.

Senator ERVIN. I thought the objections which the American Legion raised to the predecessor bill were very thoughtful.

General KUHFIELD. That was a very fine group to work with, Senator, Chairman Finn and General Rider and Admiral Matheny—they had been on this committee for a long time, and it was a fine group to work with. They studied the matter, and they first concluded that the principle that we were shooting at was right, the elimination of the court-martial, the elimination of going to reduction as the only alternative was right.

The only thing they were apprehensive about was leaving these restrictions to an Executive order or departmental regulation. And as I pointed out, the things that we did that were incorporated in the bill as the result of conferences with the Legion were the things that we have all contemplated putting in the implementing regulations. And I agree personally, it is better as it is in the bill than to be in regulations.

Senator ERVIN. As far as humanly possible, I like to find the law in the law books rather than in some regulation.

General KUHFIELD. Might I point out one thing else, based on what Mr. Braswell showed us, a letter in which somebody said that a command shouldn't be able to reduce unless he had the power to promote or appoint. Do you remember that? Now, actually in this bill—and I can't understand why they wrote that letter—in this bill you will notice that every time we talk about a reduction in grade we point out that the officer or someone junior to him must have the authority to promote to that grade before they can reduce. So I

think the objection in that letter has been taken care of in the bill in both places.

Senator ERVIN. The subcommittee has received a letter from Mr. Clarence H. Olsen, director of the Legislative Commission of the American Legion, dated July 16, in which he says that the bill in its present form is entirely acceptable to the American Legion, and that the American Legion does not desire any hearing before the subcommittee unless we revert, decide to revert to the principle of the predecessor bill, H.R. 7656, or make some substantial amendments. And I would like to put this letter in the record at this point.

(The letter referred to follows.)

THE AMERICAN LEGION,  
Washington, D.C., July 16, 1962.

HON. SAMUEL J. ERVIN, JR.,  
Chairman, Subcommittee To Consider H.R. 11257, Senate Armed Services Committee,  
Senate Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: From the Congressional Record we learned that tomorrow (July 17) your subcommittee commences consideration of H.R. 11257, a bill to amend section 815 (article 15) of title 10, United States Code, relating to nonjudicial punishment, and for other purposes.

The instant bill is acceptable to the American Legion, whereas its predecessor, H.R. 7656, 87th Congress, was not. The amended version contains important recommendations of our organization.

At the time H.R. 7656 was under consideration by Subcommittee No. 1 of the House Armed Services Committee, Hon. John J. Finn, chairman, Special Committee of the Uniform Code of Military Justice and the U.S. Court of Military Appeals of the American Legion, addressed a communication to Hon. L. Mendel Rivers setting forth objections to that bill, and incorporated modifying proposals of the American Legion. That communication is contained in House Report 1612 on H.R. 11257, copy attached.

A copy of the American Legion's report on the Uniform Code of Military Justice, referred to in Mr. Finn's communication to Chairman Rivers, is also attached. Your attention is particularly invited to the subsection on "Summary Courts and Company and Mast Punishment," appearing at page 28 of the above report. This report, adopted by the American Legion, provides the background for the position taken by our organization, as outlined in Mr. Finn's letter to Chairman Rivers.

Since the American Legion is in general accord with H.R. 11257, as passed by the House, we do not request a personal appearance before your subcommittee. If, however, a feeling exists among the members of your subcommittee that there should be a reversion to the principles of H.R. 7656, or substantial amendment to H.R. 11257, we respectfully request that your subcommittee afford the American Legion the opportunity to be heard in defense of our position.

With best wishes, I am,  
Sincerely yours,

CLARENCE H. OLSON, *Director*.

Senator ERVIN. Do you have any other questions, Senator Cannon?

Senator CANNON. No, sir.

Captain GREENBERG. Mr. Chairman, Colonel Scherr of the Marine Corps, representing the Commandant, would like to address himself to this election problem.

Senator ERVIN. We would be very glad to hear you.

Suppose you identify yourself for the record.

Colonel SCHERR. I am Lt. Col. Robert A. Scherr, U.S. Marine Corps, Personnel Department, Headquarters, Marine Corps.

Mr. Chairman, thank you for the opportunity of speaking.

The Commandant agrees that this is a fine tradition in the Navy and the Marine Corps, and we feel it is a good one, that is, the tradition of the absence of the right to refuse nonjudicial punishment.

We think it is more than that. We think it is inherent in the commander's responsibility, his authority that he is given not only in this law, that is, the Uniform Code of Military Justice, but elsewhere. It is commensurate with his responsibilities. I would like to highlight the fact that this is in the disciplinary area—which has been mentioned previously—and consequently we feel it is somewhat anomalous if we give this commander this authority in one sense and let the prospective wrongdoer be able to take it away in another. I am familiar with some of the complaints that have been made about this absence of the right to refuse nonjudicial punishment. However, I think those are complaints that came in after the punishment was administered. Up to that point the man was quite agreeable to the nonjudicial punishment, until he got the maximum that could be imposed, and then he complained.

Senator ERVIN. If I may interrupt, I think that is quite a human trait. I think somebody wrote about four or five centuries ago that "No wretch e'er felt the halter draw with good opinion of the law."

Colonel SCHERR. I think in the Navy and Marine Corps there have been very few complaints from the members that they do not have the right to refuse the commanding officer's punishment.

I would like to emphasize the fact that just in the Navy the procedure of awarding nonjudicial punishment is a personal hearing before the commander. And of course I am emphasizing the fact that this refusal would be a face-to-face refusal to the commander—certainly a flaunting of authority in a real sense.

Senator ERVIN. I wonder, though, Colonel, if a commander—you know, old Nicodemus traveled by night to find out something—I wouldn't think that you would have to call up some kind of a military formation to say that the fellow could exercise his option, it seems to me like he could do it very quietly and peacefully.

Colonel SCHERR. That is true, sir. But the mast or office hour procedures which apply to the Navy and Marine Corps, respectively, are such that the superiors of the accused are brought forward; his petty officer, his noncommissioned officer, his division officer, his platoon leader, and so on, so that he has representation through them. If he has been a good sailor or marine prior to this time, they are available there to stand up for him. So that this isn't just a closed type hearing where the commander and the accused are together.

To that extent this refusal of course brushes off on others.

But that wasn't exactly what I was driving at. It is the casting off of the authority which traditionally commanders have.

I would also like to emphasize the fact that if the concern is in the area of inexperienced officers, the junior officer or the junior commander as contemplated by the proposed law, is very, very limited in the amount of punishment that he can award, notwithstanding the fact that in any event there is the availability of appeal, as has been brought out earlier by General Kuhfeld.

I would also like to comment in the area of our experience. Of course, the Navy and the Marine Corps do not have any experience factor. The Army and the Air Force indicate that there have been very, very few refusals of nonjudicial punishment but this is in the context where the summary court-martial has considerably greater power than the present nonjudicial punishment powers of the commander. Under the present bill the powers of the commanding

officer will be almost commensurate with those of a summary court-martial except in one area, and that is in the forfeiture area, where he would have greater powers. So I think that whereas now we have had few refusals, we could anticipate a considerable number of them, resulting, of course, in greater administrative burdens attaching to trial by summary court-martial. And of course in the case of officers it would have to be by special court-martial.

In summary, sir, I would like to emphasize the fact that the Commandant of the Marine Corps is most desirous of retaining the position advanced by the Navy and the Marine Corps so as not to give the individual the right to refuse his commanding officer's punishment.

Senator ERVIN. Thank you. We appreciate your giving us the benefit of the views of the Marine Corps.

I brought that question up because, frankly, I had more misgivings expressed about that one thing in respect to this bill than any other provision of the bill. I am much in favor of the overall objective of the bill, I think that it is very unfortunate to have a tremendous number of courts-martial for relatively minor offenses. It makes a bad record against a man. And I think that he can be better cured by disciplinary action than he can by punishment following a conviction. As I say, I think the objective of the bill is highly desirable.

In connection with the correspondence received on this other, the number of people who have been tried for very minor offenses, and on account of the repetition of them, they have been given less than honorable discharges, I think disciplinary punishment of a nonjudicial nature is highly desirable, especially in the case of these young fellows that go in and haven't had too much discipline at home. I think the object is much better accomplished by procedures similar to what this bill envisages. That is the way it strikes me.

I don't think that the Navy or the Marine Corps would experience too bad a thing from the option myself, that is my reaction to it, because the military commanders have told me that they have very few instances where that option—and most of your old servicemen and noncommissioned officers usually advised an individual to take the nonjudicial punishment rather than the court.

Captain GREENBERG. We are concerned about the bad advice from the mess deckhands, not the good advice by the senior petty officers.

Senator CANNON. If the case advanced by the Navy and the Marines is valid, maybe the best procedure is to take out the election, as far as the Army and Air Force is concerned, and make it all mandatory nonjudicial punishment.

What would be your reaction to that, General?

General KUHFIELD. My reaction would be that this procedure has been used in the Army for so long, and in the Air Force, that if we came in and recommended that this option be eliminated by statute, there would be a lot of criticism, and I think it would be justifiable criticism. The way the thing works now, as I said before, we have very few people that are asking for trial by court-martial in lieu of an article 15 punishment. And my own personal reaction is that it is just like permitting enlisted men on a court-martial, it eliminates any basis for complaint, and they never use enlisted men on court-martial, anyway, but if you took away the authority to have enlisted men on court-martial the enlisted men would say, "Look what has happened to me; they are retrogressing."

That is the way it looks to me. From the standpoint of number, I don't think it would be any different in the Army and in the Navy with the provision under article 15, because the demand for trial is so rare, but I think the reaction would be different if you took away the option.

Senator ERVIN. If there are no other witnesses from the armed services, we have Mr. Speiser, of the American Civil Liberties Union, who will be heard at this time.

General KUHFIELD. Thank you very much. We will remain, and if there are any other questions you want to ask we will be glad to answer them.

Senator ERVIN. We welcome you to the subcommittee, Mr. Speiser. And we will be glad to hear the observations which you will make on behalf of the organization you represent.

#### STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. Thank you, Mr. Chairman. I feel somewhat like David with Goliath, considering the number of military officers that are here.

Senator ERVIN. I take it that you feel like David rather than Goliath, but remember what David did to Goliath.

Mr. SPEISER. I am trusting to my slingshot.

I am the director of the Washington Office of the American Civil Liberties Union and a member of the bar of the State of California and the District of Columbia and the U.S. Supreme Court.

With respect to most of the bill we have no comments. As far as the major purpose of the bill, to maintain discipline in the Armed Forces, this is certainly a desirable purpose of legislation. But we are concerned about the fact that at the time that you are enlarging the power of commanding officers to impose what is called nonjudicial punishment there is a sacrifice here which I think should be recognized and has been reconized in some of the studies that have been made, that when you enlarge this power you are at that time eliminating some judicial and procedural safeguards which exist.

And I think that this is particularly pertinent with respect to the question of choice of the offender as to whether he can choose a court-martial, a summary court-martial in place of the article 15 punishment. I listened very carefully to the arguments that were made by the representative of the Navy and the Marine Corps, and I must confess I found them unpersuasive. I think that the chairman pointed out that the fact that the Army and the Air Force are able to operate with a choice permitted would seem to indicate that most of the arguments are not valid, and I think that for the special circumstances which were mainly relied on by Captain Greenberg with respect to a ship and which were referred to by Senator Goldwater, I think that you can make exceptions for situations on a ship, and particularly a small ship, and I think that this could be spelled out to handle these unique and temporary situations.

I think for larger ships there isn't that problem. And the idea that an offender is flaunting the commanding officer by choosing a court-martial, I think, is unrealistic. He is aware of the fact that he may be subject to greater penalty, plus the stigma of a criminal conviction,

and the experience in the Army and the Air Force would indicate that very few do choose this.

This is true with a great many of the procedural rights. We have, for example, trial by jury. I read somewhere that in England now almost 90 percent of the people who are charged with crimes prefer to be tried without a jury, they have the right to a jury trial, but the fact is that only 10 percent do avail themselves of this. And in the situation here I think it is true that if you did give the choice that you are going to have very few offenders or accused offenders avail themselves of a summary court-martial. But there are going to be situations in which they think the commanding officer has made a mistake. All too often in situations like that I think, based on my own somewhat limited military experience, that the only thing the commanding officer wants to hear is, "No excuse, sir," and that consists of the defense that can be made to what might be considered a minor infraction.

And if the individual feels that he has been unjustly accused, I think he should have the procedural right that he has under some form of court-martial at the present time. And he recognizes he is taking the chance as to whether there will be increased punishment that might be imposed on him. But I think that that should be a choice that he should make, and it should not be denied because of the fact that it is not provided for in the law.

Although in the discussion here it seems apparent that the Army and the Air Force concede that they will have the continuing authority to provide for an accused to demand trial by court-martial, it seems to me this should be spelled out in the law. I think there is an ambiguity in the law as stated even though it is covered in that first section (a).

However, when you get down to section (f) it in effect states that the Government has the choice of court-martial. And I think that it would properly belong somewhere in there. This is on page 8, Mr. Chairman:

The imposition and enforcement of disciplinary punishment under this article for any act of omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission.

It seems to me that this states the only place in here that there is a choice in effect by the military service to determine that courts-martial should be given. And I think that that should be clearly spelled out in the law itself. And as I said, I think it should be applicable to all the services, and not left to regulations which can be changed, so that that right could be eliminated by the Secretaries of the various military services.

Secondly, we are concerned about increasing the period of time for correctional custody for 30 days. Although the individual is not supposed to be incarcerated in the same place or under the same type of conditions as those who are accused of crimes, this may occur. And if you permit the placing of individuals within post stockades or in briggs for 30 days, in which they have no procedural protections at all, this seems to me to be a fairly grave deprivation of liberty which is unwarranted.

I think that the bill itself by providing for flexibility in the type of nonjudicial punishments that can be imposed is good, but I think when you get to a situation where you can imprison American citizens

behind bars—and there is nothing in the bill that would prohibit this—I think that we ought to stop short in a desire not to leave individuals with the stigma of a conviction of a crime, and recognizing that even though the stigma has been removed, the fact is that he has been placed in a situation outside the military service.

And this law applies not only to times of emergency in war, but other times, that this could not be done to him unless he has the procedural protections that are guaranteed to him by the Constitution.

Third, we would like to suggest the elimination of what we conceive to be an anachronism in our modern times, which is the right of the commanding officer to impose a bread and water diet for a period of 3 days. This is only applicable to what are described as other personnel of his command, and not on officers. I recognize that this is the tradition, and I think that this is going to be the major argument as to why this is necessary. This can only be imposed in the Naval service presumably, or by Armed Forces personnel who are embarked on ships. But I don't think this really helps discipline, I think it is just a vestige of a bygone day, and I don't see any reason for keeping it for that reason alone.

For those who are going to be placed on a bread and water diet I think this is a tradition that can be done without.

Senator ERVIN. In other words, you think it ought to be made an alternate for Metrecal or something like that in order to reduce the weight.

Mr. SPEISER. They don't even describe the kind of bread.

I note just recently the Supreme Court has had a chance to give new life to the cruel and unusual punishment clause of the Constitution under article 8 in which they held that imprisonment for narcotics addiction violated the cruel and unusual punishment clauses in the case of *Robinson v. California*. I think that this means that perhaps we are going to have a new look as to what is the scope of cruel and unusual punishment. And it seems to me that this may be the type of anachronism that will fall.

Senator ERVIN. Mr. Braswell was just suggesting to me that in the old days when they put a man on bread and water, he said he was on cake and wine. I guess that kept the hardship from being quite as great an ordeal for him.

Mr. SPEISER. There is a distinction between what may be imposed on officers, for example. They may be subject to arrest in quarters as compared to correctional custody for enlisted personnel.

As I pointed out, I think that correctional custody may include placing enlisted personnel within a proposed stockade or in the brig. This is in a situation which implies conviction of a crime. And since there is a desire to increase the amount of time up to 30 days in correctional custody, that I think that this sort of distinction should be limited.

I recognize that there would be a problem, certainly on board ships, as to what you do with personnel who are subject to nonjudicial punishment. But I think officers who are arrested in quarters can be in a fairly comfortable situation as compared to enlisted men if they are placed behind bars in the post stockade, I think there is a discrimination here that there doesn't have to be.

Thank you for your consideration, Mr. Chairman.

Senator ERVIN. I infer from your testimony, Mr. Speiser, that your organization is in favor of the overall objective of the bill, that is, the substitution in minor cases, the cases of minor infractions of disciplinary punishment rather than courts-martial. But you feel that the person charged with a minor infraction in all cases should have the election between receiving nonjudicial punishment and having a trial before a summary court.

Mr. SPEISER. That is correct, Mr. Chairman. The sine qua non of this is that the choice should be there, so that he can have the procedural right in case of an injustice. The commanding officers are human like everyone else, they may make mistakes. And I think that the appeal as set out in here really is not an effective appeal, there is no record, as you pointed out, the individual doesn't have an opportunity to present his own defense adequately, and as long as that choice is there, then certainly we have no objection to increasing the powers of the commanding officers with the limitations I suggested.

Senator ERVIN. The committee is very grateful to you and your organization for giving us the benefit of your views on this particular bill.

Thank you very much.

(The prepared statement of Mr. Speiser follows:)

PREPARED STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE,  
AMERICAN CIVIL LIBERTIES UNION

I am the director of the Washington office of the American Civil Liberties Union and a member of the bar of California, the District of Columbia, and the U.S. Supreme Court. The American Civil Liberties Union has had a continuing concern that no person, whether in or out of the military services, should be deprived of life or liberty without due process of law. Because of that concern, the union wishes to make a number of comments concerning H.R. 11257, which would increase the powers of commanding officers to impose disciplinary punishments for minor offenses without the intervention of court-martial.

1. *Correctional custody for 30 days*

Section (b)(H)(ii) permits the imposition of correctional custody on enlisted men for not more than 30 days if imposed by an officer of the grade of major or of lieutenant commander or above.

As was pointed out in the report of the Special Committee on Military Justice of the Bar of the City of New York, March 1, 1961, "On the one hand, it is recognized that, by its very nature, utilization of article 15 authority to punish behavioral infractions results in punitive action without judicial safeguards, and is therefore subject to abuse."

The committee did, however, decide that it would approve the enlarged power of commanding officers by balancing this loss of rights of individuals against the avoidance of courts-martial with their resulting criminal convictions of permanent effect. We, however, arrive at the opposite conclusion. To authorize the imprisonment of American citizens without judicial safeguards, we feel, is intolerable. This is particularly true when the one who determines the imprisonment should occur is not only the prosecutor, but the judge and jury as well. *In re Oliver*, 33 U.S. 257.

2. *The right to choose a court-martial*

In the proposed bill, section (f) permits the military services to court-martial any individual "for a serious crime or offense growing out of the same act or omission" for which an article 15 punishment is imposed. This same right of choosing a court-martial is not accorded to the accused. The only right that he has is under section (c) to appeal to the next superior authority if he considers his punishment unjust or disproportionate to the offense. It can readily be seen that his appeal does not guarantee him any of the procedural rights to which he would be entitled under a court-martial. At the present time, an accused person in the

Army and Air Force, who has been offered nonjudicial punishment under article 15, has the right to be tried by summary court-martial in lieu thereof, but the right is not available in the Navy or Coast Guard (par. 132, MCM, 1951). Although the summary court-martial has been roundly criticized and many groups have urged its abolition (see report by the Special Committee on Military Justice of the Association of the Bar of the City of New York, Mar. 1, 1961), nevertheless it seems clear that if the Government should have the right to select a court-martial for imposition of punishment on military personnel in lieu of the non-judicial punishment under article 15, that the individual affected should have the same right. Our position is strengthened by reason of the proposed right to increase the period of correctional custody to 30 days.

### 3. Bread and water

With the recent decision of the U.S. Supreme Court in the case of *Robinson v. California* (30 LW 4481), holding that the imposition of punishment on narcotics addition violates the cruel and unusual punishment clause of the Constitution, it seems apparent that there is grave doubt of the validity of other punishments now imposed and which have been imposed throughout history. On this basis, we urge the elimination of the sections of the bill which authorize the imposition on individuals attached to or embarked in a vessel to confinement on bread and water or diminished rations. This is an anachronism of a bygone era. There seems to be no basis for it to only be imposed on those described as "other personnel of his command" and not on officers. In any case, such vestiges of the past should be eliminated from our modern services. Why it should only be imposed on naval personnel or those on vessels and not those on land, again is unclear, but seems to be based on ancient and, I trust, outmoded tradition.

### 4. Arrest in quarters versus correctional custody

Officers may have arrest in quarters imposed on them whereas those referred to as "other personnel" may be placed in correctional custody. Arrest in quarters may be a fairly comfortable situation, whereas correctional custody could mean the placing of enlisted men behind bars in the post stockade. We urge that this discrimination be eliminated.

Senator ERVIN. We have now heard all of the scheduled witnesses. Does anyone else wish to be heard either pro or con?

(No response.)

Senator ERVIN. Thank you. We appreciate very much all the witnesses appearing.

(Whereupon, at 12:20 p.m., the subcommittee adjourned, subject to the call of the Chair.)

The following letter was subsequently received from Senator Maurine B. Neuberger, of Oregon, submitting a letter from Sp4c. Lawrence F. Bitte for inclusion in the record:

U.S. SENATE,  
COMMITTEE ON AGRICULTURE AND FORESTRY,  
August 3, 1962.

HON. RICHARD B. RUSSELL,  
Chairman, Senate Armed Services Committee,  
Senate Office Building, Washington, D.C.

DEAR SENATOR RUSSELL: I have enclosed a letter I received today from my constituent, Mr. Lawrence F. Bitte, from St. Helens, Oreg., who is currently serving in the U.S. Army at the Chemical Center, Md.

Mr. Bitte discusses H.R. 11257, a bill which I understand is currently being considered by your committee, which amends the Code of Military Justice.

It is my hope that Mr. Bitte's comments will be considered by your committee, and that his letter may be included in the printed hearings record on this proposal.

Sincerely,

MAURINE B. NEUBERGER, U.S. Senator.

ARMY CHEMICAL CENTER, MD.,  
August 1, 1962.

Senator MAURINE B. NEUBERGER,  
Washington, D.C.

DEAR SENATOR NEUBERGER: For the purpose of establishing constituency, I will state that I am a registered resident of the State of Oregon. I was drafted into service from St. Helens, Oreg., on August 22, 1960, am presently stationed at Army Chemical Center, Md., and will be released from active service August 21, 1962.

The purpose of this letter is to solicit your assistance in presenting the following comments on bill H.R. 11257, House Report No. 1612, to amend section 815 (article 15) of title 10, U.S. Code of Military Justice to the Senate Committee which is now studying this bill.

My experience in the service leaves me in basic agreement with not only the intentions of H.R. 11257, but also with most of its provisions. However, there are two outstanding points that I feel warrant special attention.

(1) There is no guarantee that an enlisted man will have access to a trial by courts-martial if he so chooses. As presently stated in H.R. 11257, the applicability of this bill to accused persons who demand a trial by courts-martial will be decided by the Secretary concerned.

(2) The term, "Correctional Custody," will be defined by the Secretary concerned with regards as to whether the company commander can send the enlisted man he has sentenced to a correctional facility. If the company commander is to have this authority, the enlisted man being punished will be subject to what is commonly called bad time or time that will have to be made up after his normal tour of duty.

Because these decisions will be made after enactment of this bill, it is my contention that those arbitrating the amendment must assume: (1) that the enlisted men will be denied the right to courts-martial, and (2) that the company commander will be given the authority to send the man he has convicted to a correctional facility. I would like the committeemen to note at this point a statement by the American Legion. "Stated simply, this means that the American Legion wishes the language of the bill to state expressly that which the Department of Defense would leave to regulation." House Report No. 1612, page 5.

Combining these two facets, you have a situation established where a U.S. citizen can be convicted and sentenced to imprisonment without recourse to trial. This is in direct conflict with one of the basic principles of our country.

Reflecting back to the intentions of the amendment, specifically to increase the morale of the members of the armed services, it is difficult for me to imagine how an individual's morale can be improved by denying him one of his basic rights as a citizen.

I request your sternest consideration before passing this bill into law.

Respectfully yours,

LAWRENCE F. BITTE, Sp4c.,  
Hq Co CRDL, Army Chemical Center, Md.

○



