PROCEEDINGS AND REPORT

OF

U.S.

SPECIAL WAR DEPARTMENT BOARD

ON

COURTS-MARTIAL AND THEIR PROCEDURE

July 17, 1919

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

PROCEEDINGS AND REPORT OF SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE.

WASHINGTON, D. C.,
July 17, 1919.

PROCEEDINGS AND REPORT OF A BOARD OF OFFICERS CONVENED PURSUANT TO THE FOLLOWING LETTER:

Wk/lms/358
A. G. 250.03.

MAY 14, 1919.

From: The Adjutant General of the Army.
To: Maj. Gen. Francis J. Kernan, United States Army, Office of the Chief of Staff, Washington D. C.
Subject: Board of Officers.

1. A board of officers to consist of Maj. Gen. Francis J. Kernan, United States Army, Maj. Gen. John F. O'Ryan, New York National Guard, Lieut. Col. Hugh W. Ogden, judge advocate, is appointed to meet in this city at the call of the senior member.

2. The board will consider all recommendations looking to the improvement of the present system of military justice, and recommend to the War Department any changes which they believe to be necessary in the Articles of War, and in the methods of procedure which now obtain in the administration of military justice in the Army so far as such justice is administered through the agency of the authorized courts-martial. The board is authorized to call for any and all records in the War Department bearing upon this subject.

3. You will submit to this office the name of an officer with a view to his detail as recorder of the board. The recorder will not vote.

4. It is desired that the board expedite its proceedings so that they might be available for the consideration of the Secretary of War at the earliest possible date.

5. The travel directed is necessary in the military service.

By order of the Secretary of War:

WILLIAM KELLY, Jr.,
Adjutant General.

Pursuant to paragraph 3 of the foregoing letter, Lieut. Col. F. M. Barrows, F. A., was detailed as recorder of the board.

Coincident with the appointment of this board the Chief of Staff caused cablegrams to be sent to the headquarters of the Philippine and Hawaiian Departments, and to headquarters, A. E. F., France, to the following effect:

The War Department has convened at Washington a board to investigate the law and procedure of military justice and to make recommendations thereon. Advise all officers of your command who are exercising general court-martial jurisdiction, or who have heretofore exercised it, and all judge advocates, that specific recommendations looking to the improvement of the system are invited. These propositions should be concrete and in precise form for incorporation in law or regulation, and accompanied by concise statements of the reasons upon which the recommendations are grounded. They should be forwarded by mail with the least possible delay, addressed to Maj. Gen. F. J. Kernan, President, Special War Department Board, Washington, D. C.

Before this board was called into existence the Adjutant General's Office had sent a circular letter to various officers of all classes whose experience and views might be supposed to be valuable, in which the provisions of the so-called Chamberlain bill (65th Cong., 3d sess., S. 5320) were set out and opinions and recommendations in reference thereto were invited.

At the outset of its work this board sent the following circular letter to all officers in the United States, whether still in the service or not, who had acted since the United States entered the great war as reviewing authorities or judge advocates at headquarters having general court-martial jurisdiction:

MAY 20, 1919.

From: Maj. Gen. Francis J. Kernan, U. S. A., President, Special Board.
To: ——— ———.
Subject: Recommendations looking to improvement of the courts-martial system of the U. S. Army.

1. The War Department has convened at Washington a board to investigate the law and procedure of military justice, so far as administered by courts-martial, and to make recommendations thereon. You are invited to submit to this board any specific recommendations which, in your judgment, should be made effective looking toward the improvement of the present system. These propositions should be concrete and suitable in form for incorporation in law or regulation. They should be accompanied by a concise statement of the reasons upon which such recommendations are based. If such recommendations are based upon the result of any specific trials by general court-martial, sufficient reference should be included to enable such trials to be identified. To enable the board to avail itself of the result of your experience as embodied in your recommendations, it will be necessary that this communication be given immediate attention and that your reply be mailed without delay to Maj. Gen. F. J. Kernan, President, Special War Department Board, Room 2421, Munitions Building, Washington, D. C.

F. J. KERNAN.

NOTE.—Please submit four copies of your recommendations.

GENERAL DISCUSSION.

The answers received by The Adjutant General in response to his letter have been turned over to the board as fast as received, and they, as well as those coming in response to the cablegrams sent by the Chief of Staff and the circular letter put out by the board itself, have been examined and considered by the board with great care. The mass of suggestions and views thus collected is large and voices opinion from the Regular Army, the National Guard, and civil life with much fullness. Since many of the officers expressing opinions had been discharged from the service prior to giving the board their views, it is fair to infer that they were moved by no sense of fear or favor and felt free to express with entire frankness their honest opinions. Summarizing and classifying in a very general way the mass of opinion thus secured, it may be said with a fair approximation to actual facts that the opinions of officers of longest and most intimate experience with courts-martial are generally strongly in favor of the existent system, and, while conceding some defects and offering some criticism, they in a general way defend the system and attribute imperfect results achieved under it not to the system itself but to the inexperience of those called upon to administer it as members, judge advocates, or counsel in court-martial trials. The non-professional class of officers drawn for this great emergency from the

body of our citizenship presents every phase of view from utter condemnation at one extreme to complete or nearly complete approval at the other, and it may be stated roughly that the degree of approval corresponds fairly well to the degree of intimate experience with troops had by the party expressing his views. It is noticeable that replies received from officers who served with fighting units and had brought close home to them the overwhelming importance of discipline in a command when it was subjected to the supreme test of battle, are as a class favorable to the present articles and the present procedure; on the other hand, officers whose duties kept them remote from the scenes of battle, and perhaps entirely disassociated from actual service with troops, view the system with a more critical eye and manifestly compare it with criminal practice in the civil community to the advantage of the latter.

The most general criticism leveled at the existing system of military justice is that it is archaic and unsuited to these times and that it lends itself to injustice; and the urgent conclusion drawn from these premises is that a radical revision of the Articles of War is necessary, to be followed by a recasting of the procedure as now governed by regulations and custom.

Under these general assertions fall many specifications, of course, such as (*a*) that reviewing officers are arbitrary and control courts-martial to an extent which makes the final result practically a reflection of their individual will and judgment; (*b*) that the members of these courts are often so ignorant of law as to preclude their trying cases fairly, with injustice as the inevitable result; (*c*) that trial judge advocates are often incompetent to present the case clearly and properly to the court; (*d*) and that counsel for the accused are too often incompetent and not infrequently a positive hindrance to the defense; (*e*) that due to perfunctory preliminary investigations, or to the total absence of such investigations, cases in large numbers go to trial which either present no case of misconduct at all or else one which should have been settled under article 104 by summary disciplinary action; (*f*) that the Articles of War leave too much, in time of war, to the discretion of courts-martial, resulting in unduly severe sentences, in striking inequality of punishment for the same offense, and generally in faulty justice since the members, in fact, are deficient in sound discretion or in legal knowledge; (*g*) that, in brief, military tribunals and their procedure differ markedly from the ordinary criminal courts of the land and their procedure, and hence are, to the extent of such differences at least, conclusively, and by that fact shown to be faulty and in need of reformatory changes.

Many suggestions for change, intended for improvement, have been thus received. Some of these may well be accepted as corrective and useful; others must be classified as doubtful, and still others should be rejected as fundamentally wrong and certain to be hurtful.

The sovereign remedy proposed by the most pronounced critics of the existing system is the injection into it of more written rules, together with the transfer of its administration largely from those who are soldiers first and lawyers only in a mild or secondary degree, if at all, to those who are lawyers first and soldiers by title and courtesy only, if at all. This radical change is the foundation upon which

the proposed revision of the Articles of War, as set out in the Chamberlain bill (66th Cong., 1st sess., S. 64), rests. And if courts-martial have, as the chief purpose of their existence, the nice exemplification of technical rules of law, this basic change is logical. But if the real purpose of the court-martial is to enable commanders to insure discipline in their forces, it may be questioned if this end will be better served by taking the working of this agency out of the hands of those who, as soldiers, know much of discipline and something of military law, and putting it into the hands of those who as lawyers know much of law but little of soldiering, or of the discipline indispensable to successful soldiering.

It may be useful at this point to consider the real nature of command with special reference to the fundamental doctrine that the constitutional authority of the President as Commander in Chief can not be abridged by Congress in the exercise of its power to make rules for the government of our armies. Does the authority or right to command presuppose the existence of the organized Army machine fit and ready to carry out the word of command but brought into being, trained and maintained in fit condition for its work by agencies independent of him in whom command is vested? Does command imply only that the commander may express his will for the use of the force to that force, and that the latter thereupon legally bound to carry out the order? Or, does command embrace and imply, and has it always embraced and implied, not merely the right to direct the use of the force, but the duty and authority to make and maintain the force fit and suitable to its purpose by instruction, by training, and by discipline?

Is it practicable, if good results are to be expected, to divorce the command of armies from their training and discipline, to repose command in one set of men while placing in other and independent hands the creation and maintenance of that spirit of discipline which must prevail if command is to be lifted from the domain of futility to that of effectiveness?

The rules governing armies had their beginnings, not in legislative bodies, but in commanders whether called kings or chiefs or generals, and in early times those who formulated the rules carried them out. With the evolution of governments the right of prescribing the most important or fundamental rules has lodged in legislative bodies, but the execution of those rules, their practical administration, has heretofore been left to commanders and their assistants down through the hierarchy of command to the very bottom. Courts-martial have always been agencies for creating and maintaining the discipline of armies, and in earlier times, and certainly until the adoption of our Constitution, were provided and administered by commanders as of inherent right. The King of England had and exercised this inherent right. The Continental Congress took over some of the duties of government in the rebellious colonies, but Washington as Commander in Chief appointed courts-martial as of right inherent in that office without the express authority of that Congress. So that when our Constitution was adopted and the powers of the Federal Government were distributed among three great departments, and the President was made by the organic law Commander in Chief, the power to appoint courts-martial, by

virtue of that office, was well understood. The power to make rules for the government of the land forces was at the same time confided to Congress. The earlier Articles of War continued or created under that grant of power did not expressly confer upon the President the right or authority to appoint courts-martial, but actually he exercised the power, and the validity of that action is well established. It appears, therefore, that before our Constitution was established a Commander in Chief was inherently competent to appoint courts-martial as incident to his office; that under the Constitution this right has been exercised and upheld, and further, that the rules made for the Army by Congress have extended to subordinate commanders (who are in fact assistants to the President in his special capacity as Commander in Chief) the right to appoint and to make use of this agency.

The pending Chamberlain bill proposes to take out of the hands of those to whom command is confided, from the President down, the effective use of courts-martial as instruments to enforce discipline. It does this by providing a civilian court of military appeals and by injecting into the principal courts-martial a new functionary with powers so extensive and of such a kind as to constitute him the administrator of discipline, though he is not himself of the heirarchy of command. The net result in the more important cases would be to transfer the power to discipline our armies from the Commander in Chief, the President, and from his assistant commanders, to civilian hands pure and simple, i. e., the court of military appeals, or to the quasi civilian legal hands of the judge advocates provided for general and special courts-martial. In view of the history of the court-martial as an adjunct of armies and as an instrument the use of which inheres in the office of the Commander in Chief under our system of government is it not possible that the proposition to take from the President, in large measure, the effective use of this instrument, as well as to take away from his proper assistants in the task of command a like use of the same instrument, may be unconstitutional? Is it not in effect an attempt to withdraw from command an essential part of that which belongs to it historically and in sound reason? Is it not open to be questioned as an attempt by law to emasculate the legitimate and heretofore undisputed authority of the President as Commander in Chief?

If in England, whence we drew our Articles of War, the executive, independent of legislative enactment, could appoint courts-martial and execute their sentences; if Washington, as Commander in Chief of the Continental Armies, could and did exercise the like power without express authority of law, does it not seem reasonable that the new Commander in Chief under our Constitution was similarly empowered? For not only did our military system come essentially from England but the language in which that system is expressed is our own, so that words or phrases imbedded in our organic law may be taken to connote the same thing and to carry the same implications as in the mother tongue. Therefore, Commander in Chief in the Constitution would seem broadly to mean what Commander in Chief meant in the Continental Army and, in the absence of express limitations, to carry with it the same general scope of authority. If this be the fact, can the President by law be subjected in his action

upon court-martial cases to review and absolute re ersal by a civilian tribunal such as the Chamberlain bill proposes to set up? And similarly can the President's assistants in his functions of Commander in Chief, his commanding officers, have this means of *enforcing command* wrested from them and handed over to a junior staff officer himself normally exercising no command and concerned with discipline only as an abstraction? Would it not in effect be saying to all commanders from the President down, "You can issue commands, but we deny you the power to enforce them"?

If the fifty-second article of war, as proposed in the Chamberlain bill, had been law and the St. Mihiel offensive had been a complete failure of American arms instead of a brilliant success, the commander in chief in France, or the President, might have had occasion to court-martial a high commander as responsible, through misconduct, for the disaster. A finding of guilty and the sentence adjudged on the spot by a court-martial composed of fellow officers, duly equipped by special knowledge and antecedent training to judge justly and sanely, could be set aside upon a legal technicality construed by three civilians sitting in Washington to be an error of law injuriously affecting the substantial rights of the accused, although the immediate commander and the President had approved the whole proceedings as legally sufficient and intrinsically important in the highest degree for the Army's welfare. The power to discipline effectively, inseparably bound up with the power of effective command, would be in this particular case paralyzed. The requirements of effective command as determined by the Commander in Chief, be it observed, are thus halted by an independent agency outside the Army.

It has always been held that, as between the State and Federal Governments, a distinct power granted to the latter carries with it a right to the usual and necessary means to make the express grant effective, and that those means were beyond the power of the State to impede or destroy. This upon the principle that it was futile and absurd to confer on one authority the right to build up a particular agency if there existed in another authority the right to tear down that same agency. So between the different departments of the Federal Government it would be equally absurd to confer upon the Executive the right to command the armies and at the same time to confer upon the judiciary the right to render the exercise of that command futile through a power to weaken or destroy the discipline of the armies by reversing and setting aside the President's disciplinary action upon grounds which might appear material to a civilian court without military experience and far removed from the atmosphere in which armies must necessarily operate, but which, in relation to the disciplinary importance of the case and of the proved facts and circumstances, might be relatively inconsequential. If it may be said that such action by a court of review is not to be anticipated, the answer is that heretofore given by our Federal courts to a like contention, namely, that it is not alone the *exercise* of the power to nullify or destroy which must be guarded against, but its very existence.

If, however, these doubts as to the legality of the more radical innovations be set aside, there remains the duty of examining them from the standpoint of expediency, and of considering the question of providing some further agency of appellate jurisdiction and of determining whether that agency, if provided, should not, in law and

in the interest of discipline and as a logical part of a system of *military* courts, be established within the Army itself.

It is the common practice of intelligent men, founded on experience, to yoke up responsibility and a definite task with the authority and the means designed to make the accomplishment of the task reasonably certain. The chief task for which armies exist is of supreme importance to the State. The responsibility upon those exercising command, and especially high command while war lasts, is second to no other responsibility under the Government. It involves the question of life and death for many individuals and it may involve the very existence of the State itself. From this it results that great authority, great latitude of judgment, great power over the personnel of armies, have always been vested in those to whom command is confided. To achieve the purpose of their existence armies must be clothed and fed and instructed and disciplined in preparation for the test of combat. All governments provide for these things. Upon what basis of reasonableness can a general be endowed with power to give orders to his command which may mean, and often must and do mean, the certain death and mutilation of thousands, while withholding from him the antecedent authority to achieve such discipline as shall minimize death and multiply the chances of victory? Yet here is a proposition by which one of the most effective and powerful sanctions of good discipline—the court-martial—is to be taken substantially from the general who must fight the command, and whose success or failure may hinge absolutely upon its discipline, and to put it into the hands of one whose special qualification is law and whose knowledge of disciplinary requirements may be of the slightest. The highest qualification for making a court-martial achieve the object of its existence is a thorough knowledge of men and discipline in the profession of *arms*, not mere expertness in law. That is why the judgment of those responsible for discipline, and whose whole business is bed-rocked on discipline, is of higher value to the service and is entitled to greater public confidence in its essential justice than a judgment or opinion upon the same subject matter from any source not cognizant of the problems and circumstances affecting military service in the field.

In the opinion of this board the unwisdom of this new departure, assuming it to be legally competent, is startlingly apparent.

From this point it is convenient to pass to a consideration of the phenomena through which the public seems to manifest a belief that courts-martial are apt to be instruments of injustice and that their sentences often (if not habitually) are transparently excessive to the point of c[illegible]elty.

Through the daily press, magazines, lectures, and other media the public is told that courts-martial give sentences grotesquely severe, that Army officers, from some innate quality in the profession, become arbitrary and develop a callous attitude toward soldiers and are peculiarly ignorant of the laws governing the Army. These general charges of injustice are upheld by specifications consisting of a statement of offenses followed by a statement of the punishments imposed. Thus, for example, a soldier is ordered to peel potatoes and refuses to obey. He is tried for this offense, is convicted, and sentenced to years of confinement. Or, let us say, the soldier smokes

a cigarette in disobedience of orders, and is given years of confinement for this trifling indulgence in a habit to which the youngster had become addicted. The public does not stop to analyze the possible effects of these apparently trifling misdeeds. Peeling potatoes is an unpleasant task, and why wonder if some people balk at it, and why give so harsh a punishment for so simple a dereliction? Nobody would suffer much if there were no potatoes for dinner, anyhow. Similarly, smoking a cigarette is a bad habit, perhaps; but millions do it. What, then, could a court be thinking of to punish it by years of imprisonment? A young soldier whose command is about to embark for France is seized suddenly by a strong desire to say good-by once more to his mother or his sweetheart. What more human impulse can be imagined? There is general sympathy with the young man when he yields to this temptation and goes off without permission and the ship and his comrades sail without him. But a court, a singularly heartless court, awards years of confinement for this act—an act which seems at first glance (and this is as far as most people go) almost a virtue instead of a fault. The answer to the faulty public judgments upon acts of this sort, and upon military offenses generally, is that the just measure of punishment can never be inferred from a consideration of the offense as an abstraction, as if it had been committed by Robinson Crusoe in the days of his solitude. A small discoloration on a man's foot may seem to the layman a trifling matter calling, perhaps, for a mild lotion. If it signifies gangrene to the surgeon, the leg may be amputated. Insubordination is as fatal to armies as gangrene is to the physical man, and as the surgeon is the better judge of what remedy is needful in the one case, so in the other a court-martial is more apt than the general public to reach a just conclusion. And a lighted cigarette in a city park presents a proposition altogether different from the same thing in a powder plant. Let us pause a moment on the absent-without-leave man, a most common offender, and one highly effective for appealing to the public mind and misleading it. If the man himself does not set up in extenuation the overpowering effect of some deep and natural human emotion, the imagination of nearly everybody will do so, especially if guided by slight suggestion. But how about the absentee's comrades in the trenches? It may always happen, and it does often happen, that the absentee's dereliction puts a double burden of duty upon a wearied comrade and doubles the chance of death to the faithful soldier who, though he has a heart, too, and mothers and sweethearts as well, has also a sense of duty. In judging the absentee, then, no court, if it does its duty, can treat the man or his offense as an abstract proposition. It is obliged to do justice as between this man who failed in his duty and the comrades who fully performed theirs and stuck by the colors. It is obliged to do justice as between the offender and his Government. For if one man may do this thing and escape serious consequences, why should not others be tempted to follow? And if one man can be excused for this act by pleading homesickness, or similar causes in which we all sympathize, why can not the same plea be set up by others whose real animating motive may be cowardice, or a desire to shirk, or other like reason?

The simple fact is that there is no absolute standard by which one can say this sentence represents justice and that one is excessive and

therefore unjust. It all becomes a matter of opinion and opinion is valuable in proportion to the fullness of the knowledge upon which the opinion is based. Let it be acknowledged that in any system of discipline or justice administered by fallible mortals mistakes will occur; not always, however, in the direction of severity; often the other way. So much being admitted, it can safely be affirmed that whenever an outcry is raised that a particular sentence is excessive to the point of injustice, we have presented a case of differing judgments. The court and the reviewing authority thought one thing, the distant critic thinks another. Which is right? It is extraordinary, but it seems to be the fact, that in all these cases the public places its confidence as of course in the critic's judgment and condemns as of course that of the court. Yet the latter has the fullest light, the most complete knowledge, of all the facts and circumstances upon which a sound and just measure of punishment can be based. There is no comparison upon this point. No written court-martial record is anything more than a partial reproduction of the case in its fullness. A multiplicity of side lights beats upon every case not capable of reproduction in the record and therefore completely excluded from the knowledge of those at a distance who assume to form and to promulgate a different judgment, and which they unhesitatingly claim is juster and wiser than the one reached by the court. It is safe to assert, and this board believes, that in the majority of the relatively few cases criticized as unjust the sentence as given by the court and approved locally is made with fuller relevant knowledge of the whole case and of the requirements of discipline, and represents justice as a whole better than does the later opinion of the distant reviewer limited to a reading of the written record in a Washington office.

The public has apparently assumed that even the War Department itself holds that the judgment of a board of review, or a clemency board, sitting in Washington and passing upon the proper quantum of punishment is sounder and represents justice better than the judgment of the reviewing authority and the court originally imposing the sentence. This board, for reasons just indicated, is unable to join in that view. The general rule, it believes, is the other way. The board holds that present remission or mitigation is justified, not on the ground that the original sentence at the time and place of its imposition was unjustly severe, but on the ground that the war is over and the sentence, having accomplished with just severity its disciplinary purpose, may now, without detriment to discipline, have its justice tempered by mercy. If this distinction is grasped and understood much of the public misconception as to the supposed unjust severity and as to supposed dissimilarity of sentence upon like cases will disappear.

The belief that irregularity of punishment for precisely the same offense is a common fault in our practice is largely though not wholly erroneous, and that error, like the one of indefensibly severe sentences in particular cases, appears to this board to be due in part to a failure to appreciate that sentences are not imposed as abstract punishments for stated offenses, but are properly and necessarily determined by the conditions which existed at the time in the particular command of which the accused was a member, as well as

by the many circumstances which clearly appeared to the court during the trial, such as the intelligence, responsibility, and demeanor of the accused, and the witnesses—none of which appear in the written record. Cases absolutely alike, and hence calling for absolutely identical punishments, are rare. Cases apparently just alike, *as exhibited by the written records*, are exceedingly common.

Let us suppose two divisions side by side in the front line and a bloody collision with the enemy is known by everyone to be impending. If one of these divisions has been seasoned and tested by battle, has in a measure weeded out its weaklings, and has achieved a high divisional pride and morale then, when the clash comes, few absentees and few unjustified stragglers to the rear will mar its record or threaten its efficiency. If the adjacent division possesses a greener personnel, a lower standard of discipline and morale, and other conditions adverse to efficiency in greater degree than the first division, absentees may be numerous and straggling a menace of the utmost gravity. A court in the better division may take a lighter view of the proper measure of punishment for its offenders since they are rare and their particular kind of dereliction offers no threat to the continued high efficiency of that division. It is different with the other. Its absentees and its shirkers are threatening vitally the efficiency of the organization. This particular kind of misconduct, if continued, spells disaster to the division as an efficient unit; perhaps the operations of a corps or an army may be defeated because of its failure at some critical juncture. Will not its commander and its courts, gravely considering the magnitude of the evil, be apt to punish with great severity those who are convicted, and will not these heavy sentences be necessary and just? Will not the resultant difference of severity as exemplified in these two divisions toward apparently like offenses be, in fact, not an evidence of unsound judgment upon the part of one court or the other, but rather a proof that both courts were right and each knew what punishment was called for then and there in the interest of discipline in their respective situations? It can not be too strongly emphasized that punishment by military courts is not at all for the sake of vengeance, nor, except in a very subordinate way, is it for the amendment or reformation of the offender; its great purpose, the one to which all other purposes are secondary, is to secure an efficient fighting unit by making it a disciplined one. The just measure of severity of every sentence is to be sought, then, not in a flat uniformity when charges and specifications happen to read alike, but in its sound adjustment to the needs of discipline as those needs existed at the time and place of its imposition. The fundamental principle being this: That the punishment should be proportioned to the evil it seeks to cure; being light when, all the relevant circumstances duly weighed, the offense is found to be comparatively innocuous to discipline, and drastic when efficiency is imperiled. And this furnishes the conclusive argument for keeping the administration of military justice through the court-martial agency in the hands of those officers who, being assigned to command troops, are thereby vested with the chief responsibility for the discipline and fighting efficiency of those troops. Per contra, it disposes of the theory that the lawyer rather than the soldier is the one to whom, by virtue of his expert legal knowledge,

courts-martial, as an adjunct of armies, should be delivered for administration.

The fact that courts-martial may impose sentences which are for one reason or another void ab initio is pointed out and made the subject of much severe condemnation. In other words, there is no regular machinery or court of appeals provided by which cases so void can be reversed and the accused restored as far as is humanly possible to the status he would have had save for the illegal sentence. The pardoning power does not remove the moral stigma of conviction nor otherwise make completely good the judicial wrong. In theory this is true, and in practice a remedy may be necessary. Where should this power to revise, reverse, and set aside be vested? Some are contending that the Judge Advocate General should have this power. The Chamberlain bill puts it in a court of military appeals, all of the judges thereof normally being civilians. This board believes that military punishments mainly exist as aids to the creation and maintenance of military discipline; that military discipline is inherently a part of military command and inseparable therefrom; that under our Constitution the command of our Army and every part thereof is vested in the President; that other military commanders are his subordinates and assistants, and are so indicated in the Constitution, and as such share in lesser degree the rights and duties incident to command. For it is to be noted that the President is commander in chief, whereby it is clearly recognized and implied that there are other "commanders" subordinate and assistant to him. And it is to be noted also that this system was in existence in the Continental Army, and was undoubtedly intended in its general outlines to be continued under the new Federal system. Therefore appeals in the matter of military punishments from the actions of the lesser commanders can only be constitutionally made to their higher commanders, up to and including the Commander in Chief; and in cases in which the President himself has convened the court and approved the sentence appeal therefrom can only be to his own conscience and judgment upon a deliberate reconsideration of the case. If this indicated course of appeal as a legal necessity is denied, then upon the highest grounds of military expediency it is our belief that the appeal should be in the sequence of the hierarchy of command—never outside of it.

From the foregoing discussion it will be apparent that, in the opinion of this board, the existing court-martial system is fundamentally sound and well calculated to serve successfully the ends for which it was created. It is an evolution representing constant change and growth. No claim is made that it is a perfect system; rather it is distinctly admitted that in the light of experience changes may be made now in the direction of improvement. Under it errors in the proceedings, the findings, and in the measure of punishment occur from time to time. This has always been so and will always be so in some measure. But this is not peculiar to the court-martial; it is true of all agencies created and administered by men. Military justice is carried out at times under great urgency and stress, where the nice deliberation and finish of the civil procedure is utterly impossible. For reasons already set out we believe it unwise to take too seriously the criticisms of those who form conclusions at a dis-

tance and in the half light of the written record, shut out from much that would give vividness and understanding if they but had it to guide them, as those who actually tried the case did have.

Writing long after the Civil War, an author who had probably examined with greater thoroughness than any other man the detailed history of military justice in that war gave this deliberate opinion in speaking of orders issued by military commanders:

> In the orders in which they act upon the proceedings and sentences of courts-martial they exercise an authority expressly conferred upon them by statute, though here, too, they act practically as substitutes for the Commander in Chief. The very numerous orders, especially of the latter character, issued during the late war, are a monument to the fidelity to duty and scrupulous regard for justice which have in general characterized our high commanders in war as well as in peace. In the thousands of these orders published during that period from the headquarters of the various departments, divisions, districts, brigades, armies, and army corps the errors of law discovered have been strikingly few, and the cases in which justice has not clearly been duly administered most rare.

This board entertains no doubt that after the present hostile criticism, hasty and sweeping and based upon carefully selected exceptions, has cooled off, the future and final judgment, resting upon fuller knowledge and formed under the benign influence of a just perspective, will be much like the one just quoted.

The board recommends and attaches hereto its proposed modifications of the existing Articles of War. With the adoption of these by Congress necessary changes in the procedure as detailed in the Manual would follow.

The board has arranged in parallel columns the existing Articles of War opposite to the proposed new articles, and the changes are explained by comments immediately following. In this comment appears such discussion of the corresponding provisions of the Chamberlain bill as seemed necessary.

In arriving at the conclusions concretely set forth in the amendments recommended by the board, the personal knowledge and experience of its members have, of course, been factors; but the board finds it is well supported in its conclusions by the matured thought of experienced officers of the service, including a great many of those who joined the Army for the emergency of war only. Expressions of opinion were received by the board from 225 different officers, and classifying these in a general way the result is that the present court-martial system in all of its essential outlines is supported by 115 of these. On the other extreme, the system is rather severely condemned by 43 officers. Between these pronounced attitudes every shade of approval or disapproval may be found, and the number of officers so classified as intermediate is 67. From this classification, not only upon a numerical basis but upon a basis of experience and thorough knowledge of the subject matter, this board feels justified in averring that our system stands vindicated. By this is not meant that every detail of it is regarded as perfect; quite the contrary; and the effort of the board has been to accept modifications and to write them into the proposed revision of the articles so as to cure the more obvious defects and to make such substantial modifications as with our present light seem called for. But change for change sake alone has been

avoided. The net result is that should our recommendations be adopted the court-martial system would remain in its broad outlines as now, but minor defects would be eliminated and important reforms will have been inaugurated.

F. J. KERNAN,
Major General, U. S. Army.
JOHN F. O'RYAN,
Major General, National Guard (N. Y.).
HUGH W. OGDEN,
Lieutenant Colonel, J. A., U. S. A.
F. M. BARROWS,
Lieutenant Colonel, F. A., Recorder.

APPENDIX

TO

PROCEEDINGS OF SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE.

MEMBERS.

F. J. KERNAN, *Major General, U. S. Army, President.*
J. F. O'RYAN, *Major General, N. G., N. Y.*
H. W. OGDEN, *Lieutenant Colonel, J. A. G. D., U. S. A.*
F. M. BARROWS, *Lieutenant Colonel, F. A., U. S. A., Recorder.*

CONTENTS.

Changes proposed in the Articles of War.

EXPLANATION.

Proposed articles are shown on left side of page.
Existing articles are shown on right side of page.
Under proposed articles the portions in italic are new, while those shown in heavy brackets are the omitted portions of the existing articles.

COMMENT ON SECTION 1342, REVISED STATUTES, BEING THE ENACTING CLAUSE OF THE ARTICLES OF WAR.

The board suggests no change. It does not concur in the change suggested in the Chamberlain bill. The term "Articles of War" has existed for so long a period that all understand what is meant. It is no more an anachronistic misnomer than is the term "Lieutenant General" in relation to "Major General," or the title "Quartermaster General," or "rations." "Articles of War" is in reality a short name for "Articles of War for the Government of the Armies of the United States." The change proposed in the Chamberlain bill would embarrass the paper work of several hundred thousand persons for some time to come and until new custom and usage had established it.

ARTICLE 1. No change.

PROPOSED LAW.	EXISTING LAW.
"ART. 2. No change except the omitting of paragraph (f)."	"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: *Provided*, That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law. "(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or accept-

ance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into or to duty or for training in the said service from the dates they are required by the terms of the call, draft, or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided,* That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia."

COMMENT.—The only change proposed in the existing article is the elimination of subparagraph (f). It is understood that the Articles of War are not, in fact, made use of at the Army Soldiers' Home at Washington in the enforcement of discipline. In the changes proposed in the Chamberlain bill it will be noted that in subparagraph (a) "soldiers of the Marine Corps" are omitted from the application of the Articles of War when they are detached for service with the Army. Under the existing articles both officers and enlisted men of the Marine Corps, when so detached, may be tried under the Articles of War.

ART. 3. No change.

COMMENT.—The Chamberlain bill proposes to change the term "court-martial" to "court," in order to accentuate the judicial character sought to be established for such court. Court-martial is an old term, well understood, and indicates by its name that it is a military or martial court. If, as the comment made under this article in the comparative print of the Chamberlain bill states, there are abuses to be corrected, such abuses will not be minimized or affected by a mere change of the name of the tribunal, a change which will only serve as an embarrassment for some time to come in relation to paper work among many thousands of officers and men.

PROPOSED LAW.	EXISTING LAW.
"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by	"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by

order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial: *Provided, however, that officers having less than a total of two years' service, commissioned or enlisted, in either the Regular Army, National Guard, National Army, or other national armed forces, shall not, in time of peace, be appointed as members of general or special courts-martial in excess of a minority membership thereof; nor in time of war, if it can be avoided. In the selection of officers for appointment as members of courts-martial care will be taken to select those officers of the command who are best qualified for such duty by training and experience.*"

order of the President, shall be competent to serve on courts-martial for the trial of any person who may lawfully be brought before such courts for trial."

COMMENT.—The proposed change speaks for itself. It offers a remedy to cure a defect in the existing system which has been pointed out very generally in the suggestions received and considered by this board.

The Chamberlain bill under the proposed article makes soldiers legally competent to serve on general and special courts. The board does not concur in this proposal. The individual experiences and results of investigation and inquiry made by the board indicate that officers who have composed courts-martial are alert in relation to the rights and interests of enlisted men. The board is of the opinion that the proposed change is out of harmony with the American conception of democracy and of our confidence in our institutions. The change would seem to be more in harmony with that form of discipline which in Europe recently resulted in the establishment of soldiers' and workmen's councils. Court membership necessitates not only the intention to be fair and impartial, but the capacity to discern the truth, the ability to weigh evidence, and the experience to fix punishments commensurate with the offense and with the need to deter others. These qualities usually imply education and experience on the part of court members. In our armies under our democratic institutions the class of men who possess these qualities in the fullest measure are the officers for the reason that under the democratic tests made and applied for the creation of officers, the enlisted men who possess such qualities in the fullest measure become officers. The enlisted men of our armies have full confidence in the fairness and ability of officers to do justice as members of courts.

There are other objections to the proposed change. Enlisted men in close comradeship, as they are, with the enlisted personnel of their units, would at times disclose the details of trials, how one or another officer voted or viewed a particular case, with obvious embarrassment to discipline. Service by enlisted men on courts-martial would interfere with their other work. Their inclusion would amount to a proclamation that the officers are unqualified to do justice to the enlisted men. Military courts constitute an agency for the maintenance of discipline, an agency which is one of command. The proposed change is away from this sound and necessary conception of discipline.

ART. 5. No change.

COMMENT.—The Chamberlain bill proposes that general courts shall consist of eight members, three of whom in the case of the trial of a private soldier shall be privates, and in the case of noncommissioned officers shall be noncommissioned officers. In the comment under the previous article the board has recorded its views concerning the eligibility of enlisted men to serve as members of courts. In relation to the requirement that the court shall be composed of eight members, the board is of the opinion that it is unwise to have an even number constitute a court, and furthermore, that the requirement of a precise number, as eight, is unnecessary and oftentimes impracticable. The present article in prescribing that five officers may compose the court will continue as it has in the past, to meet service requirements. In this war membership of courts was constantly and necessarily changing, due to the fact that officers were killed, became ill, were ordered to school, or were transferred. The present practice

of appointing nine or eleven officers to compose a general court, and proceeding with trial so long as five members were available constantly enabled cases to be satisfactorily disposed of. Under the proposed change this would not be possible. There are frequent instances where members of a general court were killed, wounded, and evacuated, or transferred between the time the order for the court was issued and the day when the court-martial was to sit.

ART. 6. No change.

COMMENT.—See comment under articles 4 and 5.

PROPOSED LAW.	EXISTING LAW.
"ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer, *who shall be the officer of the command deemed by the appointing authority best qualified therefor, by reason of rank, experience, and judicial temperament.*"	"ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer."

COMMENT.—The board has adopted in this article the substance of the change proposed in the Chamberlain bill. It conforms the statute to the practice which has obtained in the Army.

ART. 8. No change.

COMMENT.—The Chamberlain bill, in its proposed article 8, curtails the authority of the President to empower officers to appoint general courts-martial, justifying the change with the comment that "to increase the number of appointing authorities is to increase the number of courts—an undesirable result." The board does not concur in the change on the ground that the authorization of additional commanders who may appoint general courts is at times essential, due to the circumstances of distance, numbers of troops, and a particular form of organization made necessary to meet the demands of the service. The board believes that the right to empower additional convening authorities may with safety be left to the President. The proposed change denies to an army commander authority to convene a general court-martial. In other words, the commander of an army could not convene a court for the trial of a division or other commander.

The change leaves out the existing provision that when the convening authority is the accuser or the prosecutor the court shall be appointed by superior competent authority, and also the provision that no officer shall be eligible to sit as a member of a court when he is the accuser or a witness for the prosecution.

ART. 9. No change.

COMMENT.—It is to be noted that in the comparative print of the Chamberlain bill the printer has, on page 7, on which page this article appears, reversed the captions heading the left column by "Existing law" and the right column by "Proposed law," when the converse is intended. The board, in relation to this article, reiterates the comment made under the preceding article.

The proposed change denies to the commanding officer of any garrison, fort, camp, or other place the power to appoint special courts-martial. This power, particularly in times of peace, is of great importance and should not be taken away.

ART. 10. No change.

COMMENT.—The Chamberlain bill presents its article 10 as a new article, providing for a panel of officers, believed by the appointing authority to be "fair and impartial and competent," the court to be constituted from such panel. The board regards the change as both unnecessary and undesirable. If in each court-martial jurisdiction the panel is to consist of the officers possessing the qualities named, obviously officers of a division not on the panel would be regarded as either unfair, partial, or incompetent. In other words, the panels would be composed of all the officers in each jurisdiction except such as are ineligible for one or more of the reasons stated. But in a much less cumbersome manner this is exactly the practice at the present time. Looking at this practically it is obviously impossible for the appointing officer to know with sufficient intimacy the junior officers of his command. Frequently it would happen that a question of procedure or competency could not, and would not, arise until the court of which the officer concerned was a member, was actually convened. And an officer frequently would be wholly acceptable to one accused and unacceptable to another for the reason that the latter might believe the officer to

be prejudiced or disqualified to try the particular accused. Hence it was that the board pointed out that the Chamberlain bill, in its proposed article 8, had omitted an important provision now existing, looking to the rights and interests of the accused. Obviously there seldom would be time during a state of war for the convening authority, particularly a division commander, to examine into all the facts and circumstances affecting the fairness, impartiality, and competency of each and every officer of his division in regard to each and every case that is to be tried by courts appointed by him, when such investigation would have to be made in advance of the time and occasion when the question of such fairness, impartiality, or competency would normally be raised.

PROPOSED LAW.	EXISTING LAW.
"ART. 11. APPOINTMENT OF JUDGE ADVOCATES *and counsel.*—For each general or special court-martial the authority appointing the court shall appoint a judge advocate *and a defense counsel*, and for each general court-martial one or more assistant judge advocates when necessary: *Provided, however, that no officer who has acted as member, judge advocate, assistant judge advocate, or defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.*"	"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary."

COMMENT.—It is proposed in article 12 of the Chamberlain bill to amend the provisions of old article 11. The changes proposed are based on an analogy to civil courts, it being stated that such courts possess (1) "triers of fact" and (2) "a judge of the law."

The records of military tribunals will show a very small percentage of cases wherein material errors of law occur. The proposed change would mean a great and unwarranted expense in the appointment of a large number of additional judge advocates. The power proposed for the judge advocate to pronounce sentence without approval either antecedent or subsequent by the convening authority and likewise to suspend sentence in whole or in part, would vest in this staff officer, not chargeable in any way with the responsibilities of command, some of the most important functions of the commanding officer.

The board proposes as an amendment to article 11 the above provisions which, as will be noted, provide by law for a defense counsel and prohibit a judge advocate, member or counsel, who has taken a partisan part in the trial from later serving as a staff judge advocate in reviewing cases with which he has been connected in another capacity.

PROPOSED LAW.	EXISTING LAW.
"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further, That the officer competent to appoint a general court-martial for the trial of the particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special or summary court-martial*	"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy."

notwithstanding the limitations upon the jurisdiction of such inferior courts as to offenses set out in articles 13 and 14; but the limitations upon jurisdiction as to persons and upon punishing power set out in said articles shall be observed."

COMMENT.—The modification of article 12 proposed by the board enlarges the jurisdiction of the special and summary court to embrace all offenses committed by persons other than officers and cadets. It does not enlarge the punishing powers of these courts. The fundamental idea is that many of our articles denounce offenses as capital, which, when committed under certain circumstances, are really of no vital import to the service. The amendment proposes to confide to the officer exercising general court-martial jurisdiction a discretion whereby he may either send cases before a general court or have them disposed of by one of the inferior courts. The effect of this modification ought to be a very considerable reduction in the number of cases tried by general courts-martial.

ART. 13. No change.

COMMENT.—The Chamberlain bill by its proposed article 14 provides for the trial of officers by special court. The board believes that the object sought, namely: The trial of officers for minor offenses by other than general courts, can better be attained, because in more summary manner, by the amendment of existing article 104 proposed by the board and explained under that heading.

PROPOSED LAW.	EXISTING LAW.
"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: [*Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial.] Summary courts shall [not] have power to adjudge *one or more of the following punishments:* Confinement *for* [in excess of three months] *not more than one month, restriction to limits for not more than three months,* [nor to adjudge the forfeiture of more than three months' pay] *forfeiture or detention of pay for not more than three months, and reduction in grade of noncommissioned officers and privates of the line of the Army:* [*Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority:] *Provided,* [*further*] That the President	"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations which he may modify from time to time, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law. "Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority."

may, by regulations which he may modify from time to time, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law."

COMMENT.—The board has adopted the ends sought to be obtained in article 15 of the Chamberlain bill, but has modified the phraseology so that the power of summary courts-martial to punish is stated affirmatively, and not impliedly, by prescribing what authority the court shall not have.

PROPOSED LAW.	EXISTING LAW.
"ART. 15. *Jurisdiction* NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that *by statute or* by the law of war may be [lawfully] triable by such military [commissions, provost courts, or other military] tribunals."	"ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals."

COMMENT.—The board has adopted in its proposed new article 15 the amendment proposed in article 16 of the Chamberlain bill.

ART. 16. No change.

PROPOSED LAW.	EXISTING LAW.
"ART. 17. JUDGE ADVOCATE TO PROSECUTE; *Counsel to Defend.*—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented *in his defense* before the court by counsel of his own selection [for his defense], *civil counsel if he so provides, or military* if such counsel be reasonably available, [but should he, for any reason, be unrepresented by counsel, the judge advocate shall, from time to time, throughout the proceedings advise the accused of his legal rights], *otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel of the court shall, if the accused so desires, act as his assistant counsel. The Secretary of War is authorized to increase the number of acting judge advocates provided by existing law to be detailed from the line of the Army to such number as may, in his opinion, be necessary to furnish competent trial judge advocates and defense counsel in difficult or important cases, and to perform such other legal or quasi legal duties incident to military administration as the interest of the service shall require.*"	"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall, from time to time, throughout the proceedings advise the accused of his legal rights."

COMMENT.—This board is convinced that the most serious defect in our court-martial system arises from the lack of competent trial judge advocates and

counsel. In the mass of suggestions received from experienced officers there is almost universal agreement upon this question. To cure this evil the board has already recommended, in a preliminary report, that defense counsel be appointed for each general and special court-martial, precisely as the trial judge advocate is appointed, and from the same field of selection. It is recognized, moreover, that all encouragement should be held out to young officers to study law and to otherwise equip themselves for these and similar duties. The acting judge advocate has been authorized for the Army since 1884, and under that law many of our officers became students of law and prepared themselves for expert service in that line through their whole military careers. An extension of this tried system will certainly result in producing a very considerable number of officers qualified not only for this particular duty, but for many other duties arising in the military service and which require for intelligent discharge more or less knowledge of law. Coming from the line and serving for a period of four years, more or less, these officers would not become legal experts exclusively, but should retain their knowledge of the service, of matters of discipline, and of all the intimate details which can only be kept fresh by a recurrence to duty with the troops. The usefulness of this system is not limited to the improvement of the prosecution and defense of cases, but these specially qualified officers would, as they rose to higher rank, afford a body of valuable officers for special tasks through their entire military career. The board regards this as one of the most important suggestions it has to offer the department.

The necessity of this proposed legislation has been accentuated during the last year by the experience of the Army of Occupation. Upon taking possession of the Rhine Province the necessity arose immediately to create between two and three hundred provost courts, which had jurisdiction over the German inhabitants of that Province, involving the settlement of nice questions of law and fact. The desirability of having a class of young officers trained in the study and administration of law thus enabling them easily, confidently, and justly to discharge the duty of judge of a provost court is too obvious for argument.

Articles 18, 19, and 20 of the Chamberlain bill have all been covered by this board in its preliminary report in which recommendations were made to amend the Manual of Courts-Martial so as to improve the procedure incident to the preferring of charges and the action thereon before reference for trial. The board does not regard these new articles either necessary or desirable legislation.

What has just been said in reference to the board's new article 17 expresses the board's adverse view in relation to the proposed articles 21 and 22.

PROPOSED LAW.	EXISTING LAW.
"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused *or judge advocate* [but only] for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. *Challenges by the judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge.*"	"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."

COMMENT.—The board proposes one peremptory challenge for each side. The proposed practice follows the practice in civil courts where each side is allowed to challenge for cause, and at the same time is limited in its peremptory challenges.

Gen. Kernan dissents from the proposition to introduce peremptory challenges into court-martial practice. Of the large number of officers making suggestions for the improvement of the existing system, very few recommended this change; and those who did so recommend were mostly lawyers from civil life commissioned for the emergency and whose experience upon courts-martial was either slight or none at all. The innovation, it is believed, springs from

analogy to the civil practice and is based upon the erroneous assumption that what is necessary or useful in that practice must, as a matter of course, be desirable in the military practice.

PROPOSED LAW.	EXISTING LAW.
"ART. 19. OATHS.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial *upon a challenge or upon the findings or sentence* unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'	"ART. 19. OATHS.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'
"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'	"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'
"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'	"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'
"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will	"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will

faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted."

faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted."

COMMENT.—The only change proposed in article 19 is intended to limit the obligation of secrecy to the voting upon challenges, findings, and the sentence. The object of this change is to enable the court to decide in open court any other questions which may arise in the course of their proceedings and to enable the members in arriving at such decision in open court to indicate their opinions or the opinions of their fellow members freely.

ART. 20. No change.

COMMENT.—For reasons heretofore stated under article 11 the board is not in accord with the proposal to modify this article, which is contained in article 25 of the Chamberlain bill.

PROPOSED LAW.

"ART. 21. REFUSAL *or Failure* TO PLEAD.—When an accused arraigned before a court-martial [from obstinacy and deliberate design stands mute] *fails or refuses to plead*, or answers foreign to the purpose, *or after a plea of guilty makes a statement inconsistent with the plea, or makes a plea of guilty improvidently or through lack of understanding of its meaning and effect*, the court *shall enter a plea of not guilty and shall thereupon proceed accordingly* [may proceed to trial and judgment as if he had pleaded not guilty.]"

EXISTING LAW.

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty."

COMMENT.—The board has adopted in its proposed article 21 the substance of article 26 of the Chamberlain bill. This accords with the existing practice.

ART. 22. No change.

COMMENT.—The changes proposed by the Chamberlain bill are set forth in article 27 of that bill. These changes actually constitute the practice at the present time under existing rules of procedure. The board has carefully considered the proposal to constitute these or similar rules of procedure organic law by including them as part of article 22, but believes that details of this character do not properly belong in the statute. The existing article 22 adequately furnishes the basis for rules which conform in practice to what is prescribed in article 27 of the Chamberlain bill.

ART. 23. No change.

No comment.

PROPOSED LAW.

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, *or before any officer conducting an investigation*, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, *or be-*

EXISTING LAW.

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any

fore an officer conducting an investigation, shall be compelled to incriminate himself or to answer any *question* [questions] *the answer to* which may tend to incriminate [or degrade] him, *or to answer any question not material to the issue when such answer might tend to degrade him.*"	questions which may tend to incriminate or degrade him."

COMMENT.—The board has adopted the changes proposed in article 29 of the Chamberlain bill with slight changes in the language.

ARTS. 25, 26, and 27. No change.

COMMENT.—The board does not concur in article 30 of the Chamberlain bill, believing that the existing articles 25, 26, and 27 upon the same subject are more reasonable and better adapted to serve the ends of justice.

ART. 28. No change.

ART. 29. No change. (See Comment under article 54.)

ART. 30. No change.

PROPOSED LAW.	EXISTING LAW.
"ART. 31. *Method* [ORDER] OF VOTING.—[Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank.] *Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. In the absence of objections by members of the court the president may rule in open court upon interlocutory questions, other than challenges, arising during the proceedings, provided that if any member object to such ruling the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank.*"	"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank."

COMMENT.—The object of the change proposed in article 31 is chiefly to remove all danger of junior members being influenced in their vote upon material questions by the presence of their superior officers or by the opinion held by their seniors, who may have indicated opposite views. This suggestion has been made by a number of officers as tending to secure the untrammeled vote of every member according to his conscience and without any undue influence which might arise under the open ballot heretofore existing. The other change providing for rulings in open court has as its object the saving of time. It is perfectly well known that many questions often quite unimportant and easily determined by common consent in open court are under present usage decided in closed court, with much loss of time and no possible good gained. The endeavor has been to so word the article as to save the right of every individual to his own opinion in every case, and he can, if he dissents from the proposed ruling of the president of the court, secure full discussion and a vote in closed court by simply requesting it.

PROPOSED LAW.	EXISTING LAW.
"ART. 32. CONTEMPTS.—A *military tribunal* [court-martial] may punish [at discretion, subject to the limitations contained in article fourteen,] *as for contempt* any person who uses	"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in article fourteen, any person who uses any menacing words, signs, or gestures in

any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided, That such punishment shall in no case exceed one month's confinement, or a fine of $100, or both.*"

its presence, or who disturbs its proceedings by any riot or disorder."

COMMENT.—The board has endeavored to make the punishment for contempt more definite and certain than in the existing article 32.

The term military tribunal was adopted in order to include in the power to punish for contempt military commissions and provost courts.

PROPOSED LAW.	EXISTING LAW.
"ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated by the *president and* judge advocate, by reason of *the* [his] death, disability, or absence *of either or both of them,* it shall be signed *by a member in lieu of the president and by an assistant judge advocate, if there be one, in lieu of the judge advocate; otherwise by another member of the court.* [by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.]"	"ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court."

COMMENT.—The purpose of this change is obvious. It provides for any case which can arise in the service.

ART. 34. No change.

ART. 35. No change.

COMMENT.—The change recommended in the Chamberlain bill is incident to the radical proposition set out in article 12 of that bill. This board has already recorded its total dissent from that proposition, and that same dissent extends to the new article 38 as proposed.

ART. 36. No change.

COMMENT.—See comment for article 35.

ART. 37. No change.

COMMENT.—The board believes the retention of the two provisos in the existing article to be manifestly desirable. These are dropped from article 40 of the Chamberlain bill, one for alleged bad working in practice, the other for incorporation elsewhere in the articles.

ART. 38. No change.

COMMENT.—The proposed amendment contained in the Chamberlain bill under its article 41 reads into the military system of courts the rules of evidence of a civil court. The adoption of this change would require continued study on the part of officers not only of the rules of such civil courts, but also of decisions of Federal district courts and of appellate Federal courts construing such rules. This proposition illustrates vividly the impracticability of suggestions made by officers and others who have had little or no experience with troops in the field, men whose military experience has been largely limited to permanent offices elaborately equipped with libraries and with abundant leisure to pursue the niceties of legal subtleties. The actual administration of military justice often takes place under conditions precluding reference to extensive libraries and a suggestion of that kind voices inexperience and a half-knowledge of the service.

ART. 39. No change.

PROPOSED LAW.

"ART. 40. AS TO NUMBER.—No person shall be tried a second time for the same offense: *Provided, That no procedure in which a conviction has been reached by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing authority, and, if there be one, the confirming authority, shall have taken final action upon the case.*"

EXISTING LAW.

"ART. 40. AS TO NUMBER.—No person shall be tried a second time for the same offense."

COMMENT.—The purpose of this addition to the old article 40 is to permit a rehearing only in cases where a conviction was had in the first instance but which for some material error could not be approved. It impliedly forbids any retrial when the first procedure resulted in a total acquittal.

PROPOSED LAW.

"ART. 41. CRUEL AND UNUSUAL PUNISHMENTS [CERTAIN KINDS] PROHIBITED.—*Cruel and unusual* punishments *of every kind, including* [by] flogging, [or by] branding, marking, or tattooing on the body, *are* [is] prohibited."

EXISTING LAW.

"ART. 41. CERTAIN KINDS PROHIBITED.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited."

COMMENT.—The board has adopted for the new article 41 the language of article 44 of the Chamberlain bill.

PROPOSED LAW.

"ART. 42. PLACES OF CONFINEMENT—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature *and so punishable by penitentiary confinement for more than one year* by some statute of the United States, or *by the* [at the common] law *of* [as the same exists in] the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is *more than* one year [or more]: *Provided,* That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further,* That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further,* That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be

EXISTING LAW.

"ART. 42. PLACES OF CONFINEMENT—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more: *Provided,* That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further,* That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further,* That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States disciplinary barracks or elsewhere as the Secretary of War or the reviewing

confined in the United States disciplinary barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary."

authority may direct, but not in a penitentiary."

COMMENT.—The draft herein submitted differs from the present article by making it read "more than one year" in lieu of "a year or more" and by inserting after the words "of a civil nature" the words "and so punishable by penitentiary confinement for more than one year." The word "common" has been dropped as a qualifying word for District of Columbia law.

PROPOSED LAW.

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of *three-fourths* [two-thirds] of the members of said court-martial, and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a *two-thirds vote* [majority] of the members present. *All other questions shall be determined by a majority vote.*"

EXISTING LAW.

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial, and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present."

COMMENT.—Those best informed through long experience in court-martial trials believe almost universally that very few innocent men are found guilty by military courts and sentenced to punishment. On the other hand, they believe that guilty men often, through one cause or another, succeed in escaping conviction and punishment. The board believes that it would be unwise materially to extend the opportunity of guilty men to escape conviction and punishment by reason of a desire to add precautions seemingly unnecessary to insure the rights of the innocent, as proposed in article 46 of the Chamberlain bill. In cases involving the death penalty, a requirement that three-fourths instead of two-thirds to convict and sentence is recommended. All other convictions and sentences by general and special court-martial shall be determined by a two-thirds vote.

NOTE.—Gen. Kernan dissents from the recommendation that all convictions and sentences, save those involving death, shall be reached only with the concurrence of two-thirds of the membership. The present system is old; in his observation it makes for justice in the very great majority of cases. Under it few innocent people are ever convicted, as testified by many of the experienced officers who have given this board their views. The change seems to him to lose sight of the fundamental distinction between court-martial trials, whose primary object is the paramount necessity of safeguarding the whole force, and the civil trial, where the reform of the individual is perhaps the controlling consideration and where failures of justice, through the escape of the guilty, are not fraught with such great possibilities of evil. Society at large can perhaps afford to have many of its criminals at large; the presence of such in a military force is relatively a much greater menace.

ART. 44. No change.

COMMENT.—The board recommends the retention of this article without change. In relation to the emotion of fear, pride is the greatest agency for its control. Physical fear may frequently be controlled by the greater fear of loss of reputation in home locality. The present article is an old one, and while seldom resorted to undoubtedly has served its purpose.

PROPOSED LAW.

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-

EXISTING LAW.

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-

martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe: *Provided, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the Federal civil law in like cases unless, in addition to the offenses so punishable under such law, the accused shall have been convicted at the same time of one or more purely military offenses.*"

martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe."

COMMENT.—The purpose of the change is obvious. Its justification is to be found in the principle that for like offenses like limitations of punishment should prevail.

ART. 46. No change.

ART. 47. No change.

ART. 48. No change.

ART. 49. No change.

ART. 50. No change.

PROPOSED LAW.

"*Art. 50½. Appeal and Retrial.—When the proceedings of a court-martial are held invalid or the findings or sentence are disapproved on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure which, in the opinion of the reviewing or confirming authority, has injuriously affected the substantial rights of the accused, that authority may direct the retrial of the accused before a court composed of officers who were not members of the original court, on those charges and specifications only of which the accused was found guilty: Provided, That upon such retrial no sentence shall be imposed in excess of, or more severe than, the original sentence.*

"*The record and proceedings of all general courts-martial, courts of inquiry, and military commissions shall without delay be forwarded to the Judge Advocate General of the Army, who shall receive, cause to be recorded, examine and revise such records and proceedings. When such examination or revision discloses error or other cause requiring action by the President under the provisions of these articles the Judge Advocate General shall prepare a memorandum of his views and recommendations in relation thereto and submit it with the record of the case to the Secretary of War for the action of the President.*

"*The President, as Commander in Chief, in any case tried by a general court-martial or military commission, may set aside, disapprove, or vacate any finding of guilty in whole or in part, or modify, vacate, or set aside any sentence in whole or in part, and*

EXISTING LAW.

direct the execution of the sentence as modified, and of such part thereof as has not been vacated or set aside. The President as Commander in Chief may set aside the entire proceedings in any case and, subject to the provision of this article, grant a new trial before such general court, military commission or special court as he may designate; or he may restore the accused to all rights as if no such trial had ever been held, and his necessary orders to this end shall be binding upon all departments and officers of the Government.

COMMENT.—This is a proposed new article. It provides the reviewing and confirming authorities with power to order a retrial in the event of material error, but prohibits any greater sentence than was imposed upon the original trial. In the opinion of the board, to direct a new trial in the interest of the accused is not double jeopardy within the constitutional prohibition, especially in view of the proposed amendment to article 40 defining a court-martial trial.

Next, the article provides for automatic appeal in all general court-martial cases and prescribes the duties of the Judge Advocate General of the Army in relation to such appeals. The board felt that in a matter so important the process of appeal should not be left to be fixed by order or rules of procedure subject to change from time to time without reference to Congress, but should be made mandatory in the article. Next, the President is vested with absolute authority to take any action which the record or the facts indicate to be necessary in order to render justice, including the vacating and setting aside of an order of dismissal or of dishonorable discharge. This latter is provided for in language which permits of no doubt as to the intention, for the President is authorized to restore the accused to all rights "as if no such trial had ever been held," and, further, "his necessary orders to this end shall be binding upon all departments and officers of the Government."

The proposed article gives the President more than his existing powers to exercise clemency and to vacate for material error of law. It is believed that the system herein provided for meets all reasonable suggestions of amendment and at the same time preserves unimpaired the disciplinary power of the Commander in Chief.

ART. 51. No change.

ART. 52. No change.

ART. 53. No change.

NOTE.—In the Chamberlain bill by its articles 51 and 52 provision is made for a civilian court of military appeals. The board has carefully considered this proposal and recommends against it for the reasons stated in the general report.

ART. 54. No change.

COMMENT.—The change proposed by article 53 of the Chamberlain bill would enable a soldier in time of war, who sought to avoid battle, to desert his organization in the face of the enemy and protect himself from the consequences of such desertion by fraudulently enlisting in an organization not serving at the front.

ART. 55. No change.

COMMENT.—See comment for article 54.

ARTS. 56 and 57. No change.

COMMENT.—The board recommends no change in articles 56 and 57. The language thereof not only provides for punishment of officers who violate the provisions of these articles, but emphasizes the character and importance of returns and muster rolls. As the Articles of War are required to be read once in every six months the detailed language is justified and serves a purpose.

ART. 58. No change.

COMMENT.—The board believes it wise to continue the existing article without change, in order to allow courts sufficient latitude to meet conditions and circumstances as they occur. For example: According to the proposed change contained in article 55 of the Chamberlain bill a soldier who deserts the Army two days before a declaration of war and in order to avoid military service in war could be sentenced for not more than two years' confinement, while his

comrade who deferred desertion for a few days, until after the declaration of war, could be sentenced to be punished by death or confinement for life, or for a fixed period. Furthermore, the board is of the opinion that the period of confinement for desertion bears a relation to the prescribed period of enlistment, which may change from time to time. For example: If the period of enlistment is for five years, every man who is dissatisfied with his lot may shortly after his enlistment desert, and after trial be sentenced to not more than two years' confinement, after which he is discharged, thereby terminating his connection with the military service three years in advance of the time fixed in his contract of enlistment. This may happen while other men, equally dissatisfied, but who do not desert, serve on throughout the full five-year period. The same comment would be applicable to a period of enlistment which consisted of three years of active service and three or more years in reserve.

ART. 59. No change.

ART. 60. No change.

ART. 61. No change.

COMMENT.—The proposed change in this article contained in article 58 of the Chamberlain bill is quite extraordinary. There exists already, in the limitations set out in Executive orders pursuant to article 45, ample protection for this class of offenders in times of peace. In war times it becomes, or may become, a deadly menace and this proposed article 58 speaks a total lack of appreciation of war conditions. The suggestion can not have the approval of officers who have had any extended experience in battle, or who are familiar with the past experience of armies in relation to this subject. The shirker who, knowing his company is to go into battle on the following day, absents himself therefrom without leave, and then makes a dishonest and of course fruitless effort to rejoin his company (which has in the meantime gone forward) is of the class which menaces not only the discipline of his command, but the success of the Army. No military offense in war is so contagious as the one of absence without leave. It calls for drastic action by the military authority at the very inception of military service, else it soon gets out of hand with results to others later on which would have been avoided had the subject been handled with sternness in the beginning. If the board were to recommend any change in this article, it would recommend the inclusion of the death sentence.

ART. 62. No change.

ART. 63. No change.

ART. 64. No change.

COMMENT.—The mind of an experienced officer will conceive many possibilities in relation to the changes in this article proposed by article 61 of the Chamberlain bill. These changes are believed to be radical in the extreme. Certainly they would place a premium on the avoidance of hazardous service and point out to soldiers who sought to avoid such service a happy and convenient method of avoiding death in action by committing an assault upon a superior officer and receiving a punishment of confinement for one year. The changes proposed place all assaults, whether committed against second lieutenant or the commander of the Army in the field, in the same class by limiting the punishment for all such cases to confinement of not more than one year.

ART. 65. No change.

COMMENT.—The changes proposed in article 63 of the Chamberlain bill eliminate threats of assault, attempts to assault, and disrespect to noncommissioned officers as military offenses under the article. The noncommissioned officer class is the backbone of the company, and if discipline is to exist their dignity and responsibility should be safeguarded against the strong arm methods of the unruly.

ART. 66. No change.

ART. 67. No change.

ART. 68. No change.

PROPOSED LAW.	EXISTING LAW.
"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—*Any person* [an officer] *subject to military law* charged with crime or with a serious offense under these articles shall be placed *in confinement or* in arrest [by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same	"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious

authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense may be placed in arrest.], *as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement.* [Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest.] Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer *or cadet* who breaks his arrest or who escapes from confinement, *whether before or after trial and* before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, *whether before or after trial and* before he is set at liberty by proper authority, shall be punished as a court-martial may direct."

offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct."

COMMENT.—The chief object of the changes proposed in article 69 is to lessen resort to confinement in cases where restraint is not a necessity either to prevent the escape of the accused or to restrain him from further violence or for other like reasons. Further modification is intended to clear up any possible doubt as to whether the fact of trial having taken place makes any substantial difference in the offense of breach of arrest or escape from confinement.

PROPOSED LAW.

ART. 70. *Arrest and confinement pending trial by court-martial.*—[INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.] When any person *subject to military law* is *arrested or confined* [put in arrest] for the purpose of trial [except at remote military posts or stations] the officer by whose order *this is done* [he is arrested] shall see that a copy of the charges on which *the arrest or confinement is based* [he is to be tried] is served upon *the accused party* [him] within eight days after his arrest *or confinement, and it is the duty of the officer ordering such arrest or confinement to expedite, in so far as in him lies, the speedy trial of the case.* [and that he is brought to trial within 10 days thereafter, unless the neces-

EXISTING LAW.

"ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within 10 days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within 30 days after the expiration of said 10 days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this

sities of the service prevent such trial;] *It is the like duty of all other officers having to do with the trial of the case to expedite it in every practicable way.* [and then he shall be brought to trial within 30 days after the expiration of said 10 days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease.] *If the trial can not, for good and sufficient reasons, be begun within a period of 30 days from the date of arrest or confinement the immediate commanding officer, unless otherwise ordered by superior authority, shall release the accused from arrest or confinement.* But persons released from arrest or *confinement* under the provision of this article may be tried, whenever the exigencies of the service shall permit, within 12 months after such release from arrest: *Provided,* That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him: *Provided further, That the trial judge advocate shall serve or cause to be served upon the accused a copy of the charges upon which trial is to be had and a statement of such service shall be entered upon the record of the case showing the date thereof.*"

article, may be tried, whenever the exigencies of the service shall permit, within 12 months after such release from arrest: *Provided,* That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

COMMENT.—The present article 70 calls upon local commanders to do the impossible. The changes proposed are intended to make the law conform to good practice which has never been possible under old article 70.

ART. 71. No change.

ART. 72. No change.

ART. 73. No change.

ART. 74. No change.

COMMENT.—In the Chamberlain bill article 73, which corresponds to existing article 74, changes the punishment from dismissal *or* other punishment to dismissal *and* other punishment, thus making dismissal mandatory for this offense.

PROPOSED LAW.

"ART. 75. MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up *or by any misconduct, disobedience or neglect endangers the safety of* any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

EXISTING LAW.

"ART. 75. MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

COMMENT.—The change is merely to cover conduct not now included but evidently necessary if this subject matter is to be comprehensively treated.

PROPOSED LAW.

"ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—*Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.* [If any commander of any garrison, fort, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.] "

EXISTING LAW.

"ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct."

COMMENT.—The change recommended includes an attempt as well as a successful effort to commit this grave military crime and extends the punishment to all persons subject to military law.

ART. 77. No change.
ART. 78. No change.
ART. 79. No change.
ART. 80. No change.

PROPOSED LAW.

"ART. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves *or attempts to relieve* the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

EXISTING LAW.

"ART. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

COMMENT.—The change recommended incorporates an attempt as well as a successful effort and makes it punishable.

ART. 82. No change.
ART. 83. No change.
ART. 84. No change.
ART. 85. No change.
ART. 86. No change.
ART. 87. No change.
ART. 88. No change.
ART. 89. No change.
ART. 90. No change.
ART. 91. No change.
ART. 92. No change.
ART. 93. No change.
ART. 94. No change.

PROPOSED LAW.

"ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service *and shall suffer such additional punishment as a court-martial may direct.*"

EXISTING LAW.

"ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

COMMENT.—Obviously the conduct unbecoming an officer and gentleman may be of a character to demand not merely expulsion from the service but grave penalties over and above that.

ART. 96. No change.
ART. 97. No change.
ART. 98. No change.
ART. 99. No change.
ART. 100. No change.
ART. 101. No change.
ART. 102. No change.
ART. 103. No change.

PROPOSED LAW.

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses [not denied by the accused] impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard; *except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month.* A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; 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."

EXISTING LAW.

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; 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."

COMMENT.—The existing system lacks any summary and effective method of punishing officers for delinquencies and minor offenses. In war the vast majority of company officers will always be composed of men from civil life

with industrial conceptions of discipline. They are in the active army for the war only. The summary method of stimulating attention to duty and thoroughness of work is by fine. It is also proposed to eliminate the existing clause restricting the operation of this section to offenses "not denied by the accused." No reason is perceived why this summary discipline should be restricted as in the existing article, particularly as the right of appeal is preserved.

PROPOSED LAW.

"ART. 105. INJURIES TO PERSON *or* [OF] PROPERTY—REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property *or person* of *anybody* [of any person] or that his property has been wrongfully taken by persons subject to military law, *the commanding officer may convene* [such complaint shall be investigated by] a board consisting of any number of officers from one to three *which shall investigate the complaint and which,* [which board shall be convened by the commanding officer and shall have] for the purpose of such investigation, *shall have* power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board."

EXISTING LAW.

"ART. 105. INJURIES TO PERSON OF PROPERTY — REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person, or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board."

COMMENT.—The proposed change leaves the appointment of a board to the discretion of the commanding officer and it further authorizes the assessment of damages to make good injuries to persons.

NOTE.—Maj. Gen. O'Ryan dissents from the majority opinion of the board that article 105 should not be modified. He proposes the following amendment to be added at the end of the present article:

"*But no damage against any officer, soldier, or organization shall be assessed under the provisions of this article unless notice in writing of the proceedings has been given such officer, soldier, or organization and an opportunity afforded to be heard in defense before the board; and in all cases of assessment the record of proceedings shall show the character of the notice given, together with*

the testimony offered, or the fact that after notice there was refusal to offer such testimony."

This article furnishes a convenient and what may be termed a rough-and-ready method of doing justice as between civilian claimants for damages and soldiers and organizations charged with responsibility therefor. But because the powers conveyed are so radical and because the rights of soldiers and units appear to be in no way safeguarded, the article not only opens the way to abuse but, in fact, has resulted in gross abuse. Its loose references to "the commanding officer" and the failure to provide for a "day in court" for those who become the victims of its provisions, has resulted in boards making assessments against soldiers and units which not only had no opportunity to offer defense or explanation but did not even know of the existence of the board until notice that they had been assessed was received. Cases have occurred where units, having left a camp in the United States for foreign service, were so assessed by boards appointed by "the commanding officer" of the home camp after the units had left the jurisdiction, and this without any opportunity to be heard.

It would further seem that the provision in relation to the assessment of proportional shares of damages against individual members shown to have been present with a unit at the time the damages were inflicted has no practical application to a unit larger than a company. Yet it was attempted to be applied in this war to regiments and even larger units. Not only this, but such attempts were made months after the alleged acts which caused the damage, and at a time when many of the original members of the unit had been killed, wounded, or transferred, and many new officers and men had joined, and when a determination of the men who had constituted the personnel of the command at the time the damage claimed was suffered, would have necessitated an exhaustive inquiry based on former muster rolls. Not only this, but after the listing of such names there remained the mathematical computations necessary to apportion the regimental share of the alleged damage among the "individual members thereof," so listed in order that such several sums might be assessed as "stoppages." The whole procedure is often impracticable of enforcement as presented and results in efforts to force payment from the organization or its officers by duress. Under such circumstances certainly the latter should have their "day in court," which the proposed amendment provides for.

I think Congress should make provision for prompt payment of damages for honest losses, looking to soldiers or units for reimbursement as a result of some fair method of investigation and determination. In any event, as a preventive against obnoxious abuse, I recommend the inclusion of the amendment offered.

ART. 106. No change.
ART. 107. No change.
ART. 108. No change.
ART. 109. No change.
ART. 110. No change.
ART. 111. No change.

PROPOSED LAW.	EXISTING LAW.
"ART. 112. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors, *and to pay the undisputed local creditors of decedent, in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts*	"ART. 112. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after the collection of such effects said summary court shall transmit such effects, and any money collected, through the Quartermaster Department, at Government expense, to the

therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects, any money collected, through the Quartermaster Department at Government expense to the widow or legal representative of the deceased, if such be found by said court, or to his son, daughter, father: *Provided, The father has not abandoned the support of his family,* mother, brother, sister, *or the next of kin* in the order named, if such be found by said court, or the beneficiary named *in the will* [by] *of* the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to, or readily ascertainable by, said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than 30 days after the death of the deceased, all effects of the deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash, said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia, where sent from the home for treatment."

ART. 113. No change.
ART. 114. No change.
ART. 115. No change.
ART. 116. No change.
ART. 117. No change.
ART. 118. No change.

widow or legal representative of the deceased, if such be found by said court, or to his son, daughter, father, mother, brother, or sister, in the order named, if such be found by said court, or to the beneficiary named by the deceased, if such be found by said court, and such court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to, or readily ascertainable by, said court, and the court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than 30 days after the death of the deceased, all effects of the deceased, except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers and enlisted men of the Army.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia, where sent from the home for treatment."

PROPOSED LAW.

"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade *but with different dates of commission shall rank and have precedence accordingly, the elder date giving seniority; if of the same grade and date of commission they* shall rank and have precedence in the following order, [*without regard to date of rank or* commission as between officers of different classes,] namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions."

EXISTING LAW.

"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purpose of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions."

COMMENT.—This section was amended in its present form at the time of the recent revision. The effect was to give preference not only to officers of the Regular Army in each grade, over those of the same grade appointed at the same time from sources other than the Regular Army, but to give seniority and preference to all other regular officers who at any subsequent time might be promoted to an advanced grade over all the nonregular officers already in such advanced grade. Under this article the nonregular officer during this war descended in his lineal rank as he gained in experience and length of service due to the appointment with the expansion of the Army, of additional regular officers in the grade. Officers of the Army not holding Regular Army commissions found themselves suddenly junior to officers who had been their subordinates, for the latter officers upon promotion to the higher grade were, by virtue of this provision, jumped over all in the advanced grade who were not originally of the Regular Army.

The provision criticized was one of the causes which rendered abortive the attempt to create during the war one army dominated by one-army spirit.

ART. 120. No change.

ART. 121. No change.

[250.03, A. G. O.]

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