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INVESTIGATIONS OF THE NATIONAL WAR EFFORT

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OF THE

COMMITTEE ON MILITARY AFFAIRS, HOUSE OF REPRESENTATIVES

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A RESOLUTION AUTHORIZING THE COMMITTEE ON MILITARY AFFAIRS TO STUDY THE PROGRESS OF THE NATIONAL WAR EFFORT

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I. Present Importance of the Problem

It is very important for American citizens to be convinced that when they serve in the United States Army they will be ruled by a system of justice which is not less scrupulous and fair than that which prevails in civil life. We have just finished a war in which millions of civilians were drafted into the military service, and we are confronting a decision as to whether there shall not be perpetuated a program of involuntary service for all young men. The good will of the former group toward the Army in which they served, and the acceptability of the universal service idea to the Nation at large, are bound to be conditioned in part by prevailing conceptions as to what kind of treatment the citizen gets when he finds himself in the armed forces. No small part of this treatment is the discipline imposed by the Articles of War and the court-martial system which rests upon those articles as its foundation.

Ordinarily, in times of peace, very little attention has been given to the whole matter. This is, in the first place, because in periods of peace our military forces have been very small, and court-martial policies have affected very few people. Secondly, because enlistment in peacetime has always been voluntary, and anyone who entered the service knew he was freely accepting whatever discipline the Army imposed. Perhaps the most important point in this connection, however, in peace or in wartime, is the fact that those who might most feel themselves to have been subjected to cruelty and injustice are precisely the ones who are least in a position to say anything about it. If a man has been condemned by court martial, everything is against him. For him to complain of unjust treatment is also to call attention to the fact that he is a condemned person. The publicity involved may bring him social degradation and loss of livelihood; naturally he prefers oblivion. If he does speak, anything he says is discounted on the old principle that "the thief never speaks well of the judge who hangs him." If there have been miscarriages of justice in courts martial, the victims are almost necessarily inarticulate and their friends and relatives can do little but mutter. This makes it all the more imperative, morally speaking, for Congress and the War Department to seek the greatest possible assurance that what is officially called military justice be justice indeed, and that it be adjusted, if adjustments prove necessary, to conform as closely as possible to the standards of individual rights which are established as part of our civil heritage in a democratic state.

It is noteworthy that the only times when serious public attention has been given to court-martial matters have been periods when we have been engaged in wars involving large numbers of men. In 1863, for example, Congress abolished flogging and branding in the

Army. At that time flogging had actually died out, but deserters were still branded with a "D" on the hip. In 1916, when the United States was faced with possible war, the Articles of War were revised, though that revision was largely a matter of rearrangement without appreciable change of substance. After the First World War came to a close, there was much public discussion and congressional consideration of abuses which war conditions had brought to light, and which got extra attention because it was not a condemned victim but the Acting Judge Advocate General of the Army who led the criticisms. As a result, the Army Reorganization Act of 1920 included very considerable reforms. No substantial changes have been made since.

The present time, which concludes another period during which a considerable fraction of all American citizens have been subject to military law, is the appropriate time to inquire whether further changes are needed. The possibility that universal service may become a public policy after treaties of peace have been concluded, makes examination of the court-martial system particularly opportune.

II. Responsibility of Congress

It should be understood that Army courts martial are not courts of the United States exercising the judicial power of the United States under article III of the Constitution. Instead, they exist constitutionally under the authority of the Congress. This authority is found in article I, section 8, which declares:

> The Congress shall have Power * * * to provide for the common Defense. * * * To raise and support Armies. * * * To make Rules for the Government and Regulation of the land and naval Forces.

The Supreme Court declared in *Dynes* v. *Hoover* (20 How. 79 U. S. 1857):

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.

In the exercise of the power thus granted, Congress has enacted the Articles of War, and authorized the President, as Commander in Chief of the armed forces, to exercise certain functions in connection with them. By the same authority, Congress has altered the Articles of War from time to time.

It is clear from the foregoing that constitutional responsibility for military justice is lodged not in the War Department nor in the President, but in the Congress of the United States.

It may be added that Congress has a responsibility exceeding its legal responsibility in this connection. In many other matters affecting the efficiency and welfare of the armed forces, the departments concerned may be expected to be alert to their needs, and to take the initiative in presenting to the Congress measures for expansion or improvement in their respective fields; but this cannot be expected in the field of military justice. The rights of citizens in our future forces will have to be protected by a watchful Congress or they may not be protected.

Such fundamental changes as providing that an accused man should be entitled to counsel when tried and that a person shall not be tried any number of times for the same offense were not accepted by the Army until public protests against Army justice after the First World War made it necessary. Army justice had proceeded for more than 140 years without these provisions. The Army began instituting them by regulations in 1919, and they were enacted into law by Congress in 1920.

III. Statistics

The full statistics of military justice during the war period have not been compiled due, it is said, to shortage of personnel; nor have the annual reports of the Judge Advocate General been made public for military reasons. The last annual figures to be published are those for the last full peacetime year, 1940, and pertain to the Regular Army. There were then 1,851 general court-martial trials, which resulted in 1,776 convictions and 75 acquittals. Of the 1,776 persons convicted, 1,684 received sentences of confinement. Also, in 1940, there were 4,406 special court-martial trials, with 4,185 convictions, and 10,134 summary court-martial trials, with 9,993 convictions. The average of acquittals in general courts martial was approximately 4 percent.

The only available exact figures for the years 1942, 1943, 1944, and 1945 pertain to general court-martial trials held in the United States. There were 63,876 such trials, resulting in 60,110 convictions and 3,766 acquittals. The percentage of those acquitted was 5.89. The percentage of acquittals in general court-martial cases in the First World War was 20.2.

It is estimated that overseas there have been between 25,000 and 30,000 general court-martial trials. No analysis of relative acquittals and convictions in this estimated number is available.

As of November 30, 1945, the Army held 33,741 general prisoners in confinement, including an estimated 11,000 overseas. Those in the United States were distributed as follows: 13,984 in disciplinary barracks, 5,200 in rehabilitation centers, 2,683 in Federal prisons, and 874 in guardhouses. Prior to November 30, 1945, prisoners to the number of 17,578 had been restored to the colors from rehabilitation centers and disciplinary barracks. During the period December 7, 1941, to February 22, 1946, 141 death sentences adjudged by Army courts martial were carried into execution; 71 for murder, 51 for rape, 18 for murder and rape, 1 for desertion.

IV. History of the Articles of War

Our Articles of War were taken directly from the British Articles of War at the time of the American Revolution. The second Continental Congress, on June 14, 1775, appointed a committee to "prepare rules and regulations for the government of the Army." George Washington was the first chairman, but he was soon called away to take command of the new Army and John Adams served in his stead. As Adams related in later years, the committee felt that the freedom-loving spirit of Americans would not take kindly to anything restrictive and that whatever they might recommend would probably be thrown out anyway; so it was decided to go the limit, report the severe British code in toto, and see what would happen. The Congress was too busy just then organizing the Revolution to give any great

attention to the matter, and without much consideration adopted the report as presented, to the genuine astonishment of those who presented it. The result was that the British articles as they stood in 1765 were taken over bodily. Some 30 years later the British substantially revised their code and have been constantly amending it ever since. The Army Act in which they are embodied is reconsidered every year in Parliament. Our articles have remained fundamentally unchanged, although modifications were made in 1920 which will be discussed below.

The story, however, goes much further back than 1775. The British articles of that date had not been greatly altered during preceding centuries. They derived chiefly from the articles (published in English in 1621) of Gustavus Adolphus, King of Sweden, in whose armies many Englishmen served. These in turn were derived from Roman military laws, codified in the later days of the Empire but embodying military practice from earlier times. Austerities had indeed been trimmed down as the centuries advanced. Roman practices of flogging unruly soldiers to death, or beheading them, or cutting off their noses for lesser offenses disappeared in the course of time. Familiar terms, however, are to be found in the Roman military law—fines, reduction in rank, dishonorable discharge. There are familiar offenses too—fraudulent enlistment, desertion, straggling, disobedience of orders, cowardice in the face of the enemy, larceny, rape. By and large, there is truth in the statement often made, that the Articles of War adopted in 1776 by the Continental Congress were virtually a transcript of the ancient Roman Articles of War.

This long history of the Articles of War has been gloried in by enthusiastic military writers, some of whom seem to imply that since they "inspired a discipline that achieved the conquest of the world" in Roman days, they can do the same thing for us. Apart from the question whether the victories of Roman generals or of Gustavus Adolphus are to be credited entirely to their military law, it might be pointed out that these rules have governed just about as many defeated as victorious armies. Undoubtedly the Articles of War were more thoroughly enforced in the British armies of 1776 (which lost the war) than by the Continentals (who won it).

The American Articles of War were not materially altered until the close of the First World War. By that time millions of Americans who had never before heard of it had become conscious of the system of justice practiced in the Army. Many were bitter about it. Possibly nothing much would have come of the discussion which then arose had not the Acting Judge Advocate General, Brig. Gen. S. T. Ansell, strikingly led the attack. A bill, the Chamberlain bill, was introduced in 1919, involving very considerable changes in procedure. Extended hearings on this bill took place. Meanwhile, the War Department had instituted a study of its own under the Kiernan committee.

The Chamberlain bill was described by one of its adversaries as aiming—

> to revolutionize our system of military justice by putting enlisted men on courts martial, separating the administration of military justice from command in the Army, providing for a civilian appellate court with all the complicated machinery of the ordinary tribunal, and, in short, changing the Articles of War from an instrument for maintaining discipline into a prize ring to display the prowess of the "guardhouse lawyer."

Controversy over the court-martial question became heated, and sometimes highly personal. In the end the Chamberlain bill was not passed, but the Army Reorganization Act of 1920 embodied sufficient changes in the Articles of War to constitute a definite reform, involving a greater measure of justice and improvements in administrative efficiency.

The most notable changes are listed herewith:

(*a*) A "law member" is required to sit on each general court, either a military lawyer from the Judge Advocate General's Department, or some other officer regarded as specially qualified (A. W. 8).

(*b*) Defense counsel is appointed for all general and special courts by the convening authority, but the accused has the right to counsel of his own selection, civilian counsel if he so provides, or military counsel if reasonably available. Previously, by a strange arrangement, the trial judge advocate, who is the prosecutor, was expected to advise the accused of his legal rights, if he did not have other counsel (A. W. 17).

(*c*) The accused is given the right of challenges, including one peremptory challenge (A. W. 18).

(*d*) The definition of "desertion" is broadened to include any person subject to military law who quits his organization or place of duty with intent to avoid hazardous duty or shirk important service. This is one of the few changes which might be regarded as adding to the severity of the code. In a more reasonable point of view it may be taken as a clarification of what has always been a grave military offense (A. W. 28).

(*e*) More careful procedure with regard to voting by members of the court on challenges, findings, and sentences is laid down. Secret written ballot is required, which was not the case up to 1920 (A. W. 31).

(*f*) Rules governing evidence are required to conform as far as practicable to those generally recognized in criminal cases in the district courts of the United States (A. W. 38).

(*g*) No reviewing or confirming authority may return a record of trial for reconsideration of an acquittal, or of a finding of not guilty of any specification, or of a sentence with a view to increasing its severity. It is difficult to overstate the importance of this provision which is probably the most drastic change in the system since 1776 (A. W. 40).

(*h*) Persons convicted for an offense for which the death penalty is mandatory may be convicted only by unanimous vote of the court (previously by a two-thirds vote), and sentences of confinement for more than 10 years only by a three-fourths vote (previously a majority vote) (A. W. 43).

(*i*) Penitentiary sentences in time of peace may not exceed the limits provided in United States statutes or in statutes of the District of Columbia, for the same offense (A. W. 45). With some exceptions penitentiary sentences may be given only for offenses of a civil nature so punishable by United States or District of Columbia (A. W. 42).

(*j*) The convening authority, prior to whose action no sentence can be carried into execution, is required to refer the record of trial to his staff judge advocate or to the Judge Advocate General,

before approving or disapproving. This means the taking of legal opinion and constitutes a mild brake on arbitrary action by a commanding officer (A. W. 46).

(*k*) In the most important classes of cases, a system of automatic review is set up in the office of the Judge Advocate General. No authority may order the execution of a sentence involving death, dismissal, dishonorable discharge not suspended, or confinement in a penitentiary unless the Board of Review shall have held the record of trial legally sufficient to support the sentence. If the Board of Review, with the concurrence of the Judge Advocate General, finds the record legally insufficient to support the findings or sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, the findings and sentence shall be vacated in whole or in part, and the record transmitted for a rehearing or other proper action. If the board and the Judge Advocate General disagree, both opinions are forwarded to the Secretary of War for the action of the President. When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not been duly ordered, he may authorize or direct a rehearing before a court composed of officers other than those who served on the first court. The accused may not be tried again for any offense of which he was found not guilty in the first instance, nor can a more severe sentence than the original sentence be ordered.

In the less serious but more numerous cases not covered by the above, the records of trial by general court martial are to be examined by the office of the Judge Advocate General, and if found legally insufficient are to be referred to the Board of Review for action similar to that described in the paragraph above (A. W. 50½).

(*l*) All charges and specifications must be signed under oath (A. W. 70).

(*m*) No charges will be referred to trial until after a thorough and impartial investigation of them, and a report made by the investigating officer as to the reasonable probability of the truth of the matter, with the recommendation as to what disposition should be made of the case in the interests of justice and discipline. Full opportunity is to be given the accused to cross-examine witnesses against him, and to present witnesses on his own behalf. It is claimed that this provision fills the place of a grand jury in civil justice (A. W. 70).

(*n*) Before directing trial by general court martial, the appointing authority must refer the case to his staff judge advocate for advice (A. W. 70).

(*o*) Provisions are made against delay. Any officer responsible for unnecessary delay shall be punished as court martial may direct (A. W. 70).

The Manual for Courts Martial, United States Army, embodies the whole procedure of the court-martial system as built up by Executive order based on the Articles of War. It has practically the force of law. After the Army Reorganization Act of 1920, a period of practice and study was given to their operations, preparing the way for a new edition of the manual. This was issued in 1928 by order of President Coolidge. Executive orders amending it in some particulars have

been issued during the war years just concluded. Probably the most striking changes have been those in the Table of Maximum Punishments. The limitations on punishment for absence without leave, for example, which formerly stood at confinement at hard labor for 3 days for each day absent and forfeiture of pay for 2 days for each day absent, have been entirely removed. Sentences of 5 years for this offense have not been uncommon.

V. The System of Courts Martial

At this point a brief description of the system of courts martial in its broad outline is opportune. What follows omits many details and all but the most important qualifications applying to general statements.

There are three grades of courts martial: The summary court, the special court, and the general court.

The summary court martial is a simple one-man tribunal, an officer detailed for the purpose, usually in addition to his other duties, by the regimental commander. There is no prosecutor and usually no defense counsel. Charges are ordinarily brought by the company commander of the accused. The charges and specifications are read to the accused; he pleads guilty or not guilty; witnesses are examined; the court-martial officer announces his finding and his sentence, and writes them in the form of an endorsement on the charge sheet. The maximum of punishment which a summary court may inflict is restriction within limits for not more than 3 months, detention or forfeiture of pay for not more than 1 month, confinement for 1 month or less, or a combination of these. Officers may not be tried by summary court. Naturally, the vast majority of Army trials are in summary courts martial, and these may be regarded as the base of the Army's disciplinary system. Under article of war 104, however, even these formalities are not necessary for disciplinary punishments of a minor character. Reprimand, withholding of privileges for 1 week, extra fatigue duty and restriction, or hard labor without confinement not exceeding 1 week, may be imposed by a company commander without summary-court proceedings.

The second grade of courts martial is the special court. If the charges are of such gravity that a summary court cannot impose adequate punishment, but not so grave as to require trial by a general court martial, the regimental commander may refer them to a special court martial. The special court is composed of three or more officers, and may impose a maximum sentence of two-thirds of the offender's pay for 6 months and confinement for 6 months. A full stenographic report is not kept, but a brief record of the proceedings is drawn up containing summaries of important testimony. No one above the rank of warrant officer may be tried by special court martial. There is a trial judge advocate (i. e., prosecutor) and a defense counsel. As in other courts martial, the findings and sentence must be approved by the officer appointing it, before the trial can be regarded as complete.

The highest military tribunal is the general court martial. It may impose dishonorable discharge of an enlisted man, dismissal of an officer, life imprisonment, or death. After charges have been preferred on the sworn statement of, usually, a company commander or comparable officer, they are presented to the regimental commander or

comparable officer whom we will refer to hereafter as the colonel. The colonel must conduct an investigation. While he may do so in person, he ordinarily details an investigating officer whose duty it is to examine the prima facie case thoroughly and impartially. He examines witnesses, including those whom the accused asks to be called. The accused has the right to be present at the investigation, cross-examine witnesses, make personal statements.

The investigating officer may report that the charges are in proper form, that the evidence makes out a prima facie case, and that the matter is of sufficient gravity to justify a trial by a general court martial; or he may recommend that proceedings be dropped. If the colonel does not like the findings of the investigating officer, he can order a new investigation, appointing for the purpose another investigating officer. If, however, he approves a report recommending trial, he sends the papers on to the officer having court-martial jurisdiction in that command, a division commander or comparable officer, whom we will call the general.

The general is required to submit the records to his staff judge advocate, who is a military lawyer from the Judge Advocate General's Department, for consideration and advice. The general does not, however, have to follow the advice given.

If the general decides to proceed with the case, he appoints a general court consisting of five or more officers. The senior in rank is termed the "president." He or another is designated "law member," and is especially charged with advising the court on legal questions which may arise in the course of the trial; his rulings are final on questions of the admissibility of evidence. A trial judge advocate is appointed who serves as prosecutor, and a defense counsel, both of whom may have assistants. The accused has the right to ask for counsel of his own choosing. The latter, however, must not only be reasonably available, but must have the consent of his superiors to serve. Accused may also have civilian counsel at his own expense.

The seventieth article of war directs that charges be forwarded within 8 days after the accused is arrested or confined; that a copy be served upon him; and that in time of peace the accused may not be brought to trial within 5 days subsequent to such service of the charges. The trial is reported stenographically, and the accused may ask for a copy of the record of trial. Only the bare record is given him, the investigating officer's report, with other supporting papers such as documentary exhibits, which may have had an important bearing on the outcome of the trial and which may be important in future consideration of the case, being withheld. Prosecution and defense may challenge for cause, and each side has one peremptory challenge. Charges are brought under one or more of the Articles of War. Specifications are named under each charge.

Depositions may be entered as evidence, except for the prosecution in capital cases. The rules of evidence are, in general, those applicable in district courts of the United States.

The court acts as both judge and jury. While the sessions are legally open to the public, the public is usually unrepresented. The court meets in closed sessions when discussing the case and voting, separate votes being taken on each specification and charge. The court can find the accused guilty of a lesser offense within the offense charged. Voting is by secret written ballot. A unanimous vote is

required for a conviction on the charge of spying, under the eighty-second article of war, which is the only offense for which the death penalty is mandatory.

For all other convictions, or "findings" as they are called, only a two-thirds vote is required. This affords less protection to the accused than the unanimous vote of a 12-man jury in civil courts. On the other hand, less than a two-thirds vote for conviction results in complete acquittal.

So far as sentences, as distinct from findings, are concerned, a unanimous vote is required for a death sentence. The accused can be sentenced for 10 years to life by a three-fourths vote; other sentences require a two-thirds vote.

Before passing upon the sentence, the court hears a summary of the military record of the convicted man. It is said to be a common practice, though not required, for each member of the court to write on a paper the sentence he believes proper. These are read aloud by the president in inverse order of severity, and a vote taken upon each until one is reached to which a sufficient number of members agree. Most of the 43 punitive articles have no specific limitations upon the sentences which may be imposed for particular offenses, simply prescribing "such punishment as a court martial may direct," a fact which gives wide latitude to the power of the court in this respect, very different from that of civil courts, and is productive of wide discrepancies in punishments awarded for comparable offenses. On the other hand, the President of the United States, through the Manual for Courts Martial, prescribes maximum limits for most offenses, which are said to correspond to those of the United States Criminal Code. Some of these limitations were suspended during the Second World War. Tables of maximum punishment apply only to enlisted men. Officers are entirely unprotected in this respect.

The signed documents pertaining to the case, including the stenographic record of the trial, are next forwarded to the general. He is required to send the papers to his staff judge advocate's office for written recommendation, but does not have to follow the recommendation. Except when there is an acquittal, the trial is not regarded as complete until the general has acted. The general may return the record for correction of minor or clerical irregularities. He may approve a finding of guilty or may approve only so much of a finding of guilty as involves a lesser included offense. He may wholly disapprove a finding of guilty. He may approve or disapprove the whole of a sentence, or he may reduce it. If a reversible error has been committed, he may order a new trial. He may not disapprove an acquittal nor may he increase the severity of a sentence.

The general also designates the place of confinement. Brief sentences are usually served at the post or camp where the trial took place; those of greater length at a rehabilitation center, a disciplinary barracks, or a penitentiary. The general frequently suspends the execution of that part of a sentence which calls for dishonorable discharge until after confinement has been served. This may enable an offender to be restored to the colors, if his conduct has been satisfactory during the period of confinement.

This is not the end of the matter. Records of the less grave cases, which are of course the more numerous cases, are now sent to the

Military Justice Division in the office of the Judge Advocate General in Washington, where they are read as though an objection had been made and an exception taken as to the admission of questionable evidence or doubtful rulings. If the case passes this final round, it is considered closed. If not, it is referred to the Board of Review in the office of the Judge Advocate General, which board submits a written report. If the Board of Review considers that the substantial rights of the accused have been adversely affected, the case goes to the Secretary of War, whose decision is final. Graver cases are automatically referred to the Board of Review without previous scrutiny by the Military Justice Division. The board considers only questions of law.

A further step is required in the case of some graver sentences. Sentences of death, dismissal of an officer, any sentence respecting a general officer, must be confirmed by the President. There are important exceptions to this, however, in time of war.

Finally, there is a clemency system. Application may be made by or on behalf of a general prisoner, i. e., one whose sentence involves dismissal or dishonorable discharge. If the prisoner's offense is not considered indicative of a fixed bad character, and his prison record is good, commanding generals of service commands and the Secretary of War have authority to restore a prisoner to duty or release him on home parole.

There is no provision in the system for completely reversing a conviction later found to be entirely wrong. A Presidential pardon can sometimes be invoked, but this does not restore the status quo ante, nor does it remove the stain of an unjust conviction.

VI. A System of Justice or a System of Discipline?

Neither the theoretical nor the practical problems which arise in connection with courts martial can be understood unless it is realized that there is an unresolved question underlying the whole system. Is it the purpose of the system to administer true and exact justice or to secure by punishment or the threat of punishment the relationship of command and obedience which is essential for a military organization? Is military justice something parallel in the military environment to civil justice in civil environment, or is it a function of command and an instrument for enforcing discipline? There is apt to be a fundamental difference in point of view here, between the citizen and the professional Army officer.

Historically, the professional Army officer is on solid ground. The Articles of War, in all their long descent from ancient Roman days, existed to make sure that soldiers were orderly and obedient, and that the right of command was protected and sanctioned at every step. An undisciplined army is an ineffective army. Commands must be obeyed. "Their's not to reason why, their's but to do and die," as the poet Tennyson wrote, even though they "knew someone had blundered." In England, from which our fundamental military law and customs were derived, the Army was "The King's men."

> Forasmuch as within all his majesty's realms and domains, the sole supreme power, government, command, and deposition of the militia, and of all forces both by sea and land, and of strength, is and by the laws of England ever was, the undoubted right of his majesty and his predecessors kings and queens of England; and that both or either of the houses of parliament ought not to pretend the same * * * (Statute of 13 and 14 Carolus 2).

This conception, unmodified in England till the nineteenth century, included the complete jurisdiction of all matters of military law. The latter were the King's rules for his men, and the courts existed to compel obedience in terrorem. This corresponded to the social and economic facts of those and preceding periods. Officers came from the gentry class; the men from the lower orders. In feudal times armed forces were made up of the personal retainers and levies of the King and his officers. On the Continent, armies could be rented out, as the Hessians were in our Revolution, by their kings. Rules for their conduct could be laid down and military courts existed to compel obedience. It is notable that all the earlier codes dealt with purely "military" offenses arising out of military situations. There is no express mention of "civil" offenses such as bulk considerably in our Articles of War. This is true of the earliest surviving codes—those of Richard I (A. D. 1190), Richard II (A. D. 1385), Gustavus Adolphus (A. D. 1621), and the British Articles of 1765 from which our own were originally taken in 1775 and 1776. All of them were a sort of "house regulations" for the military establishments concerned. They were neither legal nor judicial systems per se.

It is reasonably clear that the framers of our Constitution intended a difference from the historic British system. Instead of vesting in the President powers over military justice parallel to those which the British King enjoyed, the Constitution expressly vested this power in Congress, in spite of the fact that the President is designated Commander in Chief. Plainly, the Constitution intended that the President (which means, for practical purposes, the War Department) should not be the fountain of justice; Congress, not the President, is to make "rules for the government and regulation of the land and naval forces." This power was carefully vested in the legislative, not the executive, branch of the Government.

In our Army, however, the British tradition has largely remained to this day. The court-martial system is regarded by most professional officers as a means of enforcing discipline. This is not to say that officers are not interested in justice, but simply that the thought of command and obedience is paramount. Many professional officers regard a court martial as essentially a committee to conduct an inquisition for the information of the commanding officer so that he may properly enforce discipline in his command. Indeed, legally, according to the Articles of War, a court martial cannot render effective judgment. Its verdict is not a verdict until the commanding officer has approved it. Prior to 1920, the commanding officer could send back an acquittal for retrial; the present restrictions on his action are, privately perhaps, regarded as unreasonable trammels on the right of command, and some commanders seek ways of circumventing them, as we shall see later. One commanding officer (before 1920) expressed the point of view quite succinctly when rebuking a court for an acquittal by informing them that they were "appointed as an executive agency in the administration of discipline." However justly it may have been claimed that "judicial power ceases to be judicial power, independently and fearlessly exercised, the very moment it finds limitation in the power of any man—military commander or other," such a doctrine would meet with little concurrence in the military mind, and the present system of military justice still lacks essential elements of a real judicial system.

The characteristic Army point of view finds ample support in the writings of W. W. Winthrop, the "Blackstone of Military Law," whose famous work, Military Law, was published in 1886. He states (p. 52):

> Not belonging to the judicial branch of the Government it follows that courts martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power* provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives. [Italics original.]

From this doctrine, for all the non sequitur of its first clause, unfortunate deductions have been widely accepted, the most important and lingering one being that Army courts are rightfully subject to the power of command.

The Supreme Court has damaged this whole point of view by decisions which recognize courts martial not as executive agencies but as courts of justice. Perhaps the most important utterance is that in the case of *Runkle* v. *The United States*, which quoted with approval an opinion furnished to President Lincoln by his Attorney General:

> The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed upon trial in a court of justice; rights which in the very nature of things, can neither be exposed to danger or subject to the uncontrolled will of any man, but which must be adjudged according to law (122 U. S. 558, October Term 1886).

Changes made by Congress in 1920, under the influence of an aroused public opinion and the impact of Supreme Court decisions, have undoubtedly modified, in a wholesome manner, not only the practice but probably to some extent also, the thinking of responsible military men, although the first sentence of the Army's Technical Manual on Military Justice Procedure reads:

> Military justice is the system for enforcing discipline and administering criminal law in the Army.

Actual attitudes revealed in many court-martial cases known to the committee show that the old concept is dying hard among professional military men, and these attitudes are sometimes imitated by officers coming out of civilian life, perhaps because the latter consider themselves commendably military in doing so. Many lawyers and others entering the Army from civil life with ideas of justice based on the ancient Anglo-Saxon respect for the rights of the individual, find themselves shocked by disregard for these rights in the Army's military justice, and hundreds of thousands, probably millions, of plain soldiers are contemptuous or bitter about it, even when they have not themselves been enmeshed in what is widely referred to as "the mill." What should be a system of impartial justice is tied in with the chain of command—from the investigating officer, the trial judge advocate, the defense counsel, and the members of a court, who may all feel the heavy hand of their commanding officer upon them, up to the Judge Advocate General who reports to the General Staff.

Our armies are not made up of feudal levies of foreign mercenaries, or the brow-beaten underlings of an undemocratic social system. They are made up of American citizens used to the protections of the Bill of Rights and the freedoms of our American way of life. They did not fight with such discipline and loyalty over the world because

they were subject to such practices as will be cited in this report. On the contrary, the discipline even among those recalcitrants who are always to be found, might have been better had the latter felt better assured of justice in Army courts. Even Gustavus Adolphus, the father, or grandfather, of our Articles of War, said in his:

> Very requisite it is, that good justice be holden amoungst our Souldiers, as well as amoungst other our Subjects (art. 135 of articles published in 1621).

VII. Punishment by Administrative Action

It should not be supposed that the Articles of War and the system of courts martial by any means exhaust the Army's power of disciplining offenders and eliminating them with ignominy from the service. There are administrative processes which can be used for this purpose, the mere threat of which serves as a deterrent.

Enlisted men, for example, can be given a "blue discharge" which is said to be "neither honorable nor dishonorable," but which has much of the practical effect of a dishonorable discharge. Blue discharges are discussed at length in another report of this committee.

Officers have always been subjected to "reclassification boards." While not supposed, according to the regulations, to be disciplinary, reclassification procedures unquestionably have a disciplinary effect and are sometimes resorted to for punitive purposes. Reclassification board action is intended to apply to officers who are assigned to duties for which they are not fitted, or hold a commission in a grade higher than that for which they are professionally capable, or are deemed to possess habits and traits of character which actually or potentially affect their efficiency, or are not qualified to hold any commission. Reclassification boards may reassign officers, demote them, or separate them from the service entirely. In the last-named case, the officer may receive an "honorable discharge" or simply a "discharge," which is a separation from the service "without specification as to character" corresponding to the blue discharge of enlisted men.

> In a case which recently came to the attention of the Military Affairs Committee, a lieutenant colonel was convicted under the ninety-sixth article of war for causing, or consenting to, the alteration of the physical records of certain enlisted men at his post to prevent their being transferred from the Air Forces to the Ground Forces, these enlisted men being trained men in key positions deemed vital to the functioning of the post, and also for making false statements concerning the matter to an investigating officer. The lieutenant colonel was adjudged a fine of $2,400 and an official reprimand. The charges had been drawn up in such a way that a finding of guilty could have been brought under the ninety-fifth article of war, which would have made a dishonorable dismissal from the service mandatory, or under the ninety-sixth article of war, which would permit him to remain in the Army. The court selected the latter, in view perhaps of the fine record which this officer had made in the Army. He had been a Reserve officer before the war with an almost continuous service for 8 years, during which he had been promoted from first lieutenant to lieutenant colonel and had never had an official rating lower than "excellent" (the second grade), while most of his ratings were "superior" (the highest grade). Several commanding officers asked for his assignment to them after the court

martial had convicted him. Nevertheless, the verdict of the court, after judicial proceedings, must have been deemed insufficient. The lieutenant colonel was brought before a reclassification board and given a "discharge without specification" (officers' blue discharge) on the ground of "habits and traits of character." It is inconceivable how one offense can constitute a habit or a trait of character, yet absolutely nothing was alleged against this officer but the action for which he had been tried in the court martial. The proceedings were in effect a retrial on the old charges with an increment added to the sentence. It was an illustration of double jeopardy for the same offense, with an increase in the severity of the sentence, purely a punitive action.

Reclassification procedure has been described as something parallel to court-martial proceedings but lacking elementary safeguards elsewhere customary in either judicial or administrative law. The committee has evidence that the subject of this procedure is often sent to a reclassification center remote from his previous scene of action, with the result that it is difficult for him to get witnesses, not only by reason of distance and inconvenience but because he has to pay their expenses, so that he may have no witnesses at all; that decisions are made largely on documentary evidence; that if the subject sees the allegations at all prior to the hearing, it has frequently been on the very day of the hearing, with too short a time allowed him to examine them adequately; that the Government's allegations are briefed to the board in an informal session prior to the formal session, when the subject of the proceedings is not present and his side has not been heard, so that the members of the board may have their minds made up before the defense has had a chance; that the president of the board, who is always the officer senior in rank, often uses his weight and influence to dominate without even a pretense of impartiality; that even when votes are taken in inverse order of rank, the junior officers are perfectly well aware whether they are voting in accordance with his wishes; that votes are taken orally; that no record of the proceedings is given the person most concerned.

Even the reclassification action was, in the early period of the war, deemed by the Army to be too cumbersome to eliminate deadwood with needed celerity, so at the request of the Army the Seventy-seventh Congress passed, in 1941, Public Law 190. This provides that during the emergency the Secretary of War may remove from the active list of the Regular Army any officer "for good and sufficient reasons appearing to the satisfaction of the Secretary of War." Action is taken by the Secretary upon the recommendation of a board of not less than five general officers, and his action is "final and conclusive." Serious criticism of the working of Public Law 190 has arisen in Congress and bills are now pending in both Houses for its amendment. It has been in force throughout the war, however, and has been fairly widely used to eliminate from the Army Regular officers of considerable rank, some of whom have had ratings of "excellent" or "superior" over many years of service, and had even been promoted shortly prior to their forced retirement. A similar procedure existed in the First World War, but 80 percent of the officers who came before such boards were reassigned and served capably and even with distinction, while in the Second World War 100 percent of recommendations of the boards were for immediate removal from the

service, and there is no known case in which the Secretary of War did not concur in the recommendation.

Action separating officers from the service by reclassification boards and boards convened under Public Law 190 is based "upon the records." In spite of the impressive nature of this phrase, it is always possible that the records may not present a true picture of the facts, and there is truth and relevance in statements made by counsel in a recent case before the discharge review board. Counsel in this case was a retired general officer with a vast background of experience in Army legal and administrative procedure.

> We know, of course, that a separation, with its characterization, is backed by statements upon the record. We need hardly remind you that merely because a statement has become embalmed in a military record is no assurance of its truth. Too frequently those facts merit the designation only because they appear on the record; they are not tested or established facts; they are only what somebody, in more or less authority, carelessly or hastily or injudicially accepted as facts; too often they are only what somebody reported or said or thought. Sometimes they are but statements of a commanding officer who is inexperienced, or is unfair, or has been misled; sometimes they are but his own conclusions made or shaded to place himself in a better light; sometimes they are statements made with unworthy design or through servility to some superior view. Sometimes they are nothing better than the groundless report of some pseudopsychiatrist; sometimes they rest on nothing better than common camp gossip. * * *
>
> During this war there has been a tendency to force resignations for the good of the service in lieu of court martial by means of record statements whose undependability would have been developed by court-martial investigation. Such a policy gives abundant opportunity for injustice. Such resignations are sometimes the result of a species of compulsion. Besides, temporary officers, especially when advised by superiors, can easily be subjected to imposition. Few temporary officers are in a position to apprehend that a resignation for the good of the service has many of the stigmatizing consequences of a sentence of dismissal or dishonorable discharge by general court martial, consequences that deprive them of many military benefits, blotch their reputations throughout life, and prejudice them in obtaining employment. In experience officers can easily be stampeded into such ill-advised action by the threat of the court-martial alternative. Later, with time to consider, such an officer may seek to withdraw his resignation before it becomes effective and stand court martial, only to find that the War Department refuses the request. (Quoted in the Army and Navy Journal, December 1945.)

VIII. Defects of the Military Justice System

Among the criticisms of the system of military justice as it has existed during the Second World War are those described under the headings below. While some are more fundamental than others, all have importance. Each represents more than an occasional abuse, and points to something wrong with the system itself or its administration. All have arisen out of statements made by loyal Army personnel. All are substantiated by information in the possession of the committee. As illustrative of the points raised, a few cases are cited in some detail.

1. *Investigation procedure.*—The enactment of article 70 in the Articles of War in 1920 was intended to correct frequent previous injustices. Among its other provisions the article states:

> No charge will be referred to trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in such charges, form of charges, and what disposition of the case shall be made in the interests of justice and discipline.

This provision is hailed as the equivalent of a grand jury investigation, and the thoroughness with which these investigations are made is

alleged as the reason so few trials result in acquittal (5 to 6 percent).

In 1937, article of war 70 was amended by the omission of the words "or special," so that investigation is no longer required before trial by special court martial.

Directions for the investigation are in some respects vague both in the article and in the Manual for Courts Martial. Some investigating officers regard themselves as intelligence officers or police detectives, seeking for evidence and setting traps for accused persons whose conviction is desired.

> An officer in the Mediterranean theater was accused, on very flimsy evidence, of a homosexual offense. The investigating officer scouted around for more evidence. Among other things, he interviewed the five tentmates of the accused, not in the presence of the accused and without his knowledge (cf. A. W. 70). Getting nothing out of these tentmates, the investigating officer then broadcast the nature of the accusations, so that the charges became a matter of conversation in the area. Finally, at a party in a hotel some distance away, another officer who had reason for personal grudge against the accused, hearing the talk, came forward with promise of assistance in the form of testimony based on an alleged incident in the United States 6 months before. His testimony was inherently self-contradictory and entirely unsupported. The accused officer was sentenced at Oran to 5 years imprisonment and dismissal.

Furthermore, if the investigating officer is really to perform the function of a grand jury, he should not be removable by the commanding officer for making a report too favorable to an accused person whom the commanding officer might want convicted.

> An officer of field rank traveling across the country, and sitting in a club car with a gentleman and a lady, had the misfortune to have a tumbler containing a highball spilled upon his trousers, making a wet stain. An MP coming through the train at that time saw the trousers and reported that the officer was drunk and unable to control his natural functions. The first investigating officer appointed on this case recommended against trial. His recommendation was approved by the acting commanding officer of the post, a colonel. The commanding general, however, ordered a new investigation by a second investigating officer. The acting commanding officer of the post, too, felt the weight of the general's displeasure; he was transferred to insignificant jobs and invited to resign. The new investigating officer in this case recommended trial. The unfortunate field officer was convicted (although the lady traveled 1,200 miles across the country to testify that he was not intoxicated and that the accident really happened); fined $500, and given an official reprimand. A brigadier general sat as head of this court. It was felt by those in a position to know that the court itself wanted to acquit, but was afraid to brave the commanding general's ire. A further commentary on this case is provided by the fact that the court's findings were approved at the headquarters of the Eastern Technical Training Command, and subsequently by the Board of Review at Washington, before the accused had time to file a brief.

The investigating function is so important a phase of military justice that only officers of maturity and responsibility should be assigned to the duty of investigating charges.

At the Lincoln Air Base, in 1944, Sgt. Odus West was accused of brutality to prisoners in the stockade. The commanding officer of the base (illegally) originally ordered trial without making any investigation of his own, at the request of the air inspector for the commanding general of the Second Air Force. Later an investigation was entrusted to a lieutenant who at first recommended trial after seeing only two prosecution witnesses and no defense witnesses. Counsel for the defense then entering the case and, observing the incompleteness of the investigation, interrogated this lieutenant, making a record of what he said. He admitted he had made no actual investigation. Then he reported this to the trial judge advocate, who initiated a new investigation, this time by a lieutenant colonel. The latter saw more than 30 witnesses and confided to a friend afterward that he could see no real reason for bringing West to trial. Nevertheless, he found it prudent, officially, to recommend trial.

Proceedings had already been started under Public Law 190 for the forced retirement of an officer of field rank, a West Point graduate, on grounds of irascibility, when accusations of a serious but different nature were brought against him, and he was tried by general court martial. Industrious civilian counsel who were then employed to represent this officer before the Board of Review discovered irregularities of procedure and inadequate consideration of the ends of justice, and proceeded to locate the three witnesses on whose testimony the officer had been convicted. These were found in remote and widely separated parts of the country. All three voluntarily signed depositions completely repudiating their testimony, stating that they had testified originally because they were coerced by the threats and (in one case) by the physical violence of an intelligence officer. One of them said he had never seen the accused and did not know him by sight. Another had not been at the party in the hotel room where the offense was supposed to have been committed. Another had been at the party but had not seen the officer there. It was discrepancies between the description of the hotel room given in their testimony and the actual room itself, and certain facts as to registration, which had originally made counsel suspicious of the genuineness of these witnesses. When the facts were brought out by civilian counsel, the case against the officer collapsed and the Secretary of War was moved to upset the conviction. The proceedings on the basis of Public Law 190 were continued and the fact of the court martial was mentioned in the board as being part of the officer's record, though the board voted, on the protest of counsel, not to consider it. He was compulsorily retired from the Army on half pay.

Other abuses in connection with the investigation of charges have arisen during the war. While it is difficult to obtain precise confirmation as to times, places, and persons, there is enough testimony in the files of the committee to indicate the real existence of abuses which go far beyond mere carelessness or prejudice on the part of the investigating officer. They involve constraint practiced upon accused persons prior to their trial, to force confessions or damaging admissions, or (in the case of officers) willingness to "resign for the good of the service" to avoid court martial. Article of war 70, which was in-

tended to safeguard the right of the accused, has been perverted to precisely the opposite use.

It has been common to hold persons who have not been tried incommunicado for long periods. An officer in one of the cases described below, whose substantial innocence there is no reason to doubt, pleaded guilty, deciding that to do so would at least let him out of incommunicado confinement where he has been for weeks.

In some jurisdictions, men of unquestioned mental health have been kept in the psychiatric wards of hospitals with very undesirable companions, "to soften them up."

The accused has no right to counsel during the investigation.

No matter how inadequate the investigation or how prejudiced and unfair, or how incomplete, no matter even if there is no investigation at all, defects of this sort may not be considered in the review of the case by the Board of Review in Washington, because failure to comply with article of war 70 is not, per se, an error injuriously affecting the substantial rights of the accused, according to the Judge Advocate General. The amazing decision that article of war 70, "though mandatory in language" is "directory only," that failure to comply with it is not a fatal error, and hence not jurisdictional, is dated January 30, 1943. Its file number is SPJGK, CM229477. It has never been published, but has been operative since that time. This ruling, which reverses an earlier Judge Advocate General's decision that had been in effect for 15 years, vitiates the plain intent of Congress to provide a fair trial. It is wholly unrealistic, so far as fundamental justice in Army courts is concerned, because as a matter of fact though not of theory, the report of the investigating officer, recommending trial, is actually taken by most courts as creating a presumption that the accused is guilty.

The provision made in 1920 for investigating procedure prior to trial is a wholesome one, and in the main probably has fulfilled its purpose of protecting soldiers from unwarranted charges. Weaknesses and abuses in connection with it have, however, appeared. Attention should be given to protecting the procedure to make it effective for its original purpose.

2. *Composition of courts.*—Although article 4 of the Articles of War directs that the appointing authority shall detail to serve on courts martial only officers who are qualified by age, training, experience, and judicial temperament, and that officers having less than 2 years' service shall constitute no more than a minority of the membership, it is well known that these stipulations have been widely ignored during the Second World War. Nor can this be attributed only to war pressure or insufficient personnel. There is a widespread belief among intelligent soldiers that courts have been picked for the reverse of these qualities, and that not so much a qualified as a weak and compliant court has been the objective. A soldier commenting on 2 years' experience in the Pacific area, during part of which he handled court-martial records at a message center in Manila, declared:

> I was all the time seeing the names of officers whom I personally knew to be ignorant men and inefficient officers, appearing on lists of court members.

In the Odus West case, the court was presided over by a dental officer who had never participated in a trial before, and composed

of four junior officers drawn, respectively, from the Veterinary Corps, the Medical Corps, the Medical Administrative Corps, and the Quartermaster Corps, not one of whom had previously participated in a trial, none of whom was familiar with the practical problem of military police work. The only officer who had previous trial experience was the trial judge advocate, i. e., the prosecutor.

An even more searching question has been raised from time to time: Why may not enlisted men serve on courts martial in cases where enlisted men are being tried? Not even a noncommissioned officer may serve on a court martial. The Chamberlain bill in 1919 proposed that three soldiers serve on a general court martial, and one on a special court martial. This proposal to carry the civil right of trial by judgment of one's peers into Army courts found no place in the reforms of 1920. Curiously enough, the right of enlisted men to serve on courts martial has existed in the French and German Armies, and even the stern Articles of King Gustavus Adolphus directed that six sergeants and quartermasters should sit with the colonels, captains, and lieutenants as members of his 13-man regimental courts. It is said that a similar practice existed in the Confederate Army.

In opposition to proposals that enlisted men be allowed to sit in courts martial when enlisted men are being tried, it has been alleged that enlisted men do not desire this right, that they would be even more stern in their sentences than officers, that they would be subject to pressures which would make them unfair, and that they lack sufficient education. None of these objections has been proved valid because the experiment has never been tried. It is possible that they rest more on tradition than on present-day conditions. They do not seem adequate to justify denying to a citizen his constitutional rights to trial by judgment of his peers and requiring that he be tried by a judge and jury made up entirely of his superiors without a single representative of the grade to which he belongs.

3. *Court procedure.*—If the directions of the Articles of War and the Manual for Courts Martial were always carried out as they are laid down in print, there would be few things to complain of in the actual court proceedings. That they are often not so carried out, in such aspects as bringing men to a speedy trial, the nature of evidence admitted, publicity of proceedings, and other diverse matters is a fact that is constantly coming to light. It is often difficult to determine the reasons. The necessary haste of military operations in active theaters is one of the more creditable ones, but such conditions do not always prevail.

The matter of obtaining the presence of witnesses for the defense is important. Witnesses for the prosecution can be obtained without difficulty because the trial judge advocate (prosecutor) has subpena powers extending to any part of the United States, its Territories, and possessions. The defense counsel has no such powers, but must request the prosecuting officer to procure his more distant witnesses. The latter, it is implied in the manual, will act in regard to defense witnesses as he would in regard to his own; but in practice he does not always do so, and the defense may be greatly hampered. Refusal by the trial judge advocate to summon witnesses wanted by the

defense may be overruled by the commanding officer, but in experience this does not seem to happen.

In the Odus West case, the prosecutor refused to send for the provost marshal and the prison officer. Both were very material witnesses in a question as to what had been happening in their own stockade. Both had been transferred during the 2½ months which intervened between Sergeant West's arrest and his trial. The commanding general sustained the refusal. Nevertheless, the prosecutor brought five witnesses from a considerable distance for his side of the case.

A still more vital matter is the presumption of guilt. Military law, like our other law, is supposed to proceed on the presumption that the accused is innocent until his guilt is proved beyond reasonable doubt. This is explicitly stated in the manual. In practice, however, the reverse is often the case. A court martial, like any other group of laymen (in the legal sense), is likely to proceed on the assumption that the case would never have arisen unless the man were guilty, that the investigating officer's report recommending a trial practically proves it, and (sometimes) that the commanding officer's manifest zeal for a conviction clinches it. This all before the trial has even started.

A minor indication that there is an assumption of guilt rather than of innocence lies in the curious feature of Army justice, that an accused enlisted man's pay stops, not from the day of his conviction, but from the day of his arrest. Many sentences involve the forfeiture of all payments "due or to become due," which in a case where the man's pay happened to be in arrears at the time he was charged, means that the Government does not pay for service actually rendered.

Courts have often been careless about the medical or psychiatric condition of men brought before them, although the manual prescribes that where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense. It has often been customary to get a psychiatric report, not before a man has been found guilty but afterward, in order to decide where to send him for confinement.

A soldier, about 36 years of age, had lived all his life in the backwoods of the Adirondacks, gaining a poor living as a woodchopper and laborer. His mental condition was very low, bordering on the moron. It is probable he had very little idea what the war was about or what the Army was. He had been living for years with a woman not his wife, whose children by another man he was supporting, and to whom his attitude was one of deeply emotional attachment. Legally single, he was drafted in 1942 and promptly sent to the (to him) strange environment of southern Mississippi. On May 3, 9 days after his induction, while working at clearing brush, he took an ax and chopped off the remaining two fingers of his left hand (he already had two fingers missing). Within an hour he was examined by a psychiatrist of the station hospital who came to the conclusion that the soldier was not mentally responsible for his act. On June 18 he was examined again by a medical board of three, two of whom, both general medical men, overruled the psychiatrist who was the third member, and reported a majority finding that the man was responsible. Self-maiming to escape military duty has been from

ancient times a serious military offense, and the soldier was tried in July under the ninety-sixth article of war. Defense counsel presented the psychiatrist, who testified as an expert to his diagnosis, made within the hour, that the accused was not mentally responsible at the time of chopping off his fingers. The trial judge advocate did not present the two other doctors, although they were available, and offered the report of the board, dated June 18. Defense counsel contended that (a) the report of the board was unsworn and that it was hearsay evidence as defined by section 117 of the manual, not legally admissible; that (b) the absence of the doctors deprived the accused of the right to cross-examine witnesses against him; and that (c) an examination by the board on June 18 did not go to either the day of the offense or the day of the trial. Not only were these contentions legally sound, but an ordinary sense of justice would seem to have required at least that the decision be withheld until there was reasonable certainty as to the accused's mental responsibility. Nevertheless, the accused was convicted and sentenced to 2 years imprisonment, complete forfeiture of pay, and dishonorable discharge.

Identifications present many problems to courts of justice, and civil practice throws up safeguards against too easy pointing of the finger and saying "This is the man." Military courts have been very careless, perhaps because unskilled, in this respect. Bringing charges of rape against American soldiers became a sort of racket among some portions of the populace in the European theater, and it is believed that numerous convictions of innocent soldiers took place because courts too amiably accepted dubious identifications in the interest of discipline in general or of maintaining the good name of the Army among liberated or conquered people. In the ordinary court martial, a witness on entering the court has no difficulty in knowing who the accused is. It is apparent from the place he occupies. All the complainant has to do is to point out the man. Proper previous police work, or investigation, could safeguard the matter by making the witness pick out the culprit from a large number of persons; but it is not in evidence that this is often done. Identifications precarious in other ways have also been accepted with apparent readiness by military courts.

In the case mentioned under No. 1 of this section, the court at Oran brought in a finding of guilty on the basis of a personal identification by a man whose testimony shows that he saw the individual concerned once, at night, in a completely dark mess hall, by the light of a flashlight 20 feet away. The glimpse could not have lasted longer than a second or two. He had no previous acquaintance with the individual. He did not see his face. He said he recognized him by his physical characteristics in that he was tall and rather thin.

The Shapiro case, which became somewhat of a cause celebre, originated in connection with the haphazard way in which military courts are apt to accept identification. Second Lt. Sidney Shapiro had been a law student when inducted in 1942. About a year later he was commissioned. On August 27, 1943, he served as defense counsel for a soldier accused of assault with

intent to rape. Convinced that his client was innocent and that his identification with the assailant was wrong, but would be readily accepted by the court, Lieutenant Shapiro resorted to an unconventional method of convincing the latter. At the opening of the trial, he detained the accused outside the room, and substituted in his place another soldier who had no connection with the case. The imposter was arraigned. The prosecutrix solemnly identified him under oath, and so did two other Government witnesses. Not until the prosecution had finished its case did Lieutenant Shapiro tell the court of his strategem. A mistrial was declared. When the second trial came on, with the true defendant in the dock, the same prosecutrix and witnesses who a few days before had identified the other man, now swore to this one. The confidence of the court in their accuracy, however, remained unshaken and the man was convicted and sentenced to 5 years imprisonment.

There was another element in this identification. The prosecutrix had in her original complaint said that she bit her assailant in the hand. Later the military police picked up on the street a soldier with a bandage over a laceration on his hand; it was on this basis that they arrested him. It is said that a human bite can be readily identified by experts. That the lesions on this man's hand were caused by human teeth, was accepted by the court not on testimony by experts or even by medical men, but by military police. What happened to Lieutenant Shapiro will be described later in connection with another point.

4. *Defense counsel.*—While the accused has the right to counsel of his own selection, an enlisted man often does not know where to turn to find an officer of sufficient rank to secure respect, who is both willing and competent to serve. The enlisted man usually knows few officers in any personal way. Usually he "hears" that so-and-so might be willing to serve, and asks for him. The officer in question, even though willing and competent, may not be permitted to serve.

In the Oran case, the accused discovered an officer willing to serve as counsel, but the latter found himself denied permission by the commanding officer. He had to tell the accused that he had been forbidden to act as counsel "for military reasons" which he could not explain.

In this case defense was practically nonexistent at the trial. One of the two counsel did not turn up at all. The other failed to point out the most obvious defects in the prosecution. There were no witnesses for the defense and no argument was made. Defense counsel had refused to advise accused, before trial, whether to take the stand in his own defense.

When the court-martial authority appoints counsel not selected by the accused, the selection seems often to be unfortunate, so far as competent defense is concerned. Very young and inexperienced officers, or officers not very capable anyway who can readily be spared from other duties, or officers who whatever their abilities are purely perfunctory in discharging their responsibilities as counsel, or officers who fear bringing the ill will of higher authorities upon themselves by too energetic a defense—all these types appear in the story of court-martial cases.

At best, a defense counsel labors under disadvantages. He is often appointed a very short time before the trial and does not have

opportunity to get a thorough understanding of the case, whereas his adversary is usually more fully informed, and has, moreover, the backing of the staff judge advocate at headquarters. Defense counsel can secure the attendance of distant witnesses only by the aid and with the permission of the prosecution. Witnesses for the defense can be interfered with by the authorities by threats or promises, and sometimes are, while counsel for the defense has no power to resort to such practices even if he wanted to do so. Energetic defense counsel have often been told they are obstructing justice, and sometimes wonder afterward why their expected promotions fail to come through.

Counsel for the accused have the right to file a brief to be considered when the case comes up to the reviewing authority or to the Board of Review at Washington. In practice, defense counsel seldom avail themselves of this right. They seem to assume they have done their whole duty when the original hearing is over, and wash their hands of responsibility completely at that time. In the British Army it is routine for the defense counsel to send up a brief, called a "plea in mitigation," with the record of trial; in fact he is always specifically invited to do so by the court.

The court at the Army air base, Grand Island, Nebr., upon which Lieutenant Shapiro foisted the wrong defendant, was apparently more interested in its dignity than in justice. The authorities went out after Lieutenant Shapiro. Charges were issued against him under the ninety-sixth article of war, after a 1-day investigation. The specification reads that Shapiro did "wrongfully and willfully present and tender to the said court martial, Pvt. Manuel Rosas for arraignment in the stead of the said Pvt. Fausto Agredano * * * and by the aforesaid artifices did wrongfully and willfully effect a delay and obstruct the orderly administration of justice before the aforesaid court martial, to the prejudice of good order and military discipline."

The report of the investigation was handed in at 11 a. m. on September 3, 1943. Charges were served on Lieutenant Shapiro at 12:40 p. m. the same day. The trial began at 2 p. m. the same day, and concluded at 5:30 p. m. the same day. Within 5 hours Lieutenant Shapiro was charged, arraigned, tried, convicted, and sentenced to dishonorable dismissal from the service. (Subsequently he was drafted, served as an enlisted man, and was honorably discharged.)

In the 1 hour and 20 minutes allowed him to prepare for this trial, Shapiro requested one Captain Mayfield as counsel, but this officer was ordered to serve as trial judge advocate. Two second lieutenants represented Shapiro at the trial. They were inexperienced but did know enough to ask for a continuance for 7 days to prepare their defense. The law member ruled against this motion and was sustained by the court. Defense counsel put in no brief when the case went to the reviewing authority in the field or the Board of Review at Washington.

When civilian counsel took up the case later, they pointed out that Shapiro had been deprived of due process of law. The Supreme Court of the United States (along with numerous State courts) has specifically ruled that the right to assistance of counsel includes the right to be accorded a reasonable time for counsel to investigate its facts and prepare for trial, regardless of the apparent merits of the case. The defense had good reason for

needing this time, particularly in view of the fact that the ninety-sixth article of war is a "wastebasket" or catch-all article naming no particular offense and leaving the punishment entirely to the discretion of the court. While Shapiro's action was admittedly ill-advised, there was room in both law and justice for a careful argument as to the justice of any conviction and as to the nature of the appropriate punishment if a conviction should take place.

The Judge Advocate General and other authorities at the War Department did not concur with the Supreme Court as to the rights of the accused in such a case. The Adjutant General wrote civilian counsel that he had conferred with the Judge Advocate General and the latter had concluded that "the rights of the accused had not been substantially prejudiced." The Judge Advocate General himself wrote: "It is not possible to conceive in what manner the defense could have been strengthened in any respect had the additional time requested been granted." The decision was riveted by action of the highest authorities. "The appropriateness of the sentence of dismissal has been carefully considered not only by the trial court but by the reviewing authority, and, after the receipt of the Judge Advocate General's recommendation and the recommendation of the Secretary of War, by the President "(signed) Acting The Judge Advocate General."

Here the matter rested, and would have rested forever, had not a newspaper reporter happened to hear reference to the case in a District of Columbia courtroom. A Washington newspaper published a series of editorial comments with some scathing references to military justice. After the matter became public in this way, but not before, the Under Secretary of War interested himself in the matter and declared that justice must be done. Shapiro was given a Presidential pardon and restoration of his civil rights. He was not, of course, restored to his previous rank in the service.

Perhaps it is to be regretted that under present regulations chaplains are not available to serve as counsel for the accused. In older days in the Army, the chaplain was the acknowledged "Tribune of the People" in many respects, and if he were respected and skillful, as he usually was, became a very important factor in the morale and general welfare of any command. For a chaplain to act as defense counsel was almost routine. Although the regulation against this is based on arguments of some weight, and has been approved by successive Chiefs of Chaplains, it is doubtful whether the general cause of military justice has been furthered by it. An enlisted man who was defended in court by a chaplain could expect a sincere and a reasonably competent presentation of his side of the case.

The records of innumerable cases show that (in the words of a former member of a board of review who had read thousands of trial records) "the defense counsel convicted his client." In criminal practice everywhere outside the Army, an accused person is entitled to a trained attorney as counsel. No civilian court would think of appointing any other. Yet in the Army a judge advocate officer is never selected as defense counsel, except perhaps when the trial is a spectacular one involving an officer of very high rank.

5. *Law member.*—Members of courts martial are largely amateurs from the legal point of view, though they may pass on questions of life and death. They are selected for their commissions on the basis of entirely other qualifications. Even those who have had a brief and admittedly sketchy course in military law at West Point cannot be considered as particularly qualified. The Army has never admitted that its justice should be administered by jurists in the same way it recognizes that its medical treatments should be in the hands of qualified doctors or that its spiritual guidance should be administered by chaplains with theological training and the ecclesiastical endorsement of their respective churches. Officers of the Judge Advocate General's Department are, of course, legally trained, but they do not normally sit on courts martial, nor is that department itself given a free hand in technical matters as against the power of command, in the same way that the Medical Department is. Doubtless this is a fundamental cause for weaknesses in the system.

To compensate for this defect, however, the eighth article of war provides that a law member shall sit on each court "who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose an officer of some other branch of the service shall be selected by the appointing authority as specially qualified to perform the duties of law member." The intention of article 8 is to provide a trained lawyer to guide the court in passing on legal questions and in matters of procedure. He rules on all interlocutory questions. His rulings on the admissibility of evidence cannot be objected to, and are binding on the court.

The beneficent intention of this paragraph of article 8 has been, in fact, completely voided. Members of the Judge Advocate General's Department do not sit as law members. In their stead sit other officers, many of whom have been known to demonstrate their incapacity, in the opinion of competent critics. They have been described as being usually "Regular Army officers of lieutenant colonel rank who have nothing else to do." This may be too sweeping an assertion, though there is evidence in support of it. Doubtless many of the officers who serve as law members are really competent.

Why do not lawyers from the Judge Advocate General's Department serve in this capacity? So far as is known there is no written directive against their doing so. It seems to be unwritten law, however, and whether on orders from the Judge Advocate General or for some other reason, these trained military lawyers are never "available," except perhaps in some unusual and conspicuous trial. In one case known, no less than two Judge Advocate General officers sat as members of the court, but apparently neither was "available" to sit as a law member.

Exactly the reverse of this practice is required by British military law. Every court is required to have an officer of the Judge Advocate General's organization as law member. He does not, however, sit as a member of the court and, unlike our law members, does not have a vote. He is impartial. At the conclusion he gives an official summing up for both the prosecution and the defense. While his rulings do not have to be accepted by the court, it is said that when the court does not accept them, its members are likely to be sorry for it afterward. He is a true judge advocate, serving impartially as judge of

law and advocate of both sides, but not actually participating in the decision.

The only sound reason that can be alleged for the fact that Judge Advocate General officers are never available as law members of our courts is that there are not enough of them to go around. Yet it is incredible that if more judge advocate officers were needed during the war, more could not have been provided. The Army contained large numbers of lawyers with training and experience who were not utilized in their professional capacity—35,000 of them according to a recent estimate of the Judge Advocate General.

6. *Staff judge advocate.*—A key position in the organization of military justice is occupied by the staff judge advocate. Civilians unused to military nomenclature may find themselves in some confusion over the various judge advocates, so a simple explanation may not be inappropriate. Beginning at the top, the Judge Advocate General is the highest law officer of the Army, and his department is the military justice department of the Army. Theater command abroad have had during the war in their respective areas a jurisdiction comparable with that of the War Department at home, each with its own, almost independent, assistant judge advocate general. A staff judge advocate, with his assistants, serves as adviser in matters of military justice to the officer exercising court-martial jurisdiction in a particular command, the latter being usually a major general commanding a division, or the equivalent. The staff judge advocate is usually an officer of the Judge Advocate General's Department. A post judge advocate (not an official title) is the law officer of a particular post or regiment, who serves as adviser to the commanding officer, the latter being usually a colonel. A trial judge advocate is the prosecutor in a particular court. He is not necessarily legally trained in any way.

The term "judge advocate," like so many things in military justice, is derived from ancient European military usage. The equivocal nature of the term, implying that the functions of a judge and those of an advocate are united in the same person, is a not unfaithful reflection of the older military theory that every officer is so imbued with the qualities of justice that he can serve impartially as judge in the case and advocate on both sides at the same time. Officers of the Judge Advocate General's Department are even now to a considerable extent expected to perform this difficult feat.

The staff judge advocate, at the general's headquarters, receives the charges and the report of the investigating officer when they are sent up to the commanding general. He advises the latter on proceedings to follow. The members of local courts martial in the jurisdiction are appointed by the general on his recommendation. So are the trial judge advocates and defense counsel. After the trial has been held, the record of trial is forwarded to the commanding general, this time in his capacity of reviewing authority, and is referred to the staff judge advocate for advice as to whether procedure has been correct, and the trial conducted without prejudice to the substantial rights of the accused, whether the findings (i. e., the verdict) are correct, and whether the punishment of a convicted person is appropriate or excessive, and if imprisonment is ordered where the confinement is to take place, and whether a sentence of dishonorable discharge is to be suspended. When the general has acted upon these

matters, and not until then, is the trial complete. The general follows in most cases the advice of his legal expert, the staff judge advocate, but he is by no means bound to do so, and frequently does not. If the general does not happen to have a staff judge advocate, he is required to refer for this advice to the Office of the Judge Advocate General in the War Department.

In the naming of court-martial members, trial judge advocates, and defense counsel, the staff judge advocate usually has the general appoint individuals who are suggested for the purpose by the law officer (post judge advocate) of the post or regiment where the court will function. This puts the actual assignment, generally speaking, in the power of the local colonel. It is noticeable that care is always taken to see that there is a "strong" prosecutor (trial judge advocate). Defense counsel who have served in previous trials with exceptional zeal or ability are apt to find themselves named as trial judge advocates.

It is clear that the staff judge advocate, though of course not having a free hand as against the general, being only an adviser, does hold a post of great responsibility in the scheme of military justice. His duties involve two kinds of responsibility, which would not be regarded as compatible in civilian justice. They are both administrative and judicial. In his judicial capacity he decides there shall be a trial on the charges preferred. Then turning to his administrative capacity, he sets up the court, naming the president, the law member, and the other members, as also who shall prosecute and who defend. After the trial has been had, the staff judge advocate resumes the judicial role and reviews the decision of the court he set up on the charges which he approved. Obviously there are numerous possibilities of abuse here. That there are not more complaints at this point is to the credit of those who have performed this function. It may also be due to the fact that this part of the whole process is far removed from the public and even from the knowledge of those most interested in a particular case. All official acts are, of course, not those of the staff judge advocate but of the commanding general whom he advises. The general, or it may be his adjutant, often simply signs the papers without having given personal attention to them.

The case of Sgt. Odus West, adverted to above, furnishes at this point, as in so many others, an example of what should not be done. It is presented here not as a normal occurrence, but as an illustration of what is always possible. How far responsibility lies with the staff judge advocate in person, and how far with his commanding general, it is impossible to determine.

Brutalities practiced upon soldier prisoners at the Lincoln Air Base became a matter of widespread newspaper comment. The prison sergeant, West, was a former deputy sheriff in Missouri. The persons really responsible for the administration of the prison stockade at Lincoln were the provost marshal, Capt. Anthony Parisi, and the prison officer, Lt. Stanley T. Jones, not the sergeant who received his orders from them. These officers were promptly transferred to New Mexico and Louisiana, respectively, and the staff judge advocate of the Second Air Force, Col. W. I. Wilkins, sustained a refusal by the trial judge advocate to have them called as witnesses by the defense. The air inspector of the Second Air Force came to Lincoln from

Colorado Springs and made a hasty investigation. Returning to his headquarters, he published in his monthly newspaper, the Trouble Shooter, an account of the brutal conditions which he said prevailed, signed by himself and headed with the caption "Gestapo Tactics." Sergeant West and the Lincoln Air Base were not named, but the accusations against West were related in minute detail, and he was described as being of the bulldozing type. At least a hundred copies of this paper circulated at the Lincoln Air Base and no one who read them had any doubt what place and what person were referred to. Forty persons who were questioned said they knew the article referred to Sergeant West and their post. The members of the court martial professed not to have seen it. Application for change of venue because of this trying of the case in the press in advance of the trial by Air Force headquarters was refused.

Now for the part played by the staff judge advocate in this affair. The court was picked by the trial judge advocate and named by the staff judge advocate at Colorado Springs. The law member who passes on all questions of evidence was an officer sent from Colorado Springs, some 500 miles distant, for the purpose. He came out of the office of the staff judge advocate. There were many lawyers available at Lincoln, but the staff judge advocate clearly wanted one of his own assistants to make the rulings. Defense counsel challenged him during the trial for showing bias and prejudice, but got nowhere. Finally, West having been convicted, the record went up again to the same staff judge advocate for judicial review, who approved it. It might be added, to complete the record, that public disapproval continued to be shown and the House Committee on Military Affairs took an interest in the case. Parisi and Jones were themselves tried at the Lincoln Air Base. They were acquitted.

7. *Board of Review and Military Justice Division.*—At the outset of this discussion, clarification of terminology may be in place, even at the expense of repetition. The "reviewing authority" is the local commanding general, i. e., the officer exercising court-martial jurisdiction whose approval of findings and sentence is necessary to complete the trial. The "reviewing authority" is not to be confused with the authorities which give a legal review to proceedings in Washington, which are the Military Justice Division in the Office of the Judge Advocate General and the Board of Review, the latter being the higher authority.

The article of war governing this part of the procedure is No. 50½. Cases of less than extreme gravity are examined by an officer in the Military Justice Division in the Office of the Judge Advocate General, and if he finds the record legally insufficient to support the findings and sentence, the case is referred to the Board of Review. Cases of sentence involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary are referred directly to the Board of Review. If the opinion of the latter is concurred in by the Judge Advocate General and both agree that the record is legally sufficient, confirmation by higher authorities is recommended. If the board and the Judge Advocate General find the record legally insufficient to support the findings or that errors of law have been committed injuriously affecting the substantial

rights of the accused, the findings and sentence may be vacated in whole or in part and the proceedings remanded to the authority convening the court for a rehearing or other appropriate action. If the Judge Advocate General and the board do not agree, both opinions are sent directly to the Secretary of War for action of the President, who may confirm in whole or in part any finding of guilty or disapprove and vacate in whole or in part any sentence.

Some details concerning the Board of Review in the War Department are pertinent. The board is in reality not one board, but several boards, each consisting of three members. At the height of the war there were six boards. The number at present is three. Members are appointed by the Judge Advocate General. All are from his department, but at the present time (January 1946) only one is a Regular Army officer; the others are prominent civilian lawyers who have entered the service. Most have the rank of colonel or lieutenant colonel. Only general court-martial cases are reviewed. Officially, members are given complete freedom as against one another and the Judge Advocate General and a minority within a particular board may submit a report, and the board has the same privilege as against the Judge Advocate General, though such differences of opinion are generally ironed out in conference and concurrence obtained. In practice, however, as distinct from theory, the Judge Advocate General's opinion nearly always prevails when any difference is referred to the Secretary of War. The latter accepts the opinion of the head of the department. Only once was there an exception to this.

Article of war 50½ was one of the provisions created by the reform of 1920, and the procedures instituted under it are praised by admirers of the system as a means of correcting such possible miscarriages of justice as may have taken place earlier when the cases were in the hands of courts and reviewing authorities. The Board of Review studies the record as if objections had been made to every questionable bit of evidence and ruling even when defense counsel failed to note such exceptions. The reviewing actions at Washington on top of the reviewing authority vested in the general constitute, it is claimed, a double protection, far greater protection in fact than civil justice accords to defendants convicted in State or Federal courts, for there is a twofold automatic appeal taking place in each case without the defendant even having to ask for it.

Exaggerated claims made for the second review in Washington, together with the vague popular idea that "the whole case will be reviewed in Washington," are perhaps responsible for disillusionment when cases involving obvious injustices to the accused are known to have been approved. Such disillusionment gives rise to widespread though sometimes ill-informed and unjust criticism. The criticisms are not negligible; there is a considerable volume of them; they are expressed by highly reputable persons, lawyers, both civilian and military, who have done business with the Division and the Board; and they seem to be confirmed by the particular history of known cases. Apart from particular cases, however, it is probable the critics referred to above do not discriminate between the operations of the Military Justice Division and those of the Board of Review, and that they do not realize how far shortcomings complained of are attributable not to the personnel involved but to the conditions under which, by the system, they are required to operate.

The most important of these restrictions is that the power of the board is confined strictly to questions of law and not of fact. A fine-print section of the Manual for Courts Martial, under article of war 50½, reads as follows:

> Except where the President is the reviewing or confirming authority, it is not the function of the Board of Review or the Judge Advocate General, in passing upon the legal sufficiency of a record under article of war 50½ to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. In such cases the law gives to the court martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby; therefore, *if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the Board of Review and the Judge Advocate General are not permitted by law,* for the purpose of finding the record not legally sufficient to support the findings *to consider as established such facts as are inconsistent with the findings, even though there be uncontradicted evidence of such facts.* [Italics not original.]

Some observations may be made upon the above crucially important but seldom-mentioned provision in the law governing military justice. In scope it covers all general court-martial cases, except those in which the President is the reviewing or confirming authority. The substance of the paragraph quoted is that the Board of Review is enjoined by "the law" from weighing the value of evidence. Members of the board may see perfectly clearly that the evidence on which a conviction was adjudged was dubious or worthless, but if the slightest bit of evidence legally justifying the conviction was accepted by the court and the commanding general (reviewing authority), there is nothing the board can do about it. No legal error has been committed. The Judge Advocate General, by another provision, may send to the commanding general a separate letter from that which officially reports the approval of the board and authorizes the execution of the sentence, and in this letter he may indicate that in his opinion one or more findings of guilty should be disapproved, or that the sentence is unnecessarily severe; but the commanding general does not have to pay any attention to this opinion. He not infrequently rejects or ignores it.

Incidentally, no one seems to know where "the law," mentioned in the text quoted above, is to be found. It is not statutory law. It may be deemed to be implied in article 50½ or it may be an inference from common civilian practice in appellate courts.

This is not the only limitation upon the functioning of the Board of Review, though it is basic. The board works only on the legal records of cases. It has before it the report of the investigating officer, the record of trial with its attachments and exhibits, and the action of the reviewing authority. It also has and considers all letters and appeals that come in from interested persons. The number of cases in which a brief comes to the board from the defense counsel is so small as to be negligible. Counsel employed by the accused may appear at the board hearing, but this happens only in a very small percentage of cases. Many circumstances which would have a bearing on a complete examination of the case, if essential justice and not merely legal correctness could be considered, are not even known to the board.

> For example, in a recent case arising in Italy, two soldiers were involved in identical circumstances in a charge of rape. They were equally guilty or otherwise. The same charges at first were brought against them with the same accusing witnesses. One sol-

dier was tried first. He was sentenced to life imprisonment and is now at Lewisburg Penitentiary. Due to facts brought out at his trial, however, it was decided that "a trial was not warranted" for the other soldier, and he never even came to trial. The Board of Review (in the Mediterranean theater of operations, not in Washington) presumably never knew of this aspect when it approved the findings and sentence of the first soldier as "legally sufficient." It was not part of the record. Probably the board could not have considered it if they had known. Yet it made all the difference of a life in prison to the first soldier.

By a startling opinion rendered in January 1943, the Judge Advocate General himself crippled the ability of the Board of Review so far as establishing essential justice in court-martial convictions and sentences is concerned. This is the document referred to on page 18. Reversing previous practice, and plainly nullifying the intention of Congress in enacting article of war 70, the decision states that the provisions of that article requiring a thorough and impartial investigation before trial are not mandatory, and that failure to comply with them is not a jurisdictional error. The same doctrine is held to apply to the requirement of article 70 that the appointing authority (the general) refer the report of the investigation to his staff judge advocate before trial for consideration and advice, and to the requirement of article 46 that the reviewing authority (the same general) refer the decision of the court to his staff judge advocate for advice before approving of the findings and sentence.

Many miscarriages of justice which have taken place owe their origin to faulty investigation procedure. This decision, which is determinative at present for Army legal policy, means that the "thorough and impartial investigation" which article of war 70 requires may be inadequate, or prejudiced, or even nonexistent. The general does not have to refer the case to his legal adviser before referring it for trial. Nor does he have to consult his legal adviser, as directed in article 46, before approving a conviction or a sentence. As a result of any or all of these omissions, the likelihood of injustice is greatly increased. Articles 70 and 46 were enacted to protect the accused against just this possibility. Now, however, these are no longer "fatal errors" and the Board of Review is not allowed to consider that the rights of the accused have been prejudiced, or that due process of law has been violated, even though they may be well aware that this is exactly what has happened.

The Board of Review in Washington has had to bear the brunt of criticism really belonging to boards of review in overseas theaters of operation, because the public has not understood how independent the latter have been throughout the war. In major theaters of operation (Mediterranean, European, Southwest Pacific, India-Burma), each theater command has had its own judge advocate general (called an assistant judge advocate general) and his own board of review, a whole set-up parallel to that of the War Department, and practically independent of it. It is known that some of the most striking miscarriages of justice have taken place abroad—though usually little is known about them in detail, Army judicial processes abroad being enfolded in even greater obscurity than those at home. Boards of review in theaters abroad are, of course, subject to the same legal limitations as that in the War Department, but all judicial processes

from top to bottom have been more subject to arbitrary action on the part of general officers. Overseas theaters being combat areas in part, justification or extenuation can be adduced for almost anything, on grounds of haste, shortage of officers, and military necessity.

(On January 19, 1946, the powers "statutory or otherwise" of the commanding generals of overseas theaters pertaining to courts martial, including the power of confirmation and the powers conferred by articles of war 48, 49, 50, 50½, and 51 were terminated, and these commanders ordered to send to Washington all pending records involving sentences of death or dismissal for confirmation.)

It is probable also that some of the censure which has been poured upon the Board of Review, including some of the criticism mentioned above, is really applicable not to the Board of Review but to the Military Justice Division of the Judge Advocate General's Office. That division examines cases of less than extreme seriousness (i. e., cases which do not involve the penalty of death, dismissal of an officer, dishonorable discharge not suspended, or penitentiary confinement) but which are serious enough to the person concerned. The Military Justice Division has to do its work under the same general limitations as those which bind the Board of Review. It has had to deal with a much greater volume of cases. Only one person examines a particular case before decision is made. Evidence in committee files indicates that they approve the findings and sentences as they come in, in the ratio of 99 to 1. It seems incredible that only one in a hundred cases really calls for alteration, even within the limits prescribed.

The present discussion should serve to make clear that much adverse comment directed against the Board of Review does not rest upon a very solid basis when the limitations under which the board operates are considered. Nevertheless it is useless to look to the Military Justice Division and the Board of Review for over-all rectification of all injustices committed "below." The system simply does not permit it. Yet the matter of justice or injustice is the great matter. It is perhaps the greatest of all matters.

The case mentioned above is further illustrative. There would be no doubt in the mind of any reasonable person that the two soldiers went together to a well-known and apparently populous house of assignation; that there they were set upon, beaten and robbed, one of them (the second soldier) being rather severely injured; that the accusation of rape was brought to cover up the attack. In any event, the charges were dropped against the second soldier after the first had been tried. The review board in the Mediterranean theater may have made the same inference, though they had to sustain the conviction because there was testimony to the effect that the accused was guilty.

A captain in France was convicted, under the ninety-sixth article of war, of handling money in connection with English-French rates of exchange in a manner forbidden by ETO regulations. There is much evidence to show that his only essential guilt was that of not reporting the transaction of a friend, who later committed suicide, and that others more guilty testified falsely (as they later admitted) involving him in order to hide their own guilt. The day before the captain was convicted, a lieutenant colonel was tried on the same charges and given dismissal from the service. The captain was given the same plus

3 years penal servitude. Even assuming that the captain was guilty as charged, the two sentences were incompatible. The board of review in ETO pointed this out, but the general was inflexible and refused to change anything. The captain is in confinement in France.

8. *The pressure of command on the processes of military justice.*—In dealing with this phase of military justice we touch one of its most delicate and controversial aspects. While giving attention to the responsibility of the Army in connection with the "basic American rights" of the individual (which even an admiral may find it necessary to claim, as happened at a recent joint Senate-House hearing on Pearl Harbor), it would be unfair if recognition is not given at the same time to the responsibility of the Army for order, discipline, and military effectiveness. In a particular situation there may sometimes seem to be a conflict between those two necessary emphases, yet in a broad way it ought not to be impossible to reconcile justice to the individual citizen serving in the Army with the actual needs of the service. The present system of military justice seeks to do this, and in many respects it is successful. In other respects improvement is not only possible but greatly needed.

The influence of command on military justice takes two forms, which might be called official and unofficial. The two forms are easily commingled.

Officially the power of command, though not unchecked, is paramount in the processes of military justice. It is present at every step. The initial charges against an accused man are ordinarily brought by the company commander even if he does not originate them himself. He has some discretion in the matter. He may ignore the accusations, though of course he cannot do so if they are serious and the accuser might take them to a higher officer, or he may decide that the matter can be dealt with under the one hundred and fourth article of war without court-martial procedure. Summary courts, with which this study is not particularly concerned, are entirely under the control of a regimental or post commander. If the case is one in which only a general court can impose an appropriate penalty, the commanding officer appoints an investigating officer. (He may do so also in a special court case, but this is no longer required.) He accepts (or otherwise) the report of the latter, and decides whether the case shall be tried at all. He selects the prosecutor and the judges and frequently the defense counsel. (He does not, strictly speaking, appoint these officials but only recommends their appointment; it comes to about the same thing.) All the personnel involved are immediately under the jurisdiction of this commanding officer in almost every aspect of their lives. The duties to which they are assigned, their leaves and promotions, their grading in the service, their good reputation, and to a large extent their future careers are in his hands. He has many ways by which he can make his wishes in a particular case known and his power felt.

The same power in a still larger way is vested in the officer exercising general court-martial jurisdiction. He may change the local commander's recommendation regarding the appropriateness of trial and the personnel of the court, prosecution, and defense. In his capacity of reviewing officer he passes on the findings and on the sentence, overriding the advice of his staff judge advocate if he chooses

to do so. In fact, by the 1943 ruling of the Judge Advocate General referred to above, he does not even have to consult his staff judge advocate, in spite of article of war 46. He, too, has the officers concerned in the case (this time including the colonel himself) under his command. If he should wish to employ his power to determine the issue of a court martial, it is not very difficult in most cases for him to do so and still keep within legal bounds.

While the power of the commanding general over personnel involved is probably very rarely employed with the deliberate intent of affecting the course of justice, it can unintentionally do so, just as a great planet in its orbit can hardly avoid causing aberrations in the courses of other and smaller planets in its neighborhood. Quite apart from this influence, which may not be intentionally exerted, the legal official power of the commanding general exercising court-martial jurisdiction is very great indeed. While he may not reverse an acquittal (acquittals are rather rare anyway) nor increase the severity of a sentence (sentences are usually sufficiently severe), in the overwhelming majority of cases he is the final judge of both law and fact. Much is made of the examination of cases by the Board of Review and other authorities in Washington, but they may be reluctant to question the ruling of the commanding general on questions of law, and they are powerless to overrule him on questions of fact. This exceedingly important sentence from the Manual for Courts Martial has already been quoted but deserves repetition here:

> In such cases the law gives to the court martial and to the reviewing officer exclusively this function of weighing evidence and determining what facts are proved thereby; therefore if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontroverted evidence of such facts.

This means that when any evidence whatever, no matter how dubious or how clearly false, has been accepted as true by the commanding general in his capacity of reviewing authority, the judicial authorities of the Army at Washington are bound to accept it as true also, and are thus prevented from correcting even an obvious injustice.

When the case reaches the highest Army judiciary, the Board of Review and the Judge Advocate General in Washington, the personnel who make the decisions are still subject to the power of command.

It should be clearly understood that the facts as to the power of command in the system of military justice as they are indicated in the preceding paragraphs, do not constitute a basis for inferring that this power is generally misused. The overwhelming majority of officers of higher and lower grade who exercise this power in their respective measures do so conscientiously and with a keen sense of the responsibility which the possession of this power confers upon them. Nevertheless, the power is there and such power always opens the way to the possibility of abuse. The question which arises is, whether it is necessary for officers of various grades to possess very great judicial powers in addition to the powers necessary to administration. The principle of the independence of the judiciary has always been regarded as one of the most cherished and necessary safeguards of democracy. It cannot be claimed that independence of the judiciary exists in the Army. It is possible to conceive that the Army might have its own

judiciary with its personnel acting outside the sphere of the immediate commands in which cases arise.

Cases cited in previous parts of this report provide direct or indirect evidence of the pressure of command upon the course of military justice. A further illustration may be added. The point is not that such cases are typical, but that they do actually exist.

In 1942, in New York, a major lost some Army funds. Many of those closely acquainted with the case do not think there was actually any misappropriation nor apparently did the court think so, but this aspect of the case is not important for our purpose. While the investigation was still going on, the commanding general issued a court-martial order appointing a court to try the major, naming him by name, instead of employing the usual phrase, "to try such cases as may be properly brought before it." The issuance of the order while the investigation was still going on, and its unusual form, were interpreted as clear notification to the investigating officer that the general wished the major brought to trial and was in effect ordering the investigating officer to bring in that as his recommendation.

The trial itself seems to have been an exceptionally thorough one. The court deliberated on the evidence presented by more than 30 witnesses. The decision apparently proved a disappointment to the commanding general, for the court imposed only a light sentence, fining the major an amount somewhat less than the sum which had disappeared and directing an official reprimand. When the findings and sentence were reported to the commanding general, he rebuked every member of the court in writing for not pronouncing a sentence of dismissal from the service. Then he ordered reclassification proceedings initiated against the erring major. (Compare what was said on the subject of reclassification, ch. 7.) Finally the general ordered every member of the court to take a 6 weeks' course in military law; the object of this order may have been to humiliate and punish the members of the court for their light sentence, not to improve their education.

All of the eight officers composing the court were of field grade, three were experienced lawyers from civil life. The president was a Regular officer of 25 years' experience in the Army who as provost court in Hawaii had heard more than 600 alien cases and had had much court-martial experience. The most significant comment made on this affair was perhaps this: "Think of the next poor devil. Think of what he would face when he came before that court. He wouldn't have a prayer."

The Committee has in its possession examples of letters written by commanding generals rebuking members of courts martial for acquittals and "unjustifiably lenient" sentences. Such letters are apt to be based on the assumption that a court which acquits the defendant or gives a lesser sentence than might be given is not only not exercising responsible judgment but is going outside its legitimate province, which is apparently to find guilty everyone brought before it and sentence him as heavily as possible. One such letter says:

> Clemency is the peculiar prerogative of the appointing authority. A palpable invasion of this right has been effected. Such action tends to undermine the effectiveness of the general discipline which the courts have been established to maintain.

Other communications of this sort go further and threaten member of courts martial. One sent to all commanding generals and commanding officers of a very large general command contains the follows ing paragraphs of a threatening nature, the implication of which will be abundantly clear to any Army officer:

> Courts martial which acquit admittedly guilty persons and which, by their continued imposition of inadequate sentences, indicate by their findings and/or sentences that they regard themselves as rehabilitation agencies and the sole repositories of the powers of clemency will be dissolved. Appropriate letters of reprimand will be placed in the 201 files of the members of such courts martial.
>
> It is desired that when officers who exercise powers under AW 104, summary court officers, or members of special courts martial are remiss in their duties and are, therefore, removed from office or otherwise disciplined by a base unit commander, this headquarters be notified immediately of the action taken. Also, if personnel of general courts martial sitting at a base unit are similarly remiss in their duties in the judgment of the base unit commander, recommendation for appropriate action should be immediately made by him to this headquarters. This procedure is necessary so that this headquarters will know whether or not the base unit commander personally approves of the punishment, if any, meted out by the courts which sit at the base unit.

It will be noted, among other things, that such threats as these apply to all members of courts. As each member of a court is sworn to secrecy about the way he and other members have voted, the general who has an "appropriate reprimand" placed in a 201 file (the officer's confidential official Army record) does not, presumably, know whether this reprimand (so important for the officer's future career) is being placed against someone who was guilty of voting for an acquittal, or an innocent person who was all for "giving the accused the works." In short, it is group intimidation.

The assumption in the above letter that members of courts which do not impose severe sentences are "remiss in their duties" should not be overlooked. An even more glaring instance, from another part of the world, is cited below. Documents and substantiating information are in the possession of the committee.

An outstanding member of the legal profession who had served as assistant United States district attorney, as special assistant to the Attorney General of the United States, and had been recommended for the Federal bench by the Chief Justice of the United States, entered the Air Corps early in the war. He did not enter as a legal officer, however, because he had long been a student of military strategy and desired combatant service. He performed unusual services in a number of respects and was on the point of being advanced several grades and made chief of enemy tactics in the intelligence section of the ——— Air Force. About this time he was asked, because of his legal training, to serve on the side as law member of a general court, a request with which he complied reluctantly because he had heard of some of the things courts were doing and wanted to keep out of it.

During a recess in a trial, the staff judge advocate told the members of the court that the general desired them to impose maximum sentences.

The instant case was that of a soldier who delayed a day and a half in returning a camera which had been left by a passenger in the vehicle he drove. The soldier was charged with larceny. The circumstances as brought out at the trial made it very doubtful indeed whether the man had any dishonest intentions, and the court clearly felt this. But the general had made it apparent through the staff judge advocate

that he wanted findings of guilty and maximum sentences. The members of the court, perplexed as to their duty, turned to the law member and asked, "What do we do in a case like this?" The law member replied, "Gentlemen, under the Manual for Courts Martial, the general doesn't take the oath. You do." The court found the soldier guilty of larceny and fined him more than twice the value of the camera. It did not, however, give him the maximum punishment of 5 years at hard labor and dishonorable discharge which the general wanted.

The general wrote a letter of reprimand to the whole court and required the law member to read it to the court. Furthermore, he issued a special order that the reprimand should be placed in the law member's 201 file. The letter read, in part:

> That sentence is most inadequate and reflects discredit on the administration of military justice. Those members of the court responsible for it have failed in their duty and indulged a disregard for law and the high standards of honor to which members of the military service are held. A thief deserves the sternest condemnation; when convicted by general court martial he should be sentenced to dishonorable discharge, total forfeitures of pay, and a substantial term of confinement at hard labor; less is an affront to honest soldiers and a blow to discipline. Circumstances suggesting clemency may properly be referred to the reviewing authority for consideration in determining execution of the sentence but cannot justify adjudication by the court of inadequate punishment for the offense. For its failure to perform its duty, I reprimand the court most severely.

The law member did not receive the scheduled promotion and assignment but was relieved of his former post, sent to an inactive base, with orders that no duties be assigned him. His mail was censored and delayed. In these circumstances he sent, through channels, a petition to the President. His immediate commanding officer gave him the friendly advice, for his own good, not to do this. He replied that he could not morally withdraw a petition of that kind, regardless of consequences. To continue in his own words:

> I was then called to the ——— Bombardment Division. * * * General ——— stated to me that if I had been properly trained in the Army I would have known that the Army does not want interferences by the President of the United States or by Congress, and I remember those words as though I had memorized them.

The law member's petition was withheld and never reached the President. He then addressed to the President a petition for a board of inquiry, a petition which does not have to go through channels, and mailed it direct. In course of time he received a reply, not from the President but from the Adjutant General, denying the petition on the ground that the reprimand had not been found in the files of the War Department (there is no explanation of this); that it was not a reprimand anyway but "advice" (the general officially called it a reprimand); and finally that it appeared the general was only "exercising his well-recognized prerogative to advise a court through the president thereof concerning such matters as improper performance of duty."

It is clear that "improper performance of duty" in the above letter, like similar phrases in the documents cited above, means simply not finding accused persons guilty and not inflicting heavy sentences on them. It does not refer to any laxity or irregularities of procedure, or any failure to observe legal prescriptions.

By this letter (which is in the committee s possession), the War Department lined itself up officially with those officers described on

page 11 who "regard a court martial as essentially a committee to conduct an inquisition for the information of the commanding officer so that he may properly enforce discipline in his command," rather than a court of justice. The whole offense of the law member lay in the fact that he had advised the court to take action in accordance with their oath, their conscience, and the law, when action so governed did not coincide with the express will of the general. The War Department's letter is a clear indication that in its view a general is acting within "his well-organized prerogative" when he directs the sentences courts shall give and punishes members of courts who do not follow his directions. This prerogative is not mentioned in the Articles of War or the Manual for Courts Martial, but it is a powerful factor in the administration of military justice.

9. *Position of the enlisted man.*—In military justice, the enlisted man tends to be at a disadvantage, quite apart from the denial of trial by judgment of his peers. By the regulations and the Manual, for example, an enlisted man has the right to bring charges against a commissioned officer. This is largely a paper provision. An officer of long experience, well known to the public, has said that he hardly ever knew an enlisted man to accuse an officer, but when it did happen the enlisted man always found himself court-martialed or transferred.

It is a very grave offense for an enlisted man to strike an officer or even a noncommissioned officer. Even in time of peace he may be sentenced to 5 years' imprisonment, and in wartime to death. It is not a specific offense under any article of war for an officer to assault an enlisted man, though he could be charged, under the provisions of article 96, with conduct unbecoming an officer.

In the Army system the Inspector General has his representatives throughout the Army, and any officer or soldier who considers himself unjustly treated has the right to bring his grievance to the attention of the latter for correction. The opinion of enlisted men (and junior officers) seems to be that the provision is worthless.

Minor injustices often rankle deeper, and do more harm to morale, than big ones. In Manila, on the island of Leyte, and doubtless elsewhere, orders were issued that all who violated speed laws would be punished by court martial and the actual sentences were prescribed (illegally). Enlisted men were to be fined for the first offense, but officers were not to be punished until the third offense, in which case they were not to be fined but to receive a reprimand. In Manila, and doubtless elsewhere, it is known that sometimes Army chauffeurs had orders to speed their vehicles and so were forced to choose between being punished for disobeying orders or being arrested by the military police and punished for obeying orders; the officer who told the driver to get to a given place at a given time, thereby making violation of speed limits inevitable, did not come into the picture at all.

Enlisted men believe that their word is never considered quite as good as that of an officer. This differentiation is inevitable in administrative matters, in view of the superior position and greater responsibility of officers, but it has no place in what claims to be a system of justice. Before anything that calls itself a court, one man's word should be as valid as that of another, other things being equal. The underlying assumption in much Army justice is that an officer is more likely to be telling the truth than an enlisted man, if their stories conflict. The enlisted man often says, "It's a case of my word against an officer, so what can I do?"

Such discriminations as have just been mentioned are not local but general through the Army. They are of minor importance compared with some weightier matters of the law, but are nevertheless of the greatest importance for the good repute of the Army. It is only an occasional soldier who becomes involved in a big way in some legal injustice permissible by the court-martial system, but every soldier in the Army is touched by these little daily injustices. They have the result of making the military service unpalatable to American citizens. They should be taken account of by those responsible for recruiting and for morale. There have been, especially perhaps in the earlier years of the war, too many officers who thought of morale chiefly in terms of shows and beer. The greatest quality in American manhood is self-respect, and real morale must be built upon that as a foundation.

10. *Secrecy and anonymity.*—It has been one of the outstanding achievements of civil liberty in Anglo-Saxon countries that judicial processes are open to the light of day. Star-chamber courts, secret tribunals, and everything of that nature is outlawed in civilian justice. When a man comes up for trial he, and the public too, knows exactly what goes on in the courtroom and who makes the decisions. When there is an appeal, the accused, and the public if it is interested, knows who the judges will be, what they decide, and why. The testimony of witnesses, their cross-examination, the arguments on both sides are all accessible. Sometimes they are printed in the newspapers; the details are not always elevating, but the fact that decisions are openly arrived at and openly rendered is more than wholesome; it is vital. The experience of mankind has shown that it is a necessary element of justice. It is one of the freedoms for which we fought.

Army justice is not fashioned on this model. Its processes are as secretive as circumstances permit, and what occasionally reaches the public through public relations offices is shrouded in departmental anonymity.

The Manual provides that the public may be admitted to courts martial, yet the public is practically never present for the excellent reason that it knows nothing about the trial which is to be held. Even the members of the post or regiment are absent. Notices that a trial is to be held are not posted, and those not immediately concerned would feel themselves intruders. Unless the accused is acquitted, the trial is not over when verdicts are reached and punishments assessed. The records must go to the commanding general. For this purpose he is not referred to as such but by the impersonal appellation of "the reviewing authority." What happens at his headquarters no one ever knows; it lies between the general and his staff judge advocate, who is always a highly anonymous person. Eventually "the reviewing authority" makes his decision, and the trial is complete. The accused is then quietly informed of what his fate will be except in the improbable event of an overturn of the decision of the general by the still more anonymous reviewing and confirming authorities in the War Department. The names of those personages are never published. Occasionally decisions in which the public has shown an interest are announced in the name of the head of the Department. Who analyzes the facts and reaches the conclusions is not divulged.

The records of the Judge Advocate General's Department, unlike corresponding records in civil courts, are not available to the public. As a matter of courtesy, not of right, defense counsel are allowed to appear when a case comes before the Board of Review—though, of

course, this happens rather seldom, and only when the defendants can afford to employ them—but such counsel are not permitted to see the staff judge advocate's report to the convening authority (general) on the ground that this is a confidential report to a superior officer. Nor are the reports of the Board of Review in cases requiring confirmation divulged. The general Army practice is to let out as little information about court-martial trials as possible.

The accused has the right to ask for a transcript of the record of his trial. The transcript given is a bare record of what was said in open court. The report of the investigating officer, upon which the trial was based in the first place and which in practice, if not in theory, does so much to fix a presupposition of guilt upon the accused, is not included. The latter has no means of knowing, or at any rate proving, how "thorough and impartial" the investigation was and this often has a great deal of bearing upon the case, because, as we have seen, the investigation is often neither thorough nor impartial. Data given out by the Army are always limited and grudging, and defense counsel (if any), when the case reaches the Board of Review, are often considerably handicapped because of this fact.

> The famous Coleman case has been cited in public print as an example of surprising decisions by unknown authorities. Col. W. T. Coleman, commander of Selfridge Field, Mich., in a fit of drunken, irresponsible temper, shot his Negro soldier chauffeur. Four months later a court martial convicted him of drunkenness and "careless use of firearms." The original sentence was that Coleman be reduced to captain and withheld from promotion for 3 years. This must have been approved by the commanding general and the Judge Advocate General. It is open to wonder what finding and sentence would have been applied had a drunken Negro soldier shot the colonel. There was much newspaper discussion of this case, however, and 2 months later the "War Department" (not even the Secretary of War) announced that Colonel Coleman was being retired. No individual had any public responsibility for decisions made in the case, everything being veiled in corporate action.
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> In the case of the captain in France, described on page 33, the former captain was forbidden to send his record of trial home to his wife, the reason being that the document was stamped "confidential," and an Army order forbade sending it out of the country because it might reveal to the enemy the names of places where military organizations were. It happens, however, that this trial took place on May 31, 1945, after VE-day. Permission to send the record was denied to the captain in December 1945.

11. *Excessive and disparate sentences.*—There have been many excessive sentences, although none perhaps with the degree of absurdity reached in the First World War when a soldier was sentenced to a term of 30 years' imprisonment for refusing to hand over a package of cigarettes to a second lieutenant who had been in the Army 3 weeks. The most tragic, of course, are the death sentences not commuted, about which it is so difficult to obtain information. Many of these have been for rape, especially abroad. Armies of other nations in Europe and probably elsewhere never give a sentence of more than 10 years for this offense (the British Army gives 6 months to 2 years) and when the peoples abroad have seen us hang our own soldiers for it they have been asking curious questions about American freedom.

The fact that, as the Manual for Courts Martial points out, rape is "an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent," together with the possibility that Army severity in this respect contributed to a practice in Europe of bringing the charge in order to extort money from American soldiers, might well have made the Army more cautious, from motives of expediency if not from a sense of justice, in putting men to death or ordering them to life imprisonment. The object, presumably, was to coerce soldiers into good behavior and to increase the respect for our forces in enemy and liberated countries. It may be conjectured that neither of these objectives was greatly promoted.

> The case of the soldier convicted of rape in Italy and now serving a life sentence (while his companion was not even tried for the same offense because of facts exculpatory the accused brought out at the first trial) is similar to another case known to the committee in that the complainant was a woman of light morals. In fact she was the owner of a house of ill fame. The same is true in the other case known to the committee, and in this case also an American soldier is serving a life sentence for intercourse in a house where the inmates regularly received men for pay.

Absence without leave has constituted during the war a difficult problem for the Army. In peacetime the penalty imposed was very moderate (6 months if absent for 60 days or more, 3 days' confinement and 2 days' forfeiture of pay for each day absent if less than 60 days). Millions of men, whose previous experience had been that they could quit their job if they did not like it and in addition enjoy the satisfaction of telling the boss what they thought of him, were brought into the Army suddenly and found quite other conditions prevailing. Some of them were ignorant men with little understanding of what an army is and what a war is. They were sent to strange climates. It was not surprising that many "took off" for what seemed to them good reasons, sickness at home and things of that sort. Some of them were real deserters, but many had no intention of deserting. Others committed the offense of a. w. o. l. repeatedly. Others disappeared with the obvious intention of avoiding foreign service just as their outfits were likely to be shipped abroad. As a result of conditions almost chaotic in places, the President removed the limitation on the sentences which courts could give for absence without leave, and the sky became the limit. Army courts in Europe adjudged two sentences of life imprisonment for a. w. o. l. No uniformity of practice prevailed, but there is no question that sentences of utterly unreasonable severity were very common. To justify this it was said that a sentence should be long enough to keep the offender in prison until the war was over.

> A chemical engineer from Wilmington, Del., 34 years of age, an only son, was inducted in 1942. He had always been of a high-strung, nervous disposition and in the opinion of competent medical men should not have been inducted. He made good, however, and was later commissioned, serving 8 months in Iceland and later on the battlefields in France and Belgium. While his organization was in a rest area some 30 miles from Paris, he, with some companions, made a trip to Paris on a Sunday afternoon, August 27, 1944. Becoming separated from his companions who went off with some women, the lieutenant took a room at a hotel. He expected the others to join him in the morning. They

did not do so. He waited for them and did not get back to his outfit until Tuesday morning. The others were back on Monday morning. Whether or not any of the group had permission is not clear, but no charge was ever placed against any of the others. The lieutenant, who was 1 day a. w. o. l., was convicted by general court martial to dismissal and confinement at hard labor for 5 years (later reduced to 2 years). The lieutenant was brought to this country and confined at the disciplinary barracks at Green Haven, N. Y. While he was there, the commanding officer and the board of psychiatry and sociology recommended his release on grounds of his mental and physical condition. This was refused by the Secretary of War, in conformity with the policy of not freeing any prisoner sentenced for Army violations as long as the war continued. After Japan surrendered, he was released on September 4, 1944. He reached home at 9:30 p. m., and died 2½ hours later of a coronary thrombosis, possibly brought on by strain and shock.

The conviction of a useful officer and his sentence to dishonorable discharge and 2 years of hard labor, for 1 day's absence without leave, not in the presence of the enemy, the refusal of even clemency recommended by penitentiary officials, its culmination in death, and the accompanying misery of a patriotic American family were all perfectly legal under the system.

Some comments that have been made are instructive: A high-ranking Army officer said there must have been somebody in the lieutenant's company who was "out to get him" because ordinarily the offense for which he was court-martialed would have carried a penalty of not more than a $50 fine. Another officer, formerly staff judge advocate of a large command, said: "If they sentenced all the officers who were away a day too long like that they wouldn't have any Army left." A prominent civilian attorney wrote to the Secretary of War:

> When I looked into the law for the purpose of ascertaining what individual or what board had been set up to hear appeals from such sentences, I learned to my surprise that there is absolutely no appeal from the sentence of a court martial. I have discussed this case with our representatives in Congress, but they have been unable to make any impression on your subordinates in the War Department. In their attempts to have this case reviewed in this country, it became evident that we were up against a military system as self-righteous and cold-blooded as any in the world. As a practicing attorney, I realized that constitutional guaranties mean nothing as far as Army trials are concerned. * * * I am one of those who was of the opinion that universal military service would be a good thing for this country, but I have changed my mind; and as long as I live, I shall oppose any attempt to extend the military power in time of peace. I do not wish to risk having my son inducted into an army which is as inconsiderate in its practice as this case proves it to be. I do not want his heart or his spirit broken by the action or decision of arbitrary boards from whose decisions there is no appeal.

The Under Secretary of War wrote to the parents, referring to the above as a "fine letter" and extending sympathy. He would, he said, have recommended a Presidential pardon for the lieutenant, but it was decided this could not be given posthumously.

On March 5, 1943, The Adjutant General published a letter on the subject of uniformity of sentences adjudged by general courts martial (AG 250.4 (2–12–43) OB–S–SPJGJ–M). This letter outlined a policy of appropriate sentences in the area of the United States, for offenses

not controlled by the articles in time of war or by the table of maximum punishments where limitations have been removed by the President. For aggravated absence without leave, the punishment should not "ordinarily" exceed 5 years; for desertion (in the United States) "not less than 5 years"; for a soldier striking a commissioned officer 5 years would be "appropriate," with 10 years as a "probable maximum"; deliberate disobedience of a commissioned officer, "not less than 5 years"; misbehavior of a sentinel, 5 years to be considered "normal." The letter was careful to state that since a court martial is a judicial body, the policies announced must be construed as a "guide" rather than as a directive. Such a pronouncement from top authority in the Army, however, was naturally taken as virtually an order. Commanding officers read this letter to members of courts. The effect was to establish a high degree of uniformity in sentences, at a high level of severity.

As a result of this policy, hundreds, probably thousands, of bewildered boys with no really disloyal intentions were sentenced to 5 years' imprisonment for absence without leave. A policy both wiser and more humane might have been worked out which would have saved more of these soldiers to useful and honorable service. The British Army, faced with this identical problem, used other methods. (Absence without leave for more than 21 days is regarded as desertion in British military law, but no one can be sentenced to death for desertion.) The legality of the letter of The Adjutant General has been questioned. It is a case of the executive, rather than the law, directing what sentences courts must impose, and such proceedings should be scrutinized even in wartime.

Another example of infringement upon what are usually considered elementary judicial principles occurred in the Air Forces, when a letter was sent out by the commanding general, Army Air Forces, practically demanding dismissal for officers convicted of breach of certain flying regulations. This was also read to members of courts. So many officers were lost to the service through this policy that it had to be modified.

It is the opinion of competent observers that Army sentences generally err on the side of severity. This is a phase of Army justice which most excites civilian criticism, although it is the substance of this report that the root of the trouble lies deeper, in the court-martial system itself.

The same can be asserted in a general way of the much-discussed disparity between sentences imposed on different offenders for the same offense. One cause of disparity is the vagueness of so many of the Articles of War. Another cause is a difficulty not paralleled in civilian justice, but which is real to an Army in time of war. Offenses which might be trivial under some circumstances become fraught with extreme gravity on a campaign and in the presence of the enemy. This consideration constitutes a measure of justification for many severe sentences imposed abroad, although as a justification it has been abused and made to cover hasty and unjust convictions and unconscionable sentences, such convictions and sentences as make it necessary for the War Department after each war to go through the great task of revising sentences downward by the exercise of clemency.

The major root of the difficulty, however, lies in the immediate nature of the two conceptions, "peacetime" and "wartime." Some sentences imposed in quiet camps in the United States and back areas abroad have been very heavy because it was "in time of war," when as a matter of fact everything connected with the offenses took place thousands of miles from any front, and there was no apparent reason for such severity. They order this matter better in the British Army. Due perhaps to the long experience of the British in "little wars" far from home, British military justice has developed a distinction not between punishments "in time of war" and "in time of peace," but between troops "on active service" and those "not on active service." Under this distinction, "in time of war" cannot be used to justify sketchy processes of justice and extreme sentences far from the scene of actual contact with the enemy. Sentences may be more severe for military personnel who are "on active service," which is thus defined:

> In this act * * * the expression "on active service" as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operation against the enemy or is engaged in military operations in a country or place wholly or partly occupied by the enemy or is in military occupation of any foreign country (the Army Act, sec. 189).

We need some distinction equivalent to this in our Articles, and, in addition, the Articles should contain, or Congress should permit the President to publish in the Manual, maximum tables of punishments for both conditions. At present there is a maximum table for "time of peace," but in "time of war" the limits for some offenses are entirely removed, with resultant confusion, disparity of sentences, and essential injustice.

It is only fair to add that criticism of excessive and disparate sentences should not be laid at the door of the actual courts imposing the basic sentences without taking into consideration the following:

(*a*) The court is aware that its sentences can only be revised downward, and not upward, by higher authorities.

(*b*) The court tends to rely on the reviewing authorities at headquarters and in the War Department to correct sentences that are out of line.

(*c*) The court is aware that due to provisions for shortening sentences for good conduct while in confinement, to rehabilitation practices, and similar measures, the full time imposed will not, in many cases, be actually served.

(*d*) It was well understood that heavy sentences would be drastically cut down after the war, as is now actually being done.

Many, probably most, of the long terms of confinement adjudged by military courts are not served out in their entirety. Harsh sentences are often not what they seem. Yet it is questionable whether the practice of imposing heavy sentences and then by clemency or other procedures mitigating them, really serves the ends of either justice or discipline. So far as the latter is concerned, Army officers seem to feel that a good in terrorem effect is produced when the men hear that "So-and-so got 10 years for that." Yet nobody is really deceived, least of all the genuinely criminal elements who are always well informed on these points. Word gets around. What the men are more likely to say is, "So-and-so got 10 years for that, but they will probably knock off 6 or 7." It is a good maxim that celerity and

certainty of punishment are far more deterrent to wrongdoing than harsh sentences which will not be carried out. Here again it is said that our British allies are wiser, and that their military courts give what we would think lenient sentences but that the sentences are likely to be carried out in full, unless essential injustice is later proved.

It is appropriate here to describe briefly the operation of the War Department Clemency Board. Normal peacetime clemency operations as carried on by the Secretary of War's office are mentioned on page 10 of this report. The war produced a vastly greater volume of prison cases, and the sentences were for much longer periods, partly, at least, because of the feeling indicated above that a wrongdoer should not be given a short sentence with a dishonorable discharge which would enable him to go home, while honorable and well-behaved soldiers were still fighting the war. Hence it became necessary after both world wars to set up a kind of mass-production clemency procedure. In June 1945 the War Department Clemency Board was established. There are five members, headed by a Justice of the Supreme Court; the others are a former commissioner of correction of New York City, a combat officer, an Assistant Judge Advocate General, a junior officer, and a distinguished civilian trial lawyer. This is the policy-making group. Under them are four special boards, each headed by a civilian, which examine the cases and report each to one member of the general board. Operations are carried on under the fiftieth article of war. The special boards have before them the following data about each case: the record of trial, a psychiatric report from the institution where the prisoner is confined, a Red Cross report on the family circumstances of the prisoner, a Federal Bureau of Investigation report on his civil record, a recommendation on the case from the warden of the penitentiary, a recommendation from the Judge Advocate General, and a recommendation from the Correction Division of The Adjutant General's Office. Procedure is obviously thorough. In most cases (more than 85 percent of those considered up to February 1946) sentences have been mitigated, often very drastically. This is in itself indication of the extreme nature of sentences that have been imposed. The board expects to finish the examination of 35,000 cases by July 1946. So far as is known, no criticism of the operation of this board exists. The only criticism is that which arises out of the necessity for its existence.

12. *Prisons.*—Thorough consideration of the places and manner in which the Army confines military personnel whom it has condemned would be impossible without a wide independent investigation. There are a few points, however, to which attention may be directed.

In its larger institutions, such as disciplinary barracks and rehabilitation centers, it would seem that the Army is following the principles of an enlightened penology. Army prisoners serving long terms are frequently confined in Federal penitentiaries, the good management of which is well known. When trouble arises it is apt to be in smaller and more temporary places of confinement, guardhouses and stockades serving local areas and units and under local commands. In this respect the situation rather parallels that which is known to exist in civilian prisons. It is not in the great institutions maintained by the Federal Government or the governments of the States that one looks to find prison abuses but in the county jails and small city prisons.

The Army lays down very precise regulations regarding the care and supervision of prisoners. Where these regulations are carried out in spirit as well as literally, there is no ground for complaint. It is inevitable, however, that here and there the deep-seated sadistic impulses which seem to be inherent among the other complexities of human nature should get the upper hand. During the war, the Army has been reluctant to assign soldiers of the best quality to duty as prison guards; they were too greatly needed in combat units. Nor are local guard companies, often referred to as military police, usually made up of members of the Army's trained military police under the Provost Marshal General. They are often "limited duty" men whose physical disabilities prevent them being useful in other capacities, acting under the local post commander and under the immediate supervision of the officers whom he assigns to duty as provost marshal and prison officer. When higher supervision is lax, abuses arise. If there is complaint and scandal results, efforts are often made to put the blame on the guards rather than on the officers who permit or direct them to treat prisoners brutally, although regulations direct that the commanding officer is responsible for all disciplinary measures taken.

Evidence which the committee found in its own investigation of conditions at the Lincoln Army Air Base as to brutalities practiced upon American prisoners is confirmed and exceeded by reports which come in from elsewhere. There is sufficient evidence to indicate that more watchfulness could be exerted by responsible authorities against the ever present possibilities of cruel treatment of prisoners.

IX. Lack of Procedure To Correct Errors of Justice

Probably the gravest single weakness in the whole judicial system of the Army is that no procedure exists for the complete correction of miscarriages of justice. We have seen how easy it is to convict a man, and how inadequate are the higher reviewing processes in spite of the claim that they are equivalent to appellate procedure in civil justice. Once a finding and sentence are approved by the division commander (or equivalent general), little is likely to be done about it. Once it has been confirmed, nothing can be done. Yet cases are constantly coming to light, such as those which have been described above, where full knowledge of the circumstances or sometimes even a careful reading of the trial record makes it abundantly clear that a grave injustice has been perpetrated.

The Secretary of War (in practice the Under Secretary) has the power of confirming many of the most serious cases, and also advises the President in this connection. The Supreme Court has held (in the case of *Runkle* v. *U. S.*, 1886) that inasmuch as the duty of confirming the proceedings of courts martial is a judicial function and not an administrative one, the President may not delegate this power and is obliged himself to consider the cases laid before him and decide personally upon them. Manifestly, however, it is not possible for the President, especially in time of war, to carry out this prescription because of the manifold and pressing nature of his other duties. Much the same thing is true of the Secretary (or Under Secretary) of War. The latter has no staff for the purpose, and indeed the Supreme Court doctrine would seem to apply to this official also.

The difficult situation of many persons convicted should be realized. They may know that their conviction is unjust. Yet once the court has acted, they usually regard their cases as hopelessly lost. It is very improbable that a case will ever again receive full consideration, no matter what facts were ignored the first time. Requests for retrial seldom have results. Defense counsel seldom put in a brief to accompany the case for review. The Board of Review at Washington must justify the conviction and sentence if any evidence whatever appears in the record to support it. There is a right of petition to the President, but the conviction is widespread (rightly or wrongly) that the only effect of such a petition is that the letter of the petitioner will be referred for answer to the same officials in the War Department who approved the conviction in the first place, and that such petitions are vain. Finally, recourse may be had to a private bill in Congress for purposes of redress, but such procedure must inevitably be rare, and in any case cannot be regarded as judicial.

There are cases which not only the defendant but official authorities in the Army's judicature know perfectly well have gone all wrong, but no authority can do anything to correct the injustice once the procedure has passed a certain stage. Not all cases are so fortunate as to get correction by means of newspaper publicity, as did the Shapiro case, nor is it desirable that they should. In the Shapiro case, a Presidential pardon was issued. This is the last recourse, and very rare at that.

Neither clemency nor pardon are remedies for miscarriages of justice. They do not clear a man of the imputation of guilt. They may shorten sentences and restore civil rights. They do not wipe out a conviction or put the man back where he was before. His innocence is not made clear to the public or to his associates.

Perhaps the greatest single need of the whole system of military justice is an independent and public tribunal which can, in appropriate cases, consider both law and fact, and be empowered to alter any finding or any sentence of a general court martial, or void the whole action.

British military law emphasizes as completely as possible the traditional rights of the citizen, which our military seem sometimes to forget. On the first page of the British Manual of Military Law, occurs this statement accompanied by judicial citations: "By the law of England, a man who joins the Army, whether as an officer or as a soldier, does not cease to be a citizen." This may be compared with the words which Washington used in 1775, words which are carved on the Amphitheater of the Unknown Soldier at Arlington: "When we assumed the soldier we did not lay aside the citizen."

X. Recommendations

Introduction to the Recommendations

The American people are proud of their Army. They realize its stupendous achievements in the recent war. They know that it was small and in many respects unprepared for the great struggle, not through its own fault but because of the blindness of the Nation to the world situation that was developing. They watched our little Army expand to a force of many millions with an amazing absence of con-

fusion and uncertainty. They saw it adjust itself to unprecedented conditions and win incredible victories. They observed that where changes were needed there was, in most respects, a remarkable readiness to discard the traditional for the sake of meeting new exigencies effectively.

It has not failed to be noted, however, that this adjustability has not extended to military justice. In that field no improvements were made. Such important alterations as did take place, like the removal of all limitations on sentences for some offenses and making violations of articles of war 70 and 46 not jurisdictional, were not improvements. They made a system which was in some respects obsolete and defective, more so. While the country was engaged in a struggle for the rights of the common man, its citizens who were drafted to do the fighting did not have their own fundamental rights as citizens adequately protected, even within the limitations inherent in military service. Abuses have existed and wrongs have been committed in such numbers as to excite widespread comment both inside and outside the Army. Even high-ranking officers of the Judge Advocate General's Department have been known to speak, in private, of course, of the "break-down" of military justice. Millions of plain citizens have come home with some degree of bitterness in their hearts not because they object to discipline, even to severe discipline, but because they object to injustice, whether in great matters or small, and the prevailing system of military justice has been a factor contributing to this bitterness. This feeling undoubtedly plays a part in popular reluctance to consent to even such peacetime expansion of the military service as a wise public policy might direct.

The readiest reply to criticism of the system is that "discipline must be preserved." There is no question that discipline must be preserved. Discipline, however, must not be named as a cloak to cover arbitrariness and injustice. Discipline is sound only when those who are subject to it know that it will be fair, that the accused will have his side properly presented, that punishments imposed will be equal, that those who are not guilty will not be treated as if they were guilty, that when (as can always happen) mistakes are made by those in power, these mistakes will be acknowledged and corrected. This is the kind of discipline which the greatest military leaders of mankind have imposed on their troops, and which, however severe, has won that tribute of loyal affection which men will give even to the harsh when they are also just. In civilian terms, it can be summed up by the words graven in the front of the Supreme Court: "Equal justice under law."

It is not very profitable to ask (except in individual cases) who is to blame for such faults in Army justice as have become evident. Apologists for the system contend that the trouble is all due to the vast expansion of the forces, which brought into the service an overwhelming number of inexperienced civilians; everything went very well, it is said, in peacetime when Army justice was in the hands of experienced professional officers. It is to be feared that this contention fails to impress such civilians as have found themselves in the Army during the war. They know this reasoning is not applied in other phases of Army activity, and they are not unaware that not only is the system itself a creation of the Regular Establishment, but that practically all the higher officials who have been responsible

for the course of justice during the war are professional soldiers. Appointing and reviewing authorities, for example, have seldom been Reserve officers, though the personnel of Army courts are usually officers whose service began during the emergency. In any event, it is not an adequate defense of any defect in a military establishment, to say that it works well in peacetime but fails to work in time of war. In other phases of Army activity, when traditional mechanism began to show cracks, it was changed forthwith to meet the new situation.

It is more profitable to ask how the system of Army justice, which in its evolution from the pre-Revolutionary British prototype has come to be a rather illogical and frequently ineffective structure, can be so modified as to serve the needs of order and discipline and at the same time afford its citizen soldiers such a measure of regard for basic human rights, that its order and discipline may be a matter of pride and affection for the American people.

With this in view a considerable number of recommendations, growing out of this study, are made in the paragraphs below. The first two of these, pertaining to the functions of the Judge Advocate General's Department and the creation of a tribunal to correct injustices, are of a broad fundamental character implying changes in the structure of the system itself. These are the most important recommendations.

The residue of the recommendations are not unimportant but they are concerned with more specific matters. Each is intended to correct some known inadequacy in the present system.

Recommendation 1

That the Judge Advocate General's Department be invested with judicial power it does not now possess;

That after a special or general court has been held, the findings and sentences shall pass directly to the Judge Advocate General's Department for all further actions of review, promulgation, and confirmation, except for such final appellate review as may be made by the Judge Advocate General of the United States in accordance with recommendation 2 below, and such final confirmation as may legally require action on the part of the President;

That in view of its increased responsibility the Judge Advocate General's Department be reorganized and enlarged both as to the number and qualifications of its personnel, provision being made for Judge Advocate jurisdictions to be set up throughout the Army independent of the immediate commands in which cases arise, and provision being made for higher reviewing officers of the Judge Advocate General's Department to take part in actual trials from time to time throughout their service in order to keep their judgment realistic as well as academically and legally sound;

That officers of the Judge Advocate General's Department be made available to sit as law members and defense counsel in all general courts martial in accordance with recommendations 4 and 6 below;

That the Articles of War be amended as may be necessary to give effect to the foregoing provisions of the recommendation.

Explanation of recommendation 1.—The administration of a system of justice is a task primarily for trained experts or technicians. Civil justice, the outgrowth of many centuries of experience in a liberty-loving people, places this responsibility in the hands of persons of legal

training and judicial character, and then segregates these functionaries as completely as possible from interference by executive power. There is no good reason why it should not be so in the Army. The Army already has an organization of trained military lawyers, but it places little real authority in their hands. They do not have authority in their field comparable with that of the Medical Department in its field. The Army admits that a general officer does not know better than a surgeon when an operation on a soldier's stomach is indicated, but it has not yet recognized that a general officer may not know better than a judicial officer when a 10-year sentence of confinement at hard labor for a soldier is indicated. A great many of the defects and abuses of the court-martial system arise from this fact.

In brief, the purpose of the above recommendation is to provide the Army with a judicial department as complete and autonomous in its field as is the Medical Department. It is believed that this proposal preserves to command, essentially intact, its function of maintaining discipline. In addition to having control of discipline by virtue of its general authority, by the wide application of article of war 104 in connection with minor offenses, and by means of summary courts martial, command will also be able to institute proceedings against those believed guilty of graver offenses, will control the investigation procedure, will have the right to commit a case to special or general court martial, and then will name the personnel of the court which will try it. After trial, the case will be in the hands of the Army judiciary, not in the hands of the immediate commanding officer of the personnel involved. To continue the comparison employed above, it will be as if the soldier, whose commander suspects him of a serious crime, will at this point be turned over to the judiciary as another soldier might be turned over to the hospital. It is believed that this procedure, while providing ample means to insure good order and discipline in the Army as a whole, will protect the individual soldier against many now-existing possibilities of injustice. At the same time, the Judge Advocate General's Department, being in fact as well as in name responsible for Army justice, may be expected to advance to new levels of judicial impartiality, judicial effectiveness, and judicial independence.

It may be objected that this still leaves the commanding general with power to take penalizing measures against members of courts who have brought in findings which he considers objectionable. With this in mind, it has been suggested in various quarters that authority to appoint general courts be limited to the Chief of Staff, and that courts so appointed have jurisdiction over specified geographical areas and function for long periods at a time. There seem to be some objections to this suggestion, however, and the recommendation of this report is in favor of the proposal here made as involving less dislocation of precedent. Mobility is required and the courts need to be closer to the points of origin of the cases. Army justice, like other Army functions, must be kept fairly fluid and mobile. It is probable that the Judge Advocate General's Department functioning as a judicial system for the whole Army can bring oppressive practices into disrepute, dispense an even-handed justice, and eventually build up a system of precedents with respect to both findings and sentences which will constitute a true corpus juris militaris and establish a desirable uniformity in the whole.

Recommendation 2

That Congress give consideration to the creation of an office of Judge Advocate General of the United States, entirely apart from the administrative system of the Army, vesting in this office authority to correct injustices arising in the judicial system of the Army, basing decisions in fact as well as in law;

That the Judge Advocate General of the United States shall be required to review all convictions by general courts martial in cases now requiring confirmation by the President of the United States as listed in articles of war 48 and 49, and to exercise in connection with them and all other cases the powers delegated by the President to the Secretary of War and the Under Secretary of War by Executive Order No. 9556, dated May 26, 1945;

That the Judge Advocate General of the United States shall be specifically empowered to receive appeals from all other decisions of general courts martial after promulgation, and to consider these appeals on a prima facie basis and, if in his judgment such appeals warrant further consideration, to give them such consideration as he deems necessary in the interests of justice, and to make such decisions concerning them as he shall deem appropriate;

That the Judge Advocate General of the United States be empowered in his judgment to order any case retried de novo or to retry it de novo in his own person, or to void any original proceeding, or to alter any sentence, or to issue an honorable discharge in place of a dishonorable discharge, or to restore to an officer his commission or the grade of which he may have been deprived by sentence of a general court martial, or to take other action as may be required to correct any injustice and so far as possible to make whole the party or parties injured;

That Congress authorize, empower, and direct the President, with the advice and consent of the Senate, to name the Judge Advocate General of the United States and one or more Assistant Judge Advocates General of the United States as in his discretion may be advisable;

That no person shall be appointed a Judge Advocate General of the United States or an Assistant Judge Advocate General of the United States who shall have been a commissioned officer in the Regular Army, Navy, or Marine Corps;

That when the Judge Advocate General of the United States shall have two or more Assistant Judge Advocates General, any decision reached by him must be concurred in by at least one-half of the number, to be considered valid;

That the Articles of War be amended as may be necessary to give effect to the foregoing provisions of this recommendation.

Explanation of recommendation 2.—The most conspicuous gap in the present system of military justice is its failure to make provision for the reversal of injustices once the findings and sentences of a general court martial have been approved by the local commanding general. There is no such thing as an appeal, and the subsequent automatic processes of review are strictly confined to the possibility of legal errors, and even in that respect are highly restricted. There is little evidence that any considerable independent study is given to such serious cases as require confirmation by the President on the recom-

mendation of the Secretary of War or by the Secretary or Under Secretary of War under the Presidential powers now delegated to them. Yet instances are constantly cropping up where it is plain that out-and-out wrongs have been committed in the form of either an unjust conviction or an unconscionable sentence. There is no real redress in such cases. The only recourse is a Presidential pardon. This is very rarely issued, and when issued does not fully clear the accused.

In this connection much is made by the Army of the procedures for clemency, both the normal procedure which is something like a parole board in civil life, and the Special Clemency Board which has been operating on war cases since the middle of 1945. The fact that the latter board is reducing terms of confinement in an overwhelming majority of the 35,000 cases of long-term confinement being considered is itself evidence of the need of such action but has no bearing whatever on the question of whether an injustice was committed in the first place, nor can the action taken restore the life or the years that may have wrongfully been taken away or the former standing of the accused in the Army or in society. Clemency cannot even grant an honorable discharge instead of a dishonorable one, its utmost capacity in this respect being to enable a convict whose dishonorable discharge was suspended the right to reenlist in the Army (even if he were a commissioned officer previously) and earn a later honorable discharge.

Clemency procedure, then, fails to provide adequate correction for errors of justice. The same may be said of the procedure requiring Presidential confirmation in certain serious cases. In article of war 48, Congress provided that any sentence respecting a general officer or dismissal of an officer or cadet, or any sentence of death, should be confirmed by the President, with the exception that in time of war officers below the rank of brigadier general may be dismissed and death sentences for murder, rape, mutiny, and espionage may be executed upon confirmation by the commanding general of the Army in the field. The purpose of reserving the most serious classes of cases (though even among these sentences of long imprisonment are not included) for confirmation by the President, was obviously to protect the accused by insuring careful, authoritative, and independent consideration before the execution of the sentence. It is instructive to inquire how completely this intention has been realized. To begin with overseas theaters, it should be observed that there the confirming power has been vested in theater commanders, without reference to the War Department or the President. This is justified by article of war 48 as it stands.

We turn now to procedure at home. During most of the war period, article 48 was carried out in that the cases concerned were referred to the President by the Secretary of War with his recommendations, recommendations which originated in the Board of Review, the limitations of which are discussed above. In 1945, however, a change was made. Despite the fact that in the case of *Runkle* v. *the United States*, referred to above (p. 12), the Supreme Court approved the doctrine that the confirming power of the President, being a judicial function, cannot be delegated and must be exercised in his own person, the President, by Executive order dated May 26, 1945, under the First War Powers Act, delegated this power to the Secretary of War and the

Under Secretary of War. A practical reason for this move was stated in the order, viz, that "the burden of duties upon the President is becoming increasingly heavy," which unquestionable fact is an additional reason for believing the system itself needs alteration. It is well understood that the power thus delegated to the Secretary of War and the Under Secretary of War actually devolved upon the Under Secretary. It is also understood that the Under Secretary of War, who has had no staff to assist him in this function, and of course also has many other duties, has relied upon the advice of the Judge Advocate General and the Board of Review. But these are exactly the authorities that have already passed upon the case. It is clear that the intention of Congress to ensure a careful, authoritative, and independent, examination by placing responsibility for final justice in the hands of the President, has miscarried. The Presidential responsibility has, in the course of being handed around to theater commanders to the Secretary of War, to the Under Secretary of War, to the Judge Advocate General, and to the Board of Review, completely evaporated, and left actual decisions in the original hands.

There is indeed a formidable array of higher authorities passing upon some court-martial cases—the approving or reviewing authority, the Board of Review, the Judge Advocate General, the Secretary of War, the President, the Clemency Board. Study of the facts brought out in the body of this report and in the above paragraphs, however, demonstrates that a case which bears all the scars of an original injustice can be passed upward from one of these august authorities to another on a basis of recommendations and decisions from below, and emerge from the process with the fundamental injustice untouched. There is clear need of an over-all agency with general and quite independent power to correct miscarriages of justice.

The intention of this recommendation is that the corrective power be lodged in a civilian public official of judicial character and standing, independent of the influence and control of the War and Navy Departments. (If Congress should see fit, the Judge Advocate General of the United States could serve in a similar character for the Navy to that proposed here for the Army.)

While many have concurred in the need for vesting this corrective power in some authority outside the War Department, there have been variations in the suggestions made. It has been proposed that a board be set up for the purpose, and this option deserves consideration. The present recommendation for a single official is offered with the idea that it is better to have a single and rather conspicuous official invested with this responsibility, in view of the impersonal and corporate nature of all other action in the court-martial system. The anonymity of military justice proceedings is commented upon in the body of this report. It is among the characteristics that give to the outside world an impression of cold-blooded impersonality and evasion of personal responsibility in connection with military justice. Regardless of how well-founded or otherwise this impression may be, its existence is sufficient reason for not leaving the tribunal here recommended to function in a mist of obscurity. The Judge Advocate General of the United States should be publicly as responsible for his decisions as is a Justice of the Supreme Court.

It has been objected that to set up an additional tribunal is simply to add another to what may seem an interminable list of reviewing and confirming authorities. The reasons for having this tribunal would seem to be made amply clear in the body of this report. On the other hand there is no reason to suppose that the Judge Advocate General of the United States and his staff would be burdened with an impossible number of cases in time of peace, and in time of war his office can be expanded by an arrangement parallel to that by which Assistant Judge Advocates General functioned with virtually independent powers in overseas theaters in the two World Wars. Nor would it be requisite for the Judge Advocate General of the United States to prepare an elaborate review of each case, a declaration of his decision being all that would be needed.

The Board of Review in the War Department would continue in its present form. In most instances its decisions would still be final and the meticulous reports which it draws up on the purely legal aspects of each major case would be of great value to the Judge Advocate General of the United States in those cases which he considers.

Recommendation 3

That Congress consider amending article of war 4 in such manner as to provide that when charges are brought against enlisted men for trial by special or general court martial, they shall be informed of their right to have enlisted men sit on the court;

That if the accused so requests, enlisted men shall be appointed to the number of one-third of the total membership of the court;

That enlisted men so appointed shall be selected from other companies or equivalent organizations than that of the accused person and that of the officer bringing the charges;

That failure to comply with this provision shall be a jurisdictional error.

Explanation of recommendation 3.—In the body of this report the matter of enlisted men serving on courts martial is discussed, and mention made of the practice of some foreign armies in this connection, as well as reference to the ancient civil right of an accused person to trial by a jury of his peers. There has been a rising demand on the part of our soldiers for recognition of this elementary principle of justice in military courts.

Recommendation 4

That article of war 8 be amended in such a manner as to require that the law member in a general court martial be an officer of the Judge Advocate General's Department;

That the law member shall at the conclusion of proceedings, if requested by the president of the court, sum up the case impartially for both the prosecution and the defense;

That the law member shall not vote on the findings or sentence;

That failure to observe the foregoing provisions shall constitute a jurisdictional error;

That consideration be given to the advisability of denominating the law member by the term "trial judge advocate," at present applied to the prosecutor, and the prosecuting officer by the term "prosecuting officer."

Recommendation 5

That articles of war 8, 9, and 10 be amended as may be necessary to prohibit the censure, reprimand, or admonishing of any member of a court martial by any authority who has appointed a general, special, or summary court, with respect to the findings or sentences adjudged by such court.

Recommendation 6

That article of war 11 be amended to require that counsel appointed for the defense be officers of the Judge Advocate General's Department.

Explanation of recommendation 6.—This recommendation is made in view of the facts that inadequate defense counsel have been responsible for many miscarriages of justice, that there has been in existence a steadily maintained policy prohibiting Judge Advocate General officers from serving as defense counsel, and that in criminal practice everywhere except in the Army trained attorneys are assigned as defense counsel.

Recommendation 7

That Congress consider amending article of war 45 and such other articles as may be necessary, to provide a maximum table of punishments in time of war;

That in this connection a differentiation be made between military personnel in zones of combat or in occupation of foreign countries, and military personnel in areas where more normal conditions prevail even in wartime;

That the above table of maximum punishments apply equally to officers and enlisted men.

Explanation of recommendation 7.—Excessive sentences such as have excited civilian resentment and which have in many cases been so severe as to constitute an actual indictment of the system of military justice, have in fact been almost entirely due to three factors: (1) the removal of limitations on sentences for certain offenses, by the President, during the war; (2) the absence of limitations on sentences in wartime in certain of the articles; and (3) by the fact that officers are not included in many of the limitations on punishments.

Recommendation 8

That article of war 44, requiring publication in his home newspapers of the conviction of an officer for cowardice or fraud, and making it scandalous for any other officer to associate with him, be dropped.

Explanation of recommendation 8.—Article of war 44 has not been carried out in practice for many years for obvious reasons.

Recommendation 9

That article of war 50½ be amended to require that all convictions under which the accused has been confined for more than 6 months be reviewed by the Board of Review.

Explanation of recommendation 9.—The purpose of this recommendation is to close a loophole now existing. Cases in which a dishonorable discharge has been suspended are reviewed by the Military Justice Division; cases in which a dishonorable discharge is not suspended are subject to the far more exacting scrutiny of the Board of Review. With the definite intention of avoiding the latter, in certain cases, the

general exercising court-martial jurisdiction sometimes suspends the dishonorable discharge until after the case has been approved by the Military Justice Division and then orders its execution. This enables the case to bypass examination by the Board of Review.

Recommendation 10

That article of war 70 be amended to provide that failure to comply with its requirement for a thorough and impartial investigation before trial shall be a jurisdictional error.

Recommendation 11

That article of war 70 be further amended to make provision that a showing of evidence having been obtained by oppressive, cruel, or persecuting practices, including threats, for forcing confessions or admissions from accused person or persons under investigation, shall be excluded from use at the trial by the prosecution; and that officers or others clearly responsible for such practices shall themselves be subject to charges under the Articles of War.

Recommendation 12

That article of war 92 be amended to make the punishment for rape subject to the discretion of the court; and that for United States personnel serving in a foreign country, the maximum punishment be that imposed by the civil law of the country for its own citizens.

Explanation of recommendation 12.—Convictions for the crime of rape have been fairly frequent during the war. Widely different from the codes of other nations, article of war 92 makes mandatory a sentence of either death or imprisonment for life for this offense. There is reason to believe that not only have there been unjust convictions for this offense but that other abuses have arisen because of the mandatory severity of this article.

Recommendation 13

That article of war 96 be amended to provide that punishments for crimes and offenses not capital, awarded under the article, be required to conform to the prescriptions of Federal and State statutes for corresponding offenses;

That article of war 96 be amended by the omission of the clause "conduct of a nature to bring discredit on the military service."

Explanation of recommendation 13.—Article of war 96 is of a general nature, intended to cover many kinds of offenses not covered in other specific articles. The more serious of these offenses are paralleled in civil criminal codes, and the amendment proposed is intended to correct the wide disparity of sentences now awarded under this article by placing them under the limitations prescribed by Federal statutes or by the statutes of the State in which the offense is committed.

Recommendation for dropping the clause, "conduct of a nature to bring discredit on the military service," is based on the following facts: In 1916, at the request of the Army, Congress inserted the clause mentioned into the article as it stood previously. It was represented by the War Department at the time that the sole purpose of this clause and the only use which would be made of it was to enable prosecution of retired Army personnel who were remiss in paying their debts. Yet the committee has it on good authority that only once in the years since 1916 has this clause of this article of war been used for the purpose named, and it is notorious that it has constantly been used

for other purposes in a way that constitutes a serious abuse of justice. Almost any peccadillo or error of judgment can be stretched into "conduct of a nature to bring discredit on the military service." It is believed that without this clause, article of war 96 is sufficiently broad to cover all genuine offenses against good order and military discipline which require correction by prosecution under the Articles of War.

Recommendation 14

That the Manual for Courts Martial, paragraph 97, be altered to make it a matter of right for defense counsel to procure witnesses by subpena on an equal basis with the prosecution.

Recommendation 15

That the Manual for Courts Martial be altered to require that notices of impending court-martial trials be published on bulletin boards in the camp or post where they are to be held, with an accompanying statement that attendance at trials is permitted to the public and to military personnel.

Recommendation 16

That Army regulations governing reclassification boards, boards convened under Public Law 190, and similar boards, be altered to provide fully that administrative due process of law be accorded to officers or enlisted men brought before these boards, and full protection provided for the rights of those against whom allegations are made, including provision for supplying defense counsel and witnesses on complete parity with the privilege of the Army.

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