

A B I L L

To amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

(a) It is hereby declared to be in the interest of the national defense and necessary to the morale of the officers and men serving in the Army of the United States in times of peace or war, and the purposes of this Act are, to make more secure the rights of officers and men before the military courts of the Army, and generally to improve the administration of military justice, in the light of the experience gained from its operation during the two World Wars, by: the establishment of a Military Justice Corps independent of command channels and directly responsible to the Secretary of War, which will be charged with the functions of indictment, defense, trial, judgment and review, in Court Martial proceedings, while the responsibility for investigation and prosecution will continue to rest in the hands of the local Army command; the inclusion among Courts-Martial judges of persons of equal rank with the accused, in order to buttress the confidence of all ranks in the objectivity of these tribunals; the statutory provision of

maximum penalties for each offense defined in the Articles of War; the equalization of sentences among military personnel of all ranks; the organization of a more effective system of appellate review; and generally such revisions of the Articles of War which can be considered indispensable to the protection of the basic constitutional rights of a Citizen Army with due regard to that essential measure of discipline and organization which must be maintained in an effective military organization,

The Articles of War (41 Stat. 787 to 811, as amended, 10 U. S. Code secs. 1471-1593a) are hereby amended as follows:

Sections (b), (c), and (d) of Article 1 are amended to read as follows:

"(b) The word 'soldier' shall be construed as including a warrant officer, a flight officer, a noncommissioned officer, a private, or any other enlisted man or woman.

"(c) The word 'company' shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.

"(d) The word 'battalion' shall be construed as including a squadron or corresponding unit of the ground or air forces."

SEC. 2. Article 2, section (a), is amended by deleting the words "Army field clerks" and substituting the words "flight officers."

SEC. 3. Article 4 is amended to read as follows:

"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.--All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

"All soldiers in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of soldiers and persons of this category shall be detailed for such service when deemed proper by the appointing authority and such civilian members of the Judge Advocate Corps as shall be designated by the appointing authority.

"When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those soldiers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and soldiers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof. No person shall be eligible to sit as a

member of a general or special court-martial when he is the accuser or a witness for the prosecution."

SEC. 4. Article 5 is amended to read as follows:

"ART. 5. GENERAL COURTS-MARTIAL.--General courts-martial may consist of any number of members not less than five, of whom at least one-third shall be of the same basic service status as the accused except that where the accused is neither an officer nor a soldier one-third of the members shall be enlisted personnel."

SEC. 5. Article 6 is amended to read as follows:

"ART. 6. SPECIAL COURTS-MARTIAL.--Special courts-martial may consist of any number of members not less than three, of whom at least one-third shall be of the same basic service status as the accused."

SEC. 6. Article 7 is amended to read as follows:

"ART. 7. SUMMARY COURTS-MARTIAL.--A summary court-martial shall consist of one officer, or a civilian member of the Military Justice Corps."

SEC. 7. Article 8 is amended to read as follows:

"ART. 8. GENERAL COURTS-MARTIAL.--The President of the United States, the Secretary of War, the Principal Legal Administrator of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the

Ground or Air Forces, unless such power is withdrawn by the President, and when empowered by the President the Legal Administrator of any district or of any force or body of troops may appoint general courts-martial.

"The authority appointing a general courts-martial shall detail as one of the members thereof a law member who shall be an officer or civilian employee of the Judge Advocate General Corps; he shall also select from a list submitted by the commanding officer of such army organizations as are available for such service the soldier and officer members of the court: Provided that the law member, whether an officer or civilian, shall be the presiding member of the general court irrespective of the relative rank of the other members and no conviction shall be valid where he has not participated in the entire proceedings. The law member, in addition to his duties as a member, shall perform the duties prescribed in Article 31 hereof and such other duties as the President may by regulation prescribe.

"No person shall be eligible to sit as a member of such court when he is the accuser, or witness for the prosecution."

SEC. 8. Article 9 is amended to read as follows:

"ART. 9. SPECIAL COURTS-MARTIAL.--The persons having authority to appoint general courts-martial shall have similar authority to appoint special courts-martial including the

designation of the law member, officers and soldiers in the manner provided for general courts-martial. The powers and duties of the law member shall be the same as for the law member of a general courts-martial.

"No person shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

SEC. 9. Article 10 is amended to read as follows:

"ART. 10. SUMMARY COURTS-MARTIAL.--The Legal Administrators authorized to appoint special courts-martial at the request of a commanding officer of a garrison, fort, camp, or other place where troops are on duty, of a regiment, detached battalion, detached company, or similar units of the Ground and Air Forces, may appoint summary courts-martial. Such summary court shall preferably be an officer or civilian member of the Military Justice Corps. Where it is not practicable to assign Military Justice Corps personnel, the Legal Administrator is authorized to appoint such officer as he shall deem qualified by experience, temperament, and ability to render justice with full respect for the rights of the accused.

SEC. 10. Article 11 is amended to read as follows:

"ART. 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND DEFENSE COUNSEL.--For each general or special courts-martial the authority appointing the court may designate as trial judge advocate and assistant trial judge advocate or advocates such

officers as are recommended for such duty by the commanding officer of the military organization of the accused or such other officers as will faithfully discharge the duties of the prosecution. Such authority shall also assign one or more members of the Military Justice Corps regularly detailed for duty as defense counsel. Provided, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the court.

"When requested by the accused, counsel shall be assigned to assist in his defense in trial by summary courts-martial."

SEC. 11. Article 12 is amended to read as follows:

"ART. 12. GENERAL COURTS-MARTIAL.--General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge and reduction in the permanent or temporary grade of an officer."

Sec. 12. Article 13 is amended to read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law: Provided further, That the authority competent

to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed, but the limitations upon jurisdiction as to persons and upon punishing power herein prescribed shall be observed.

"Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months."

SEC. 13. Article 13 is amended to read as follows:

"ART. 13. PERSONS IN THE MILITARY SERVICE--NOT TRIABLE.--
Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in service status. No person may sit as a member of a court-martial for the trial of another person who is assigned to the same company or corresponding military unit."

SEC. 14. Article 17 is amended to read as follows:

"ART. 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND.
--The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have

counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

"The record of the proceedings shall be prepared under the direction of the law member of the court and shall be authenticated by such member and verified without reservations or with stated exceptions by the prosecution and defense counsel."

SEC. 15. Article 19 is amended to read as follows:

"ART. 19. OATHS.--All members of the Military Justice Corps shall take an appropriate oath faithfully to discharge their duties upon entry into such service. The law member of a general or special court-martial shall administer an oath in appropriate form to the other members of the court and the trial judge advocate and assistant trial judge advocate. He shall also administer an oath in appropriate form to the witnesses, to the reporter of the proceedings, and to every interpreter participating in the proceedings. In all cases an affirmation shall be acceptable in place and stead of an oath."

SEC. 16. Article 22 is amended to read as follows:

"ART. 22. PROCESS TO OBTAIN WITNESSES.--Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue;

but such process shall run to any part of the United States, its Territories, and possessions. Witnesses for the defense shall be subpoenaed, upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witnesses for the prosecution."

SEC. 17. Article 24 is amended to read as follows:

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.--

No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue when such answer might tend to degrade him.

"The use of coercion or undue influence in any manner whatsoever by any person subject to military law to obtain any degrading statement not material to the issue, or any self-incriminating statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial.

"No confession of an accused shall be admitted in evidence in a trial before a special or general court-martial over the objection of defense counsel unless the law member shall be satisfied that the confession was voluntarily made by the accused while free from coercion, intimidation, undue influence or military pressure."

SEC. 18. Article 25 is amended to read as follows:

"ART. 25. DEPOSITIONS--WHEN ADMISSIBLE.--A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses, to, appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases: Provided further, That a deposition may be read in

evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial; And provided further, That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases."

SEC. 19. Article 28 is repealed.

SEC. 20. Article 29 is amended to read as follows:

"ART. 29. COURT TO ANNOUNCE ACTION.--The court shall announce findings of acquittal in open court and in the presence of the accused. Findings of guilty shall not be publicly announced while opportunity remains for further appeal, but the accused shall be immediately informed of the decision of the court under such regulations as the President shall prescribe."

SEC. 21. Article 31 is amended to read as follows:

"ART. 31. METHOD OF VOTING.--Voting by members of a general or special court martial upon questions of challenge,

on the findings, and on the sentence shall be by secret written ballot. Except on questions of challenge, the law member of the court shall in each case count the votes and announce the result of the ballot to the court."

SEC. 22. Article 32 is amended to read as follows:

"ART. 32. METHOD OF RULING ON INTERLOCUTORY QUESTIONS AND EVIDENCE.--The law member of the court shall rule in open court upon all interlocutory questions with the exception of a challenge for cause of such law member. The decision of such law member upon such interlocutory questions including challenges to other members and the admission of evidence shall be final.

SEC. 23. Article 33 is amended to read as follows:

"ART. 33. RECORDS.--Each general, special and summary court-martial shall keep a record of its proceedings, separate for each case, which record shall include at the least a summary of testimony adduced and shall contain such other matter as may be required by regulations which the President may from time to time prescribe except that there shall be a verbatim transcript of all testimony and evidence introduced before a general court-martial unless military necessity makes this impossible and no matter not introduced in evidence in the proceedings and not subject to judicial notice shall be considered in any legal review of the proceedings. Provided, That such matter may be considered by the authority having power to exercise clemency."

SEC. 24. Article 34 is repealed.

SEC. 25. Article 35 is amended to read as follows:

"ART. 35. DISPOSITION OF RECORDS.--The law member of each general or special court-martial shall forward the record to such persons and in such manner as may be required by regulations which the President may from time to time prescribe, and such record shall be disposed of as required by such regulations: Provided, That one permanent record of all general and special courts-martial shall be kept in such place as said regulations shall designate."

SEC. 26. Article 36 is amended to read as follows:

"ART. 36. REVIEW OF PROCEEDINGS.--(a) The Chief of the Military Justice Corps shall appoint from time to time such courts of appeal as he shall deem necessary expeditiously and adequately to hear such cases as may be appealed from the courts of original jurisdiction.

"(b) The courts of appeal shall consist of not less than three civilian or officer members of the Military Justice Corps who shall be assigned to such duty for a period of not less than one year so long as they perform such duty creditably.

"(c) The courts of appeal shall have substantive jurisdiction to review all proceedings of summary courts-martial, special courts-martial, or general courts-martial comparable to that of the United States Circuit Courts of Appeal over the United States District Courts in criminal cases.

"(d) There shall be a Supreme Court of Review which shall consist of not less than five civilian or officer members of the Military Justice Corps who shall be assigned to such duty for a period of not less than one year so long as they shall perform such duty creditably.

"(e) The Supreme Court of Review shall have jurisdiction upon petition of a defendant to require that the record of the trial be transferred to it for review, and shall have further jurisdiction to hear appeals where the sentence imposed is either death or life imprisonment.

"(f) The aforementioned courts shall wherever appropriate issue written opinions and the Chief of the Military Justice Corps shall cause such opinions to be published and distributed to all the members of the Military Justice Corps."

SEC. 27. Article 37 is amended to read as follows:

"ART. 37. REVERSIBLE ERROR.--The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any other error unless the reviewing court, after examination of the entire record, shall be of the opinion that the error or errors noted have injuriously affected the substantial rights of the accused."

SEC. 28. Article 38 is amended to read as follows:

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.--The President

may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally observed in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules and regulations made in pursuance of this Article shall promptly be laid before the Congress,"

SEC. 29. Article 39 is amended to read as follows:

"ART. 39. AS TO TIME.--Except for desertion or absence without leave committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles 93 and 94 of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation:

Provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: And provided further, That in the case of any offense the trial of which in time of war shall be certified by the Secretary of War to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitations herein provided for the trial of the said offense shall be extended to the duration of the war and six months thereafter."

SEC. 30. Article 43 is amended to read as follows:

"ART. 43. DEATH SENTENCE--WHEN LAWFUL; VOTE ON FINDINGS AND SENTENCE.--No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. Conviction of any offense for which the death sentence is not mandatory and any sentence to confinement not in excess of ten years, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

SEC. 31. Article 44 is amended to read as follows:

"ART. 44. OFFICERS--REDUCTION TO RANKS.--When a sentence of dismissal may lawfully be adjudged in the case of an officer, or a sentence of six months confinement in the case of a non-commissioned warrant, or flight officer, the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof such reduction in grade or rank as may seem appropriate."

SEC. 32. Article 45 is repealed.

SEC. 33. Article 46 is amended to read as follows:

"ART. 46. CHARGES; ACTION UPON.--

"(a) COMPLAINTS.--Charges may be made orally or in writing to the Military Justice Corps member or such other person as may be assigned to such duty by a Principal Legal Administrator assigned to such duty or to the commanding officer of a company or larger organization by any person subject to military law against any other such person.

"(b) INVESTIGATION.--Investigation shall be the function of command, except that the appointing authority may order an independent investigation if he should deem it necessary. No charge will be referred to a court-martial for 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 said charges, form of charges,

and what disposition of the case should be made in the interest of justice and discipline. In case of a general or special court-martial full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigator shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides: Provided, however, That simultaneously with the commencement of an investigation into charges to be referred to a general or special court-martial, a defense counsel shall be assigned to the accused to serve as such unless and until accused shall secure counsel of his own choice; and no statement made by the accused to anyone other than a Military Justice Corps member may be used in evidence against the accused unless such statement was made in the presence of said defense counsel.

"(c) FORWARDING CHARGES; DELAYS; SERVICE OF CHARGES.-- When a person is held for trial by general or special court-martial, the investigator shall promptly forward the charges through the appropriate Military Justice Corps personnel to the Principal Legal Administrator for the jurisdiction and furnish the accused a copy of such charges. All delay in forwarding such charges shall be accounted for. The trial judge advocate

shall cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general or special court-martial within a period of five days subsequent to the service of charges upon him."

SEC. 34. Article 47 is amended to read as follows:

"ART. 47. REFERENCE FOR TRIAL.--

"(a) ACTION BY THE COMMANDING OFFICER.--Under such regulations as the President may prescribe, the appropriate commanding officer shall appoint a trial judge advocate and such assistant trial judge advocates as shall be necessary for the command. The persons so appointed shall whenever possible be chosen from those lawyers in the command that by training, ability and experience are best able to exercise the duties of a fair-minded and honorable prosecutor.

"(b) REFERENCE FOR TRIAL.--Where assented to by the trial judge advocate, a member of the military justice corps assigned to process charges at any level may refer charges for trial by summary court-martial. Charges may be referred for trial by special court-martial or general court-martial by a legal administrator having authority to appoint the court to which the charges are referred; however, no charges will be so

referred unless it has been found that a thorough and fair investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.

"(c) ACT IN PENDING APPEAL.--The appointing authority may upon issuance of a certificate of reasonable doubt cause the release pending decision on appeal of a person sentenced to imprisonment by a general or special court-martial; Provided, That pending such decision such person shall not be transferred or assigned to new duties or station."

SEC. 35. Article 48 is amended to read as follows:

"ART. 48. CONFIRMATION.--Confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

"(a) By the President with respect to any sentence --

- (1) of death, or
- (2) involving a general officer.

"(b) By the Secretary of the Army with respect to any sentence

- (1) involving imprisonment for life, or
- (2) involving the dismissal of an officer other than a general officer, or of a cadet."

SEC. 36. Article 49 is amended to read as follows:

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.--The power to confirm the sentence of a court-martial shall be held to include:-

"(a) The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

"(b) The power to restore all rights, privileges, and property affected by any sentence disapproved or vacated;

"(c) The power to order the sentence to be carried into execution."

SEC. 37. Article 50 is repealed.

SEC. 38. Article 50-1/2 is repealed.

SEC. 39. Article 51 is amended to read as follows:

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.--

"(a) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the authority competent to appoint, for the command in which the person under sentence may be, a court of the kind that imposed

the sentence, and the same power may be exercised by superior legal authority or the Secretary of War: Provided, That no sentence confirmed by the President shall be mitigated, remitted or suspended by any authority other than the President.

"(b) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.

"(c) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a penitentiary shall be exercised by the Secretary of War or his delegatee."

SEC. 40. Article 52 is repealed.

SEC. 41. Article 53 is amended to read as follows:

"ART. 53. PETITION FOR NEW TRIAL.--Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review:
Provided, That with regard to cases involving offenses committed

during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

SEC. 41(a). Article 54 is amended by adding after the word "enlisted", the words "or commissioned" and after the word "enlistment", the words "or commission".

SEC. 41(b) Article 62 is amended to read as follows:

"ART. 62. Any officer who uses contemptuous or disrespectful words against the President, the Congress of the United States, or the Secretary of Defense or the Secretary of the Army shall be dismissed from the service or suffer such other punishment

as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct. This section shall not be construed to forbid normal political criticism and discussion."

SEC. 41(b)(1). Article 63 is amended to read as follows:

"ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.--Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished by confinement up to two weeks. Where such disrespectful behavior constitutes a threat to military discipline, as distinguished from military courtesy, the punishment may be up to six months confinement and loss of two-thirds pay for the same period."

SEC. 41(c). Article 64 is amended to read as follows:

"ART. 64.

"(a) Any person subject to military law who on any pretense whatsoever strikes his superior officer or draws or lifts up any weapon of force in violence against him, being in the execution of his office, shall suffer any punishment up to confinement for 20 years, as a court-martial may direct.

"(b) Any person subject to military law who wilfully disobeys any lawful command of his superior officer shall suffer death or such other punishment as a court-martial may direct: Provided, however, That the death penalty shall be imposed only for wilful disobedience of commands in direct reference to combat

activity or, in peacetime, where such disobedience imperils the lives of troops."

SEC. 41(d). Article 66 is amended by adding the following sentence:

. "The death penalty shall not be imposed unless the offense is committed in time of war or, in time of peace, is designed to incite insurrection or mass riots."

SEC. 41(e). Article 67 is amended by adding the following sentence:

"The death penalty shall not be imposed unless the offense is committed in time of war or, in time of peace, is designed to incite insurrection or mass riots."

SEC. 42. Article 70 is amended to read as follows:

"ART. 70. CHARGES; ACTION UPON, UNNECESSARY DELAY.--When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any person who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct.

"Time spent by a person awaiting trial in confinement under military jurisdiction shall be computed as having been served as part of the sentence resulting from said trial."

SEC. 42(a). Article 75 is amended to read as follows:

"ART. 75. Any officer or soldier who, before the enemy, by any disobedience or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

SEC. 42(a)(1). Article 80 is amended by adding the words "up to ten years" after the word "imprisonment."

SEC. 42(b). Article 84 is amended by adding after the word "soldier" the words "or officer".

SEC. 42(c). Article 87 is amended to read as follows:

"ART. 87. Any officer commanding in any garrison, fort, barracks, camp or other place where troops of the United States may be serving, or any other person subject to the articles of war who has any authority or influence, direct or indirect, in the procurement, protection or disposition of any supplies of the armed forces who, for his private advantage, or for the private advantage of any other person, lays any duty or imposition upon or is interested in the sale of any supplies purchased for the use of the troops shall be dismissed from the service and suffer such other punishment as a court-martial may direct."

SEC. 43. Article 88 is amended to read as follows:

"ART. 88. UNLAWFULLY INFLUENCING ACTION OF COURT.--Any person subject to military law who attempts to coerce or, except as authorized by law, to influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts, shall be punished as a court-martial may direct."

SEC. 44. Article 89 is amended to read as follows:

"ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.
--All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who wrongfully or through neglect destroys any property whatsoever or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him refuses or omits to see reparation made to the party injured, insofar as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct."

SEC. 44(a). Article 90 is repealed.

SEC. 45. Article 92 is amended to read as follows:

"ART. 92. MURDER--RAPE.--Any person subject to military

law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

SEC. 46. Article 93 is amended to read as follows:

"ART. 93. VARIOUS CRIMES.--Any person subject to military law who commits manslaughter, mayhem, arson, burglary, house-breaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: Provided, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article."

SEC. 47. Article 94 is amended to read as follows:

"ART. 94. FRAUDS AGAINST THE GOVERNMENT.--A person subject to military law who makes or causes to be made any claim against the United States or any officer thereof knowing such claim to be false or fraudulent; or who defrauds or attempts to defraud the

Government of the United States or any of its agencies in any manner denounced by the Criminal Code of the United States, or who steals, knowingly and willfully misappropriates, wrongfully applies to his own use or benefit or wrongfully and knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof shall be punished as a court-martial may direct: Pro-
vided, That any person subject to military law who commits larceny or embezzlement with respect to property of the United States furnished or intended for the military service thereof or with respect to other property within the purview of this article, steals said property within the meaning of this article.

"If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom."

SEC. 48. Article 95 is repealed.

SEC. 49. Article 96 is amended to read as follows:

"ART. 96. PENALTIES IN GENERAL.--

"(a) Any sentence which does not exceed confinement for six months may include (1) such reduction in grade or rank as the court-martial may direct, and (2) forfeiture of up to two-thirds of the base pay for six months or less.

"(b) Any sentence of confinement for over six months may include (1) forfeiture of all pay and allowances due and to become due, and (2) dismissal from the service: Provided, That nothing in this section shall prevent a sentence of dismissal where such sentence is specifically prescribed under these Articles or where the soldier has been previously convicted one or more times by a special or general court-martial.

"(c) Persons who commit crimes and misdemeanors which fall within the scope of the Criminal Code or, in the continental United States, within the scope of State or local laws, or, outside the continental United States, within the scope of the Code of Law for the District of Columbia may, to the extent that such laws may be reasonably applied, be punished by court-martial. In such instances and subject to sections (a) and (b) of this Article, the maximum punishment may not exceed the punishment, other than a fine, provided by such applicable law, subject, however, to sections (a) and (b) of this Article.

"(d) Where an offense named in these Articles falls within the scope of the Criminal Code, or, in the continental

United States, State or local law in the locality where the offense is committed, or, outside the continental United States, the code of law for the District of Columbia, and where no other punishment, including punishment as a court-martial may direct, is prescribed under these Articles, the punishment may not exceed the punishment, other than a fine, prescribed by the applicable law stated above, subject, however, to sections (a) and (b) of this Article.

"(e) Failure to obey or violation of an order other than a command, of a regulation or directive or of an Article of War shall be punishable by confinement not over one week, or forfeiture of not over two-thirds of one week's base pay or both unless a greater punishment is prescribed in the order, regulation, directive, by these Articles or by regulation issued by the President or Secretary of Defense prior to the commission of the offense: Provided, That the maximum penalty provided by any regulation issued by the President or Secretary of Defense shall be imprisonment for ten years, that the maximum penalty provided by any order, regulation, or directive issued by a theater commander shall be imprisonment for six months, and that the maximum penalty fixed by any other commanding officer shall be one month; and Provided, further, That in any case where death is an alternative punishment under these Articles, the court-martial may prescribe confinement up to life."

SEC. 50. Article 104 is amended to read as follows:

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.--

Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any authority exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or flight officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.

"A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion

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

SEC. 51. Article 108 is amended to read as follows:

"ART. 108. SOLDIERS--SEPARATION FROM THE SERVICE.--No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of War, or by sentence of a general or special court-martial."

SEC. 52. Article 110 is amended to read as follows:

"ART. 110. CERTAIN ARTICLES OF WAR TO BE READ OR EXPLAINED.--Articles 1, 2, 24, 28, 29, 54 to 97, inclusive, 104 to 109, inclusive, and 121 shall be read or carefully explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read or explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. And a complete text of the

Articles of War and of the Manual for Courts-Martial shall be made available to any soldier, upon his request, for his personal examination."

SEC. 53. Article 116 is amended to read as follows:

"ART. 116. POWERS OF ASSISTANT TRIAL JUDGE ADVOCATE AND OF ASSISTANT DEFENSE COUNCIL.--An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

SEC. 54. Article 117 is amended to read as follows:

"ART. 117. REMOVAL OF CIVIL SUITS.--When any civil or criminal prosecution is commenced in any court of a State of the United States against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and

the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause."

SEC. 55. Section 1 of article 121 is amended to read as follows:

"ART. 121. COMPLAINTS OF WRONGS.--Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the officer or legal officer or administrator exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the War Department a true statement of such complaint, with the proceedings had thereon."

SEC. 56. This Act shall become effective on the first day of the fourth calendar month after approval of this Act.

SEC. 57. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act, under any law embraced in or modified, changed or repealed by this Act, may be prosecuted, punished and enforced in the same manner and with the same effect as if this Act had not been passed.

SCHEDULE

Suggested rearrangement of the Articles of War in order to make them more understandable and easier to use.

(References are to article numbers of the Articles of War, as they would be amended by the accompanying proposed bill.)

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4 (15)

REPORT
of the
INSTITUTE OF LIVING LAW

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Problems of Democracy



REPORT TO ACCOMPANY)
BILL TO REVISE) REPORT NO. 6
THE ARTICLES OF WAR) (Part 2)

New Address: INSTITUTE OF LIVING LAW
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Washington 6, D. C.



INSTITUTE OF LIVING LAW
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I

INTRODUCTION

With fifteen million young American men and women serving in the armed forces during World War II, it is not surprising that the nation has become aware of basic shortcomings in our present system of military justice. The realization that we shall have to maintain a large military establishment for a long time to come lends urgency to a complete revision of the Articles of War.^{1/} The fundamental purpose of such a revision is to extend to all Army personnel the protection of those Constitutional safeguards to which they are entitled in civilian status, although discipline and hierarchy, the cornerstones of military organization, must not be impaired by the proposed reform. If this principle is accepted, no deviation from the Constitutional protections surrounding civilian justice should survive, unless they are imposed by the demands of military life. Basically citizen-soldiers should no longer live under a system of military justice which combines extreme formal harshness with arbitrary powers of clemency to mitigate its excesses.

As long as our army was a close-knit professional organization and its members, officers as well as enlisted personnel, had in some measure cut themselves off voluntarily from the social customs of civilian life, the fundamental differences between military and civilian justice were hardly noted. A popular movement for reform did not develop, until World War I had extended the experience of army life to a large segment of the population. But as that citizen army was short-lived and the possibility of another war seemed to recede into the distant future, reform plans lost their vitality.

There is little chance that this development will be repeated today. The abuses in the exercise of commanding officers' uncontrolled authority over court martial judges, the application of double-standards for accused officers and enlisted men, and the absence of Constitutional safeguards to protect defendants in court martial proceedings, have become matters of public notoriety. Far from seeing in the examination of these specific evils an attack directed against the brilliant leadership of our victorious armies, responsible officers of our citizen army welcome the opportunity to revise a system which has taken an unnecessary toll in soldier morale.

^{1/} While, for simplicity's sake, this Report will address itself to the Articles of War only, its criticisms and recommendations apply mutatis mutandis to the Articles for the Governing of the Navy.

Much has already been done to set machinery in motion by which the Articles of War may be brought in line with acceptable standards of civilian justice. On March 25, 1946, the Secretary of War appointed a civilian board composed largely of ex-presidents of the American Bar Association to prepare recommendations for the revision of the Articles of War. Most of the board's recommendations contained in its report of December 13, 1946, were approved by the Secretary in his announcement, dated February 20, 1947; they have either been incorporated in the Manual for Courts Martial or will be submitted to the 80th Congress in the form of proposed statutory amendments. These reforms, however, attack the existing system in points of detail only; in fact the report expressly described that the existing "Army system of justice . . . is a good one; that it is excellent . . . to secure swift and sure justice." Insufficient attention, however, was placed both, by the Secretary and the board itself, to its own finding that the system had these qualities only "as written in the books" and "in theory".

The Judge Advocate General of the Navy more recently proposed certain changes in the Articles for the Governing of the Navy which followed, in part, the recommendations of a civilian-naval board of inquiry into wartime administration of justice in the Navy.

Congress similarly has shown an active interest in the question, and there is little doubt that the new Congress will be confronted with determined demands for legislative action. Already during the 79th Congress, the Committee on Military Affairs of the House of Representatives had investigated the functioning of courts martial and had published a critical ^{2/} report, though again failing to demand a fundamental reform. H. R. 5675, a bill "To create a court for the review of sentences imposed by courts martial" was introduced in the 79th Congress, 2nd Session. Finally the President adopted a procedure under which courts of review were set up under the supervision of former Supreme Court Justice Owen D. Roberts, which reviewed sentences imposed by courts martial during World War II.

In addition to these official acts on the part of Congress and the Executive, there has been a great deal of public discussion in recent months on the methods best designed to bring about a more acceptable system of military justice. Foremost among these were such articles as that published in the November issue of Harper's Magazine by Professor Sidney Post Simpson of Harvard Law School. The article, entitled "Courts-Martial Come to Justice", criticized the present system on three fundamental grounds, echoed,

^{2/} House Report No. 2722, 79th Cong., 2d Sess.

though somewhat more softly, by the Bar Association Report of December 16, 1946: lack of equal justice for officers and enlisted men; lack of independence from command; lack of competence on the part of court martial personnel. The article culminates in a recommendation that jurisdiction of military courts be withdrawn altogether from the armed services and be placed in an independent civilian authority directly responsible to the President, similar to our civilian judiciary.

Carefully weighing the minimum requirements of a fair trial and the unalterable needs of efficient military organization, the present report has abstained from putting forward such radical proposals, no matter how useful they may be from the point of view of promoting Constitutional safeguards alone. It is, however, predicated on the conviction that piece-meal revisions, such as were attempted after World War I, will be as unavailing.

The report was prepared by a group of lawyers, members of the Institute of Living Law and of the American Veterans Committee, many of whom have had extensive practical experience in the administration of military justice in the Army and Navy during World War II, as trial judge advocates, court martial judges, and provost marshal investigators.

The report covers systematically the entire field of military justice. Its purpose is to provide those fundamental changes which will eliminate source and symptom of recognized abuses. On the other hand, the report does not propose to attack institutions or provisions which, though imperfect, are not obnoxious. Whatever can be preserved, should be preserved, and only the minimum necessary reforms should be effected.

The report postulates three basic principles:

- (1) Independence of Courts Martial from Military Command in the Field.

Their judicial function is wholly separate from the Command function of enforcing military authority. In the words of the Bar Association Report, they should not be "instruments for enforcing discipline by instilling fear and inflicting punishment". Their function can be exercised fairly only if the question of guilt or innocence is decided by men who need consider neither the wishes nor the orders of the field commander. To this end, a Military Justice Corps should be created, responsible directly and solely to the Secretary of War. It will provide judges, defense counsel, and administrative personnel for the courts

martial. Prosecution and investigation should remain under the jurisdiction of the field commanders, as in civilian life they fall under the authority of the Executive.

(2) Equal Justice for Officers and Enlisted Personnel.

This rule must apply in the fixing of penalties, as well as in their enforcement. As more and more officers rise from the ranks through officer candidate schools, the principle should be accepted that even where the offense does not require a dishonorable discharge, officers may be broken to the ranks, and condemned to hard labor. This reform has the support of the Secretary of War. The rule should not be mechanical, however. In certain cases, officers, because of their rank, should be punished more severely for offenses which endanger the men under their commands. Drunkenness, while on duty, would be an example in point.

In order to assure equal justice in the court martial proceeding itself, the report proposes the inclusion of enlisted men among the members of the court.

These reforms should especially put an end to the widespread practice of not trying officers at all, because of favoritism and because the only available punishment is that of dismissal from the service, or that of fixing sentences strikingly lighter than those imposed on enlisted men for the same violations. The recent Litchfield trials may be cited once more as an example for this abuse, and for the grave effect it has on soldier morale and public respect for the integrity of military justice.

(3) Protection of Defendants.

The great power wielded by military commanders, and the prosecution and investigation staffs under their direction, requires that the rights of a defendant in court martial proceedings be protected even more vigorously than in civilian proceedings. To that end, the employment of qualified defense counsel even in the Summary Courts should be made compulsory to ward off ill-considered waiving of this essential privilege.

To the same end the report proposes that confessions should be admissible only if obtained in the presence of defense counsel or under specifically provided safeguards. Incarceration pending trial should be reduced to a minimum reconcilable with the requirements of military security.

Finally, and most importantly, the protection of defendants requires that all offenses and penalties be clearly and specifically set forth in the Articles of War. The traditional principles of nullum crimen sine lege and nulla poena sine lege, are grievously violated by such provisions as Articles 95 and 96 which blanket any action displeasing to a field commander under the vague offense of "conduct unbecoming an officer" or "conduct of a nature to bring discredit upon the military service", and by such penalty provisions as "shall be punished at the discretion of such court" or "shall be punished as a court-martial may direct". All Articles of War, in future, should prohibit only offenses defined with the clarity and definiteness demanded of civilian penal codes, under penalties directly and expressly delimited as to the minimum and maximum sentences applicable.

If these basic rules are adopted and followed throughout the Articles of War and their enforcement, our citizen soldiers will henceforth enjoy all the rights and privileges which the Constitution guarantees and which the effectiveness and security of military operations allow.

I. STRUCTURE AND PERSONNEL

A. Present System and Defects.

All personnel employed in the present court martial proceeding as well as the entire proceeding itself are wholly subject to command authority. The court martial proceeding is an adjunct of command responsibility at each level. The trial judge advocate who supervises the investigation of charges and conducts the prosecution, and the investigation officer himself where one is appointed, are on the commanding officer's staff; so is the staff judge advocate who examines the charges prior to their referral for trial and who reviews the trial record after judgment. The same is true even of the defense counsel assigned to protect the rights of the accused. All members of the court martial including the law member are appointed by and subject to the orders of the commanding officer who may even reprimand them, if he disapproves of their decision.

The possibilities of abuse in such a system are obvious: they affect both the selection of court martial personnel by commanding officers who frequently lack knowledge and interest in effective legal administration, the formulation of former charges as well as the decisions of courts martial which flow all too frequently from the personal beliefs and desires of the commanding officer, rather

than the objective findings of trained personnel. The dangers inherent in the selection of court martial personnel by the local commanding officer are enhanced by the absence of proper standards which would guarantee their competence and legal training. In fact it is neither required nor the rule that the trial judge advocate and defense counsel or even the law member be lawyers. Moreover, where the law member of the court has legal training, his presence is not compulsory and his function may be taken over by the presiding officer. Finally the restriction of court martial positions to persons of officer rank constitutes a grave threat to the assurance of equal justice for all accused or at least to the conviction of enlisted personnel that they may expect equal justice from courts martial solely composed of officers.

The following proposals for change are directed specifically to assure in the future the independence, technical competence and representative character of court martial personnel.

B. Proposed Changes.

Military Justice Corps.--In order to remedy the basic defects of the existing court martial system the entire administration of military justice should be taken out of Command and placed directly under the supervision of the Secretary of War acting through a civilian Assistant Secretary who should be chief law officer of the Army as head of a Military Justice Corps.

The Corps should have its own channels of command comparable to those of the Inspector General's Office acting through presiding law officers attached to each Army corps, division, regiment and other levels of command. Proper standards of competence and experience in the law should be established for the different levels of presiding law officers. They, as well as the other members of the corps, may be civilians or members of the armed forces, preference to be given, however, among candidates of equal ability to the latter. This admission of civilians into the administration of military justice was rejected in the recent report of the Secretary of War who ruled that "the extent of the expansion in the Judge Advocate General's Department will be determined after further detailed study of availability of military personnel in the active Army." Little justification can be seen for this insistence on cutting down the acknowledged needs of military justice to the admittedly insufficient resources of the active Army in competent legal personnel.

Appointment and removal of all members of the Corps, except as hereinafter specifically provided, proceed solely through

Corps channels under the ultimate authority of the Assistant Secretary. The proposal of the Secretary of War that only the law member be appointed independently from Command condemns the majority of court martial members to continued abjection; whatever reasons moved the Secretary to free one of the members must with equal force apply to all of them. The Secretary's expressed apprehension that reform here proposed might lead to excessive centralization in Washington is readily answered by the fact that Corps channels are as susceptible to the decentralization of authority as are Command channels. The recommendation of the Bar Association Committee that all court martial members be appointed by the Judge Advocate General's Department from panels of available officers established by Command would appear to be equally open to objection in view of the well-known practice to include in such panels only those officers who "never will be missed".

The Corps should contain in addition to the presiding law officers such assistant law officers as may be required for the functions of the Corps, i.e., judges, defense counsel, and investigators. Except for the last named these would all be members of a bar. Wherever necessary and feasible one or more members of the Surgeon General's staff of the corresponding echelon should be assigned to units of the Corps, in order to assist in handling cases of misconduct due to battle fatigue or similar psycho-neurotic disturbances. The Secretary of War's opinion that complete independence may not be granted to the Corps because its members must remain interchangeable within the Army would appear to be no more convincing -- in view of the overwhelming importance of independent and respected military justice -- than in the case of chaplains or physicians.

Specifically the administration of military justice would be staffed as follows:

1. Pre-Trial Procedure.-- For the reasons to be stated in part II of this report the investigation and prosecution of alleged violations of the Articles of War should in principle remain a command function. The Corps would be involved in pre-trial procedure only in the following three cases:

a. Complaints may be made directly to an assistant law officer assigned to this task, by any person not wishing to bring his complaint to the trial judge advocate. In such cases the name of the complainant should not be revealed without his consent although he may, of course, be named as a witness without revealing his action in bringing the violation to the attention

of the Corps. This channel would avoid repetition of the numerous instances where for fear of reprisals one of inferior rank has refrained from making complaint against one of higher rank, however outrageous the wrong-doing.

b. The Corps may assign its own prosecutor and investigator where the presiding law officer finds that command is not effectively handling the complaint, as where the object of the complaint is persona grata with the commanding officer.

c. There should at all times be available a list of assistant law officers assigned for full-time duty as defense counsel. Each defendant may either select a name from that list or substitute therefor any other person, civilian or military, whom he wishes to act as defense counsel for him. The defendant may not renounce the aid of counsel except in open court at the beginning of the trial and in the presence of an assistant law officer whose name appears on the defense counsel list. Defense counsel should be reasonably available to the accused from the moment when he is placed under charges, until either his acquittal or his conviction after review has become final.

2. Trial

a. Summary courts martial should remain outside the jurisdiction of the Corps. No change is proposed in their composition. *

b. Special and general courts martial should be composed of assistant law officers on the one hand and officers and enlisted men on temporary duty on the other. The proposal of the Secretary of War to place the admission of enlisted men within the discretion of the commanding officer would, it is submitted, deprive this reform of its outstanding merits: independence and the permanent assurance of judgment by one's peers. The president should always be an assistant law member with full authority to rule on all matters of law.

* ~~Note: This appears to be the conclusion of the Subcommittee. I disagree because of the overwhelming numerical importance of summary proceedings and their grave impact on a man's service record. A distinction might be desirable, based on the penalties that might be imposed in the proceeding. (This Note applies equally to II-B-2.)~~

c. Officers and enlisted men, the latter to constitute at least one-third of all the members of each court, ^{if the defendant is an} should be ^{enlisted} selected by the presiding officer under whose authority the court ^{man} is set up from a pool created as follows:

(1) Each presiding officer should inform the presiding officer of the next higher headquarters of the number of officers and enlisted men which will be required to sit as members of the special and general courts under the supervision of the first such presiding officer.

(2) The presiding officer of the next higher headquarters should, not less frequently than specified by the Assistant Secretary, call upon the commander of that headquarters to detail for court duty exclusively the required number of officers and enlisted men; provided that the commander should be informed of the unit or units to which such men will be assigned for court duty and shall select men from among the units under his command in such proportion as to assure that no man will be required to sit upon a court which will try members of the unit to which the member of the court is regularly attached when not on court duty.

(3) Any enlisted man should be granted a transfer, at his request, if he is a member of a military organization one of whose officers was a defendant before a court on which he served as a member.

(4) The minimum educational and other qualifications to be possessed by enlisted members of the court, should be fixed by the Assistant Secretary, and commanders should furnish to pools for court duty only such persons as meet the requirements thus established.

(5) In instances where there is no higher headquarters convenient to supply men for pools, as in the case of theatre headquarters or troops in small units on duty in isolated posts, special regulations should be promulgated by the Assistant Secretary to provide enlisted members of the courts who will meet the minimum educational and other requirements fixed for such members of other courts and to assure that such members of the court are not members of the unit to which an accused belongs or subject to discipline by the officers who are authorized to administer discipline to an accused or to review the propriety of such discipline.

3. Appellate Procedure.--Boards of review to be set up in accordance with the principles to be discussed in part IV of this report should be composed exclusively of members of the Corps. Their function is solely one of examining the legal efficiency and propriety of the decision below. It should be guided solely and objectively by legal considerations and must be withdrawn from the policies and preferences of command.

II. PRE-TRIAL PROCEDURE

A. Present System and Defects.

Under the present system which integrates court martial procedure into the chain of Command, charges are usually preferred by the superior officer of the accused and forwarded to the higher officer having court martial jurisdiction. The superior officer may act either on his own information or upon a complaint lodged with him by some other officer or enlisted man. No provision is made for an enlisted man to file a formal complaint of an alleged wrongdoing on the part of his superior officer without fear of reprisals, since all military justice personnel are now subject to Command in direct line with his commanding officer. The only other recourse for an enlisted man in such a situation, an informal complaint to the Inspector General, is not part of the regular military justice procedure and therefore offers no reliable guarantee of an effective proceeding against the wrongdoer.

In minor offenses which are dealt with by a summary court martial there is no investigation apart from that which might be undertaken by the officer preferring the charges. In special court martial offenses the Trial Judge Advocate may open an additional investigation. Only where serious charges cognizable by a general court martial are involved, a special investigating officer theoretically, impartial but in fact under the authority of the commanding officer, must be appointed to inquire into the cases both of the prosecution and of the defense. There is no provision in any court martial proceeding, no matter how grave the offense charged, for the appointment of defense counsel for the protection of the rights of the accused, until after Command has completed its investigation and the charges have formally been served upon the accused. Until that time the accused may be confined without proper knowledge either of the charges against him or of his right to have counsel to assist him in the preparation of his defense. During that time the accused may be subject to all manner of pressures and interrogations designed to produce a confession which will relieve the prosecution from the further need for proving its case or even for finding the real culprit.

B, Proposed Changes.

In order to modify only those aspects of the existing system which unavoidably demand a change, it is suggested that prosecution which as in civilian justice is a policy function should remain in the hands of Command; so should the investigation which is a necessary adjunct of the prosecutor's task. On the other hand, in order to enable any person subject to courts martial to file a complaint against any other such person, the independent Corps should become the depository of all complaints. It should also have final jurisdiction over the filing of charges after investigation. Special provision should furthermore be made for assignment of defense counsel at the time a person is arrested or otherwise placed under accusation; for proper safeguards to assure the reliability of confessions obtained from persons under accusation; and finally for medical aid for those whose wrongdoings are the result of a service-connected neurosis.

1. Preferring of Charges.--Complaints should be filed orally or in writing, with the independent Corps only (or with an officer or enlisted man specifically designated by the presiding law officer of the echelon for that purpose), by any person subject to courts martial against any other such person. The name of the complainant should not be disclosed except through routine channels within the Corps. To that end complaints should be forwarded directly within the Corps and not through Command channels. For the same reason they should not be subject to censorship or examination; where censorship is required for security reasons the commanding officer should designate a member of the Corps for that particular duty in agreement with the presiding law officer for the next higher echelon.

A complaint should be disposed of only in one of the following three ways:

(a) It may be withdrawn in open court upon the complainant's request, accompanied by a statement of the reasons for such request. The court should determine whether permission to withdraw the charges should be granted; it may hear witnesses and accept other evidence in order to reach its decision.

(b) If the nature of the evidence accompanying the complaint convinces the Corps that the complaint is arbitrary or capricious and not founded in fact it may dismiss it.

(c) In all other cases the Corps may either file formal charges against the accused if the complaint is accompanied

by sufficient substantiating evidence or, if that is not the case, the Corps may refer the complaint to the Provost Marshall's Office for further investigation. At the conclusion of such investigation the Corps should decide whether to lodge formal charges or dismiss the complaint. In any case in which a complaint is dismissed, either before or after investigation, a complainant should have the right to appeal for reconsideration of his complaint to the next higher echelon of the Corps.

Once formal charges have been lodged, the case is transferred to Command for prosecution in the usual manner. The Corps, however, should have the additional authority to undertake through its own staff either investigation or prosecution or both, if it should find that Command is not properly exercising these functions either because of undue sympathy or because of undue hostility towards the accused.

While, for reasons of military safety, Command must have authority under certain conditions to place a suspect under arrest, before formal charges have been filed, provision should be made to require the release of the suspect, unless charges are filed by the Corps within 48 hours, or a similarly brief period.

2. Defense Counsel.--The accused should be advised of his right to counsel as soon as he has been placed under arrest or the Corps has decided that a complaint is not arbitrary and capricious, i.e., before any investigation of the charges or interrogation of the accused can take place. The accused should not be limited in his choice of counsel except that in cases of special or general courts martial offenses he must select an attorney in good standing. As against the endorsement of this reform by the Bar Association Report, the Secretary of War's proposal that the defense counsel need be a lawyer only if the Trial Judge Advocate is, too, seems to disregard the universal right of an accused for competent representation in favor of a misplaced notion of sportsmanship between the two parties.

Apart from this requirement, such defense counsel may be a civilian or a person subject to courts martial or an attorney from a standing list of members of the independent Corps. If the accused refuses or neglects to select counsel the Corps shall appoint an attorney from its standing list. In no case involving a special or general court martial offense should the accused remain without proper counsel after the point of time defined at the beginning of this subsection.*

* See Note under I-B-2-a.

3. Special Safeguards.--A study of actual court martial proceedings leads to the conclusion that there are two outstanding classes of abuses against which an accused should be protected. One concerns the improper methods that may be used in order to extract a confession from him. The other relates to the numerous avoidable delays in the procedure.

In order to make certain that no confessions are used which have been obtained through pressure or promises, their admission into court should be limited to the following cases:

(a) The confession was made in the presence of counsel for the accused.

(b) Counsel for the accused certifies in writing that he has questioned the accused in confidence and is satisfied, that the latter made the confession after having been advised of his privilege against self-incrimination and that no improper methods were used in obtaining the confession,

(c) The accused was interrogated and made his confession in the presence of a member of the Corps not otherwise connected with the case who certifies that the accused was advised of his privilege and that no impropriety was used in obtaining the confession.

In order to assure persons accused of court martial offenses of as speedy a trial as the nature of each case and prevailing military conditions will permit, the following changes in Article 69 are suggested:

(a) Investigation prior to the lodging of charges should be completed within one week; extensions, not to exceed another week in the absence of exceptional circumstances, should be granted only by authorization of the Corps.

(b) Confinement of persons awaiting trial for offenses which carry a maximum penalty of less than six months confinement should be limited to one week, and may be extended from week to week only upon authorization of the Corps. The full period of any confinement pending trial should, in all cases, be credited on any term of confinement ultimately imposed upon the defendant by the court.

4. Medical Cases.--It is today generally recognized that acts constituting violations of the Articles of War may be the direct result and expression of battle fatigue or other psychoneurotic disturbance. In such cases a court martial proceeding

would not only be futile but in effect psychologically harmful to the person involved, while prompt medical attention could frequently cure him. In order to make sure that such cases are promptly and effectively treated the Corps should refer for examination an accused who is reasonably believed to be suffering from a psycho-neurotic disturbance to medical personnel on its own staff, or, if there is none available, on the staff of Command. Upon receipt of the medical report the Corps should be authorized to refuse to lodge charges if the report shows the alleged violation to have been caused by such disturbance; if the disturbance is shown to have developed since the commission of the alleged violation, the Corps may hold the charges open pending recovery of the accused.

III. TRIAL

A. Present System and Defects.

Courts martial under the existing system are appointed by the commanding officer for his echelon. They are composed solely of officers under his direct orders. The commanding officer may instruct them as to the manner in which they are to administer the Articles of War and to impose sentences upon persons found guilty by them; he may dissolve the court appointed by him; and he may reprimand its members, if he disagrees with their decision. Provision for a law member is made only for general courts; even there the law member need not be an attorney if no officer of the Judge Advocate General's Department is held to be available for that function.

B. Proposed Changes.

The principal changes concerning the personnel of the courts have been discussed under part I, supra. They are designed to assure the independence of the judges from the commanding officer of the accused and to broaden their base of recruitment in order to assure objectivity and fairness in their dealings with the accused. In further pursuit of these ends two additional provisions are suggested:

1. The number of each type of court martial to be established in each echelon should be fixed from time to time by the presiding law officer thereof.

2. Any member of a court martial may be challenged for cause by the accused or the Judge Advocate. The decision subject to review should be up to the presiding judge except where he is himself challenged in which case a majority of the other Corps members or if there are none, ~~the~~ the other members of the court should decide.

IV. APPEAL AND REVIEW

Recognizing that the principles governing criminal procedure in the civil courts should apply wherever possible in the review of court martial decisions, the following recommendations are based on an analysis of the existing system with a view to the elimination of those variations from the civilian practice which are recognized as unnecessary and unjustifiable. In this analysis reference is made throughout to the Federal Rules of Criminal Procedure.

A. Present System and Defects.

1. Personnel of Reviewing Authorities.--Initial review is in the hands of the commanding officer who appointed the court martial. His review thus gives assurance neither of legal competence nor of independent judgment. This condition is not remedied by the frequent though not universal practice of obtaining the advisory assistance of the Staff Judge Advocate, who is neither independent of Command nor, as a member of the prosecution, independent in his judgment.

The Board of Review in the Judge Advocate General's Office which, under Article 50-1/2 reviews all general court martial judgments again lacks independence from Command, especially because of the insecure tenure of its members.

2. Manner of Review.--Review in all cases where provision is made for it by the Articles of War is automatic. As a result the excessive burden is placed on the reviewing authorities to examine voluminous records of cases in which the defendant finds no reason to complain or grounds on which to hope for a reversal.

As there is no provision for appeal, there is no requirement that prosecution and defense be heard in oral or written argument on the points of law or fact involved in the case. As a result the reviewing authorities who are necessarily less familiar with the cases are unable to concentrate their attention on what the parties below have found to be the principal points in issue.

Under the current system the reviewing authorities are not limited by the record and may accumulate further evidence without the safeguards of a proper court procedure in the presence of the accused.

3. Scope of Review.--The convening authority, though not the Board of Review, may, under the present system, consider cases coming before it de novo without being bound by the findings of fact supported by evidence made by the court martial. While such broad scope of reconsideration may seem to be in the interest of the defendant it is open to the same objection as the rule of automatic review in that it engages the reviewing authority in a vast and unnecessary field of examination instead of concentrating its attention on the few issues of law which alone should determine the validity of the judgment.

Under the present system the convening authority may review an acquittal for the purpose of expressing its disagreement in a letter of reprimand to the members of the court martial appointed by it. Such a procedure, while not directly harmful to the defendant involved in that particular case, must destroy the last vestige of independence of the members of such court and may be relied upon to assure a conviction in an identical case arising thereafter.

B. Proposed Changes.

1. Personnel of Reviewing Authorities.--Since the independence of the reviewing authorities from Command seems as vital to the proper administration of military justice as that of the courts martial themselves, review should proceed wholly within the channels of the independent Corps. In view of the greater need for legal competence in the reviewing stages of the procedure, it is recommended that only attorneys in good standing be admitted to sit in review of any court martial decision. Additional requirements as to the general legal and specialized court martial experience of court of review members may be usefully inserted into any future revision of the Articles of War. In order to emphasize this aspect of the procedure, it may be found desirable to change the name "Board of Review" into that of "Court of Review".

In order further to insure independent and experienced judgment in the review stages, members of courts of review should be appointed to that duty exclusively for fixed periods of at least one year. They should furthermore be responsible only to the chief of the Corps. The general laws regarding obstruction of justice should be applicable to any attempts to influence and interfere with the conduct of their duties. This must extend to acts on the part of Command which, under the now existing set-up, are not only lawful but required. On the other hand, judges of the court of review must, of course, remain subject to military law and, unless they are civilians,

to military duties which do not interfere with their proper functioning as such reviewing judges according to rules and under the sole jurisdiction of the chief of the Corps.

To correspond to the present two steps of review, namely, the convening authority and the board of review, there should be two levels of review which might usefully consist of courts of first review with three members and a superior court of review with five members. Courts of first review would be appointed by the chief of the Corps in such numbers and at such places as he may determine. The superior court of review, located in the office of the chief of the Corps, would also consist of as many divisions as the burden of work would call for. It is recommended that the chief of the Corps appoint a presiding justice of the superior court whose main function would be to administer the business of the superior court to the extent to which a similar function is now exercised by the Chief Justice of the United States in regard to the Supreme Court, and to call plenary sessions whenever necessary to dissolve significant disagreements between the divisions.

Special emphasis should be placed on the desirability of using this system of courts of review for the purpose of evolving a workable body of military law. To this end all opinions on both levels of review should be in writing indicating not only the ruling but also the reasons therefor. They should be collected and a broad selection made under the direction of the presiding justice of the superior court of review for the purpose of publication and distribution among all branches of the Corps. In this way military law would gain in certainty, uniformity, and consequently in universal authority.

The President of the United States should retain his power to review all cases in which the death penalty has been imposed, its execution being stayed until such review has been had. His authority may, in time of war, be delegated to theater commanders.

2. Manner of Review.--There shall be no review otherwise than upon appeal by the defendant except that the presiding law chief or officer of the echelon for which the court martial was appointed may, on his own motion, appeal the decision if he finds that it has done substantial injustice to the defendant.

Appeal may be taken as of right to the court of first review from all decisions of general or special courts

martial. A further appeal as of right to the superior court of review should be granted only where the sentence is more than six months' confinement or six months' forfeiture of pay or reduction of more than one enlisted or officer's grade. In all other cases the superior court may accept an appeal if it finds that substantial injustice has been done the defendant. It may be advisable for the presiding justice of the superior court of review to assign one division of that court to the full-time task of reviewing such applications for discretionary appeal and then referring them to one of the other divisions in case it decides that an appeal should be granted.

Appeals on either level should be by written notice of appeal, assignment of errors, briefs and on argument in a manner as closely conforming to the Federal Rules of Criminal Procedure as possible. It may be desirable to grant the superior court of review and perhaps even the court of first review discretion as to whether it wants to hear oral argument or have the case submitted on briefs only. The presiding law officer for the echelon for which the court martial was appointed should be allowed to intervene at either stage of review if he finds that the interests of the defendant are not sufficiently protected. This may well be the case in view of each defendant's right to appoint defense counsel of his own choosing and especially if it should be decided to permit the selection of non-lawyers as counsel.

No appeal should be allowed on the part of the prosecution except on questions of law raised by demurs before jeopardy has attached.

The record on appeal should be designated in a manner similar to the civilian practice, i.e., where a verbatim transcript is available the appellant shall designate, and appellee may counter-designate, such portions of the record as may be found necessary; where no verbatim transcript is available, counsel should agree on a record, the presiding judge of the court martial to rule in case of disagreement.

3. Scope of Review.--Review should be limited, as in civilian courts, to questions of law and to an inquiry into the sufficiency of the evidence, strictly within the confines of the record. Findings or sentences contrary to law, including executed forfeitures, should be set aside and full restoration made to the defendant. A new trial should be ordered in the usual cases, especially where defendant's rights were not properly protected

at the original trial. Where a lesser offense than the crime specified is found to have been committed by the court of review, it should remand the case for re-sentencing only.

Individual members of any court of review should have authority to stay the execution of any sentence pending appeal to that court. In the superior court of review this authority might most practically be reserved to members of the division charged with the allowance of discretionary appeals.

The present system of allowing reviewing authorities to remit or mitigate sentences as a matter of clemency would appear to be irreconcilable with the legal procedure proposed in this report. As a practical matter it has been found to encourage courts martial to impose fantastic sentences in the safe reliance that they will never come to execution; such a system, it is submitted, is inimical to the dignity of courts martial and to the respect and authority that must attach to all their official acts. The Secretary of War's decision to amend the Manual for Courts Martial so as "to forbid the courts . . . to impose extremes known to be excessive" with needs remains an empty gesture as long as the underlying defects are not eliminated. Moreover, the recommendations contained in part V of this report, that the Articles of War should be amended so as to provide for definite minimum and maximum penalties within a range reasonably appropriate to the offense specified, should do away with much of the presently existing need for broad powers of clemency on review. The remaining need for clemency should be fully satisfied by the general powers of the President of the United States and by an additional provision for the establishment of clemency boards in each theater of operations and lower echelons, if appropriate, composed of members of the Corps and authorized to remit or mitigate sentences which have become final, upon a written opinion stating the reasons for such action. In view of the importance of the strict administration of military justice, it is suggested, however, that the Judge Advocate in the case be allowed to petition the above-mentioned division of the superior court of review for permission to appeal clemency rulings to that court.

The suggestion of the Bar Association Committee that clemency powers should be retained by Command because of its "special understanding . . . of local conditions" is sufficiently refuted by the statement contained on the same page of the same Report to the effect that the members of the Judge Advocate General's Department corresponding to the independent Corps here proposed will "in time of war . . . be in close association with the Command and cognizant of all the considerations of safety and success which influence the Command itself."

C. Comparative Table of Existing and Proposed Systems of Review. *Military*

SYSTEM OF COURTS

A

<u>Civilian</u>	<u>Trial</u>	<u>Military</u>
District Court	.	Summary
	.	Special
	.	General

B

Appellate

Circuit Court of Appeals	.	1. Reviewing Authority
Supreme Court	.	<u>For General Courts</u>
	.	A. Staff Judge Advocate
	.	B. Convening Authority
	.	C. Board of Review and
	.	Judge Advocate General
	.	D. President of United
	.	States (Special cases)
	.	(Actually report of Staff Judge
	.	Advocate often "adopted"
	.	from that of local post Judge
	.	Advocate)
	.	<u>For Special Courts</u>
	.	A. Convening Authority,
	.	with assistance of local
	.	Judge Advocate if avail-
	.	able.
	.	B. Judge Advocate for
	.	General Court Martial
	.	appointing authority.
	.	<u>For Summary Courts</u>
	.	A. Convening Authority.
	.	B. Same as for special
	.	court martial.

Civilian

Military

2. Personnel of Reviewing Authority

Judges appointed for life by President, having no other function, authority, or responsibility and not responsible to any legislative, or executive official.	Reviewing Authority below Judge Advocate General and Board of Review is either non-legal personnel or personnel normally commissioned in Judge Advocate General's Department but attached and subject to authority of particular command. No assured tenure.
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3. How Reviewed

By appeal or by writ of certiorari.	All review is automatic where provided and to extent provided.
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4. Method of Review

Argument before tribunal by affected parties orally and by brief,	Review of record of proceedings without benefit of either oral or written argument (latter is permissive). (Accepted practice for reviewer, particularly convening authority, to use oral and written reports outside of the record and from any source.)
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5. Scope of Review

All errors of law; errors of fact insofar as they affect sufficiency of evidence to support verdict.	1. Below Board of Review: <u>De Novo</u>
	2. Board of Review: Same as Civil Courts.
	3. No effective review of executed sentences.

6. Final Action by Reviewing Authority

Affirmance, reversal and entrance of final judgment or remand for appropriate disposition including new trial.	Same as in Civil Courts, <u>Plus:</u> 1. In cases of acquittal permissible to advise members of Court by letter of non-concurrence in findings and reasons therefor. 2. Power to remit or mitigate sentences, as a matter of clemency.
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V. SUBSTANTIVE PROVISIONS AND PENALTIES.

In view of the fact that this part of the report covers a large number of specific Articles of War dealing with all the offenses and penalties specified therein, it would not seem to be practical to follow the plan used in parts I to IV of first discussing the existing system and then detailing the proposed changes. Instead this part of the report will contain a statement of the general principles which it is submitted should govern the revision of the substantive provisions and an analysis of specific changes suggested in individual articles which appear to be particularly in need of revision.

A. General Principles.

The fundamental principle to guide the revision of the substantive Articles of War may be stated as follows:

No one subject to the Articles of War may be punished for any act or omission to act which has not been previously prohibited or commanded under threat of a definite punishment.

It is, indeed, a traditional principle of our law that the certainty of prohibitory provisions constitutes the basis for government by law. Thus Bentham stated a hundred and fifty years ago:

"We hear of tyrants, and those cruel ones: but whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of." (5 Bentham Works 1843, p. 547)

Chief Justice White restated this rule, when the Supreme Court declared the penal provisions of the Lever Act unconstitutional:

"Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of

which no one can foresee and the result of which no one can foreshadow or adequately guard against. *** to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

" * * * the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon." (United States v. Cohen Grocery Co., 225 U.S. 81, 88 (1921)).

From the adoption of this principle flow a number of rules which must be applied if the rights of those appearing before courts martial are to be effectively protected:

1. The Articles of War should provide for specific penalties in case of violation. Where the prohibitory Article itself provides no specific penalty, the maximum should be set by a generally applicable Article. The need for such a reform has been recognized by the Secretary of War who proposes that Article 45 be amended so as to require the Executive to fix maximum penalties for all violations. Yet, it is felt that persons subject to courts martial are entitled to a delimitation of their punishment by the same law or rule which defines their crimes, rather than by the uncontrolled discretion of the court martial.

2. Crimes punishable under the Articles of War should be set forth in clear and simple language avoiding catch-all phrases and indefinite terminology. This rule strikes at the basic vice of the present Articles of War. Articles 95 and 96 should be revoked and should be replaced by a substitute article providing that no one may be punished for an act which has not been previously prohibited by an Article of War or by an order published by a competent officer, and that punishment for such acts so prohibited shall be the punishment provided in such Article of War or such written order. If no specific punishment is provided therein the punishment should be no more than a maximum to be fixed by that Article. It is suggested that this upper limit might be set at one week's confinement with a forfeiture of pay for a like period.

In addition to the basic necessity of eliminating catch-all provisions, one of the strongest considerations militating against the retention of Articles 95 and 96 is that based on the frequent practice of careless investigation and charging flowing from the assurance that, if the offense charged cannot be proved, especially if no willfulness can be shown, the prosecution can fall back on Article 95 or 96 in order to snatch a conviction from the defeat of its case.

3. The same principle requires the elimination of all weasel words spread throughout the Articles of War, such as the words "reproachful" and "gesture" in Article 90, the word "waste" in Article 89, the words "misbehavior", "shamefully", and "misconduct" in Article 75. These words are subject to such varied interpretations that penal articles which use them cannot serve as effective deterrents to misconduct but rather afford opportunities for the exercise of arbitrary and capricious judgments by the military courts.

4. The type of punishment for a like offense should not differ with rank or grade. Officers guilty of violations of the Articles of War should be subject to confinement and to reduction in grade comparable to the "breaking" of enlisted men. Consideration may, however, be given to the fact that certain crimes such as drunkenness while on duty, absence without leave, and shirking of important duties might well call for a more severe penalty the higher the rank of the wrong-doer. The proposed participation of enlisted men on courts martial will assure equal application of the equal-punishment rule.

5. In revising the Articles of War care should be taken to rearrange the subject matter in a clear and orderly fashion so as to separate into special sections matters of jurisdiction, procedure, and substance, and to group the substantive provisions in such a way as to provide ready reference to the various types of offenses. This suggestion is not born simply from a desire to improve the draftsmanship of the Articles of War, but from the realization that the rights of persons subject to them will be the better protected the easier their perusal and understanding is made to the untrained mind. A schedule suggesting such an arrangement of the proposed revised Articles of War accompanies this report.

B. More Important Proposed Amendments of Specific Articles of War.

Article 54.-- This Article should be extended to officers who have obtained commissions in the manner therein contemplated.

Article 62.-- This Article should be amended expressly to permit normal political criticism and discussion of a kind generally indulged in by the civilian population, and to exclude reference to "the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered". While the demands of discipline may require particular restraint on the part of the members of the armed forces in their references to the highest authorities of the United States Government, the non-professional citizens' army of today can neither deny to its temporary members the basic democratic rights of political discussion nor impose upon them an artificial respect toward local civilian authorities within whose jurisdiction they may happen to find themselves.

Article 63.-- The word "disrespect" should be more fully defined in order to provide varying penalties for acts ranging from minor discourtesies to actual insubordination.

The coverage of this Article should be carefully delimited from that of Article 64.

Article 64.-- This Article should be separated into two provisions, one dealing with assault, the other with disobedience. The latter should include disobedience of standing and direct orders. The death penalty should be imposed only on the willful disobedience of direct orders given in time of war and in direct reference to combat activity.

Articles 66 and 67.--The death penalty should be provided for the commission of these offenses only in time of war, or when the offense is accompanied by conspiracy to incite insurrection or mass violence.

Articles 75 and 76.--These Articles should be combined with Article 28 to provide separately and more clearly for the various offenses therein described, which are of differing degrees of seriousness.

Reference to plunder or pillage should be eliminated from Article 75 in order to avoid confusion with provisions contained in Articles 79 and 80.

Article 84.-- This Article should be extended to include officers.

Article 87.-- This Article should be extended to apply to any person subject to the Articles of War who has any authority or influence, direct or indirect, in the procurement, protection or disposition of any supplies for the armed forces or any component part thereof. It should also include the words "or for the private advantage of any other person" after the words "for his private advantage".

Article 88.-- This Article seems to be obsolete and could be covered by Article 87 as amended. The number may be used for a new section.

Article 89.-- The word "willfully" should be changed to "wrongfully" and the exception in parentheses "unless by order of his commanding officer" should be eliminated.

Article 90.-- This Article should be repealed.

Articles 92 and 93.-- These Articles should be supplemented by a general provision making all non-military crimes committed in the United States, its Territories, or Possessions punishable in the cases and by the penalties provided by the laws applicable in the State, Territory, or Possession where that crime was committed. Outside the limits of the United States, its Territories, and Possessions, the code of the District of Columbia should be the law applicable to all persons subject to military law for the punishment of all crimes therein set forth and not specifically dealt with in the Articles of War.

Articles 95 and 96.--See A-2, supra.

Article 110.-- This Article should be amended so as to prescribe only certain Articles should be read or carefully explained to every soldier at the time of his enlistment or muster-in and every six months thereafter and that copies of the Articles of War and of the Manual for Courts Martial shall be made available to every soldier upon his request.

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