

APPELLATE REVIEW IN AMERICAN MILITARY LAW

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With Magna Charta, the Bill of Rights and the common law, our system of military justice is an inheritance from England. While the levies of feudal barons were gradually being replaced by a royal army in the centuries between the end of the Middle Ages and the outbreak of the American Revolution there was developing a system of government for the English army which came to be codified in regulations, promulgated from time to time by the king, called articles of war, supplemented from 1689 by the annually reenacted Mutiny Act.¹ The central institution in the developed system is the court-martial, a board of officers appointed by a military commander to investigate alleged offenses, make findings and report its sentence to the commander who appointed it. Since the latter part of the eighteenth century the sentence of an army court-martial under the Anglo-American system, unlike the judgment of a common law court, has had no force or effect unless approved by superior military authority, usually the commander who appointed the court-martial.² Thus the relation between a

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1. The development is traced in some detail in DAVIS, *TREATISE ON THE MILITARY LAW OF THE UNITED STATES*, iii-vi, 1-4, 13-15 (2d ed. 1909); see also Holdsworth, *Martial Law Historically Considered* 18 L. Q. REV. 117 (1902); McLean, *An Historical Sketch of Military Law* 8 J. CRIM. L. 27-32 (1917). Articles of war were issued by virtue of the royal prerogative until 1715. The Mutiny Act of that year (1 Geo. 1, c. 9) authorized their promulgation and subsequent annual acts continued the authorization, it being contained now in § 69 of the Army Act (44 & 45 Vict. c. 58). From 1689 until 1879 the articles of war and the Mutiny Act together constituted the British military code. Since 1879 the entire code has been contained in the Army Act (42 & 43 Vict. c. revised by 44 & 45 Vict. c. 58) and the king has not promulgated articles of war although he does issue rules for the procedure of courts-martial under authority conferred by § 70 of the Army Act. The Army Act has no force of its own and is put into effect yearly by an Army and Air Force (Annual) Act.

2. DAVIS, *op. cit.* note 1, *supra*, 537; WINTHROP, *MILITARY LAW AND PRECEDENTS*, 683 (2d ed. 1896); GLENN AND SCHILLER, *THE ARMY AND THE LAW* 51-52 (1943). The present British requirements for approval and confirmation of sentences are imposed by § 54 of the Army Act (44 & 45 Vict. c. 58); the present American requirements, by Articles of War 46, 47, 48 and 49 (act June 4, 1920, 41 STAT. 796, 10 U.S.C. §§ 1517, 1518, 1519, 1520 (1946)). The latter will be superseded on February 1, 1949 by amended Articles 47, 48 and 49 (Appendix, *infra*.) The early British articles did not contain such requirements. See, for example, the Articles of 1673 reprinted in DAVIS, *ibid.*, 567-580, the Articles of 1688 reprinted in WINTHROP, *ibid.*, 1434-1445, and the articles summarized in JACOB, *LEX CONSTITUTIONIS* 319-324 (1719).

military commander and a court-martial which he appoints is analogous to that between a Tudor king and his parliament. The commander may not (with minor exceptions) impose punishment on a member of his command without the findings and sentence of a court-martial; a Tudor king might not levy taxes without the advice and consent of the Lords spiritual and temporal and the Commons in Parliament assembled. But a court-martial sentence is inchoate until approved, just as a bill passed by the Lords and Commons was without effect unless approved by the king.

The British Articles of War of 1774 provided that no sentence of a regimental or garrison court-martial (which courts had jurisdiction over petty offenses committed by noncommissioned officers and privates) should be executed until confirmed by the commanding officer or governor of the garrison and that no sentence of a general court-martial (the tribunal of general jurisdiction over all persons subject to military law and all offenses known to that law) should be put in execution until confirmed by the king, the commander-in-chief, or some other person authorized by the king under his sign manual to confirm.³ These articles directed that, "The Judge Advocate General, or some Person deputed by him, shall prosecute in his Majesty's Name. . . ."⁴ This Judge Advocate General was a civilian member of the ministry in office, appointed on a partisan political basis. He had a deputy in the War Office at London who was a colonel in the army. In practice neither the Judge Advocate General nor his War Office deputy engaged in the actual trial of cases before courts-martial. Such cases were conducted by the judge advocates of the courts-martial, who were either field deputies of the Judge Advocate General or officers appointed *ad hoc* by the commander convening the court. After 1750 the judge-advocate of a general court-martial was required to send the record of trial to the Judge Advocate General.⁵ The king acted as confirming authority in cases tried in Great Britain. The Judge Advocate General reviewed the records of trial in these cases and submitted his advice to the king prior to confirmation. Thus the record of every general court-martial case tried in Great Britain received automatic review by a minister of the crown learned in the law before the sentence could be put in execution. Power to confirm was delegated to overseas commanders-in-chief. Hence the records of trial in cases

3. Sec. 15, Arts. 10, 12, 13, 14. The Articles of 1774 are reprinted in DAVIS, *op. cit.*, note 1, *supra*, 581-601.

4. Sec. 15, Art. 6.

5. DAVIS, *op. cit.*, note 1, *supra*, 553.

tried overseas did not reach the Judge Advocate General until after the sentences had been confirmed and put in execution.⁶

On June 14, 1775, the same day upon which it chose Washington as commander-in-chief, the Continental Congress appointed a committee, consisting of Messrs. Washington, Schuyler, Deane, Cushing and Hewes, to ". . . bring in a dra't of Rules and regulations for the government of the army."⁷ The committee reported proposed articles of war, which were considered on several successive days and adopted on June 30, 1775.⁸ These articles were, in substance, a restatement of the British Articles of 1774 and contained the same provisions for confirmation of sentences of regimental and garrison courts-martial by the commanding officer.⁹ The British requirement of confirmation of sentences of general courts-martial was omitted, however, and the American Articles of 1775 contained no provision relative to approval or confirmation of sentences of general courts-martial. They did authorize the general or commander in chief to pardon or mitigate court-martial sentences.¹⁰ The 1775 Articles of War also omitted all references to the Judge Advocate General, his deputies, and judge advocates, making no provision as to who should prosecute cases before courts-martial. In the British practice, the members of the court were sworn by the judge advocate.¹¹ The new American articles conferred this function on the president of the court,¹² thus suggesting that Congress did not then contemplate the existence of judge advocates in the American system.

In the English practice and in the American practice from 1776 to 1920 the judge advocate of a court-martial was something more than a prosecutor. He administered oaths to the members of the court and the witnesses, collected and presented the evidence for both sides of the case, ad-

6. 9 HALSBURY, LAWS OF ENGLAND 101 (1909); ENCYCLOPAEDIA BRITANNICA, 11th ed., *Judge Advocate General*; Winthrop, *op. cit.*, note 2, *supra*, 60, 61; 7 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND, 516-519 (1907).

7. 2 JLS. CONT. CONG. 90.

8. *Ibid.*, 110, 111, 112. The articles are reprinted in WINTHROP, *op. cit.*, note 2, *supra*, 1478-1486. Additional punitive articles were adopted on November 7, 1775, 3 JLS. CONT. CONG. 331-334.

9. Arts. XXXVII, XXXVIII, XXXIX.

10. Art. LXII, "That the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender, convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel or officer commanding the regiment."

11. British Articles of War of 1774, § 15, Art. 6.

12. Art. LIII.

vised the court and the accused (defendant) on questions of law, protected the rights of the accused, summed up the case at the conclusion of the trial in the manner of an English common law judge's charge to a jury, and prepared the record of trial.¹³ As the performance of most of these duties is essential, the lack of provision with regard to them in the 1775 Articles of War must have proved inconvenient. General Washington assumed command of the army at Cambridge on July 3, 1775. On July 29 the Continental Congress elected William Tudor, Esq., Judge Advocate of the army.¹⁴ A year later, on August 10, 1776, Congress resolved, "That William Tudor, judge advocate general, have the rank of lieutenant colonel in the army of the United States."¹⁵ The use of the term, "judge advocate general" may have been inadvertent. In any event the bestowal of military rank and the actual subsequent practice indicate that Colonel Tudor's position was much more like that of a British deputy judge advocate general for an overseas command, that is, an officer engaged as prosecutor in the actual trial of cases, than that of the British Judge Advocate General, a civilian minister of the crown with functions similar to those of an appellate judge.¹⁶

In August 1776 Colonel Tudor delivered to Congress a letter from General Washington recommending revision of the articles of war and himself prepared a memorandum of recommended changes. Mr. John Adams and Mr. Jefferson were appointed a committee to hear Tudor and revise the articles. The committee recommended what was virtually a literal transcription of the British Articles of War of 1774 and these articles were adopted on September 20, 1776, over the vigorous opposition of some members who seem to have preferred something more like the common law

13. 9 HALSBURY, LAWS OF ENGLAND, 97, 98, 101, 102 (1909); ENCYCLOPAEDIA BRITANNICA, 11th ed., *Judge Advocate General*; 7 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND, 518, 519 (1907); WINTHROP, *op. cit.*, note 2, *supra*, 262, 303; DAVIS, *op. cit.*, note 1, *supra*, 34-38.

14. 2 JLS. CONT. CONG. 221. Mr. Tudor (A.B., Harvard, 1769) had studied law under John Adams and been admitted to the Boston Bar in 1772. Fratcher, *Notes on the History of the Judge Advocate General's Department*, 1 JUDGE ADV. J. 5 (June, 1944).

15. 5 JLS. CONT. CONG. 645.

16. Colonel Tudor and his successor are known to have conducted a number of trials in person, WINTHROP, *op. cit.*, note 2, *supra*, 264 note. Other officers, variously styled "deputy judge advocate general," "judge advocate" and "deputy judge advocate" also conducted trials during the Revolutionary War. On June 6, 1777 Congress accorded two of these the rank and pay of captains, 8 JLS. CONT. CONG. 421. On December 21, 1779 Congress granted the Judge Advocate General the subsistence of a colonel and other judge advocates that of lieutenant colonels, 15 JLS. CONT. CONG. 1397. Fratcher, *op. cit.*, note 14, *supra*, 5, 6.

system of criminal procedure.¹⁷ The new articles provided that, "The judge-advocate general, or some person deputed by him, shall prosecute in the name of the United States of America, . . ." that the judge-advocate of a general court-martial should transmit the original proceedings and sentence to the secretary at war, and that no sentence of a general court-martial should be put in execution until confirmed by Congress or the general or commander in chief of the forces of the United States.¹⁸ This last provision was amended on April 14, 1777 so as to empower "the continental general commanding in the state" to confirm sentences of general courts-martial.¹⁹

Section 14 of the Articles of War of 1776, which governed procedural matters, was repealed by the Congress of the Confederation on May 31, 1786 and replaced by twenty seven articles of war entitled, "Administration of Justice."²⁰ These articles provided that, "The judge advocate, or some other person deputed by him, or by the general or officer commanding the army, detachment or garrison, shall prosecute in the name of the United States of America," repeated the direction that the judge advocate, or person officiating as such, at any court-martial, should transmit the original proceedings and sentence to the secretary at war,²¹ and included the following provision, which has had an important influence on subsequent American legislation governing review of general court-martial records:

"But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the said general or officer commanding the troops for the time being [*i.e.*, the commander who appointed the court]; neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall either in time of peace or war respect a general officer, be

17. 5 JLS. CONT. CONG. 670, 670-71 note, 764, 787, 788 note, 788-807. The articles are reprinted in WINTHROP, *op. cit.*, note 2, *supra*, 1489-1503, and DAVIS, *op. cit.*, note 1, *supra*, 602-618.

18. Sec. XIV, Arts. 3, 5; Sec. XVIII, Art. 3.

19. 7 JLS. CONT. CONG. 265.

20. 30 JLS. CONT. CONG. 316-322. The articles are reprinted in WINTHROP, *op. cit.*, note 2, *supra*, 1504-1508, and DAVIS, *op. cit.*, note 1, *supra*, 619-624. The primary purpose of the 1786 revision was to reduce the required membership of a general court martial from thirteen officers to five, a change made necessary by the prevalence of small commands without thirteen available officers (Letter of Gen. Henry Knox, Secretary at War, to Congress, March 21, 1786, 30 JLS. CONT. CONG. 119-120). The 1786 articles were drafted by a committee of Congress consisting of Arthur St. Clair, Henry Lee and John Lawrance (30 JLS. CONT. CONG. 145, 146). Colonel Lawrance, a member of the New York Bar, had been Judge Advocate General of the Army, in succession to Colonel Tudor, from April 10, 1777 to June 3, 1782 (Fratcher, *op. cit.*, note 14, *supra*, 5, 6).

21. Arts. 6, 24.

carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation, or disapproval, and their orders on the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."²²

Mr. Justice Blackstone was of the opinion that articles of war should be promulgated by statute instead of by executive order.²³ Although his view did not prevail in Great Britain for over a century, it was adopted in the American Constitution of 1789, which allocated to Congress the power to make rules for the government of the land and naval forces.²⁴ The First Congress exercised this power only by continuing in force the Articles of War of 1776 as amended in 1786.²⁵ By the act of May 30, 1796 the Fourth Congress amended the article quoted in the preceding paragraph

22. Art. 2. The articles of war of 1775 and 1776 contained no provision as to what commanders could convene (appoint) general courts-martial. The omission was probably due to the fact that the English provision on the subject was contained in the Mutiny Act, not the articles of war. DAVIS, *op. cit.*, 490. Express authority was conferred on "the continental general commanding in the state" by resolution of April 14, 1777 (7 JLS. CONT. CONG. 265), and the later codes of articles of war all contained provisions on this subject: Art. 2 of 1786 (general or officer commanding the troops); Art. 65 of 1806 (any general officer commanding an army, or Colonel commanding a separate department); act Dec. 24, 1861, 12 STAT. 330 (commander of a division or separate brigade in time of war); act Mar. 3, 1873, 17 STAT. 604 and R. S. § 1326 (Superintendent of the Military Academy); Arts. 72 and 73 of 1874 (any general officer commanding an army, a Territorial Division or a Department and, in time of war, the commander of a division, or of a separate brigade of troops); act July 5, 1884, 23 STAT. 121 (colonel commanding a separate Department); act Mar. 2, 1913, 37 STAT. 722, and Art. 8 of 1916 and 1920 (President of the United States, commanding officer of a territorial division or department, Superintendent of the Military Academy, commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops); Art. 8 of 1948 (sec. 206, Selective Service Act of 1948, effective Feb. 1, 1949) (President of the United States, commanding officer of a Territorial department, Superintendent of the Military Academy, commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Department is assigned as staff judge advocate, and, when empowered by the President, the commanding officer of any district or of any force or body of troops). It has been held that the President could appoint general courts-martial without statutory authority, he being the constitutional commander-in-chief of the Army. *Runkle v. United States*, 19 Ct. Cl. 396 (1886), *aff'd*, 122 U. S. 543 (1886); *Swaim v. United States*, 28 Ct. Cl. 173 (1893), *aff'd*, 165 U. S. 553 (1896).

23. 1 BLACKSTONE, COMMENTARIES *416 (1765).

24. Art. I, Sec. 8, Cl. 14.

25. Sec. 4, act Sept. 29, 1789, 1 STAT. 96. The Judiciary Act was approved September 24, 1789 (1 STAT. 73).

by substituting the President for Congress.²⁶ The articles of war were revised and reenacted in 1806 but no substantial change was made in this article and it remained in force until the enactment of the Revised Statutes in 1874.²⁷

The last Revolutionary Judge Advocate General was mustered out of the service on November 3, 1783 and the United States did not again have an officer with that title until the Civil War. A captain of infantry was detailed as Judge Advocate of the Army from April 1, 1801 to March 16, 1802 under statutory authority.²⁸ He was, apparently, a prosecuting officer. Throughout the early nineteenth century records of trials by general courts-martial were, as a matter of military usage, transmitted to the Adjutant General, then the principal staff officer of the army and custodian of its files and records. The Adjutant General reviewed such records of trial and occasionally sent letters of criticism or recommendation to the field commanders concerned. From 1844 on the Adjutant General performed this function through a series of captains and lieutenants on duty in his office, detailed as Acting Judge Advocate of the Army. The act of March 2, 1849²⁹ authorized the President to detail a captain as Judge Advocate of the Army, with the brevet rank and pay of a major of cavalry. The captain who was then serving as Acting Judge Advocate in the Adjutant General's Office was detailed under this authority and retained the position as long as it existed.³⁰ The Judge Advocate of the Army appointed under the act of 1849

26. Sec. 18; 1 STAT. 485. See also sec. 10, act March 16, 1802, 2 STAT. 134. For ninety years it was assumed that the Secretary of War could confirm on behalf of the President. *Runkle v. United States*, 122 U. S. 543 (1886), held that, although the sign manual of the President was not required, his personal exercise of discretion was. Since that decision confirmations have usually been authenticated by the sign manual of the President. WINTHROP, *op. cit.*, note 2, *supra*, 705-708. See note 124, *infra*.

27. Art. 65, act April 10, 1806, 2 STAT. 359, 367. The 1806 version substituted the Secretary of War for the Secretary at War. Article 65 was amended in 1830 in respects not here material (act May 29, 1830, 4 STAT. 417).

28. The office was created by sec. 2, act March 3, 1797, 1 STAT. 507, and abolished by the act of March 16, 1802, 2 STAT. 132. Its holder was entitled to \$25 per month in addition to the pay of his grade. The only incumbent was Captain Campbell Smith, 4th Infantry. Sec. 19, act Jan. 11, 1812, 2 STAT. 674, authorized the appointment of division judge advocates with the pay of majors of infantry if civilians or \$30 per month in addition to the pay of their grades if detailed from the line of the army. Sixteen persons served under this legislation. The number authorized was changed by the acts of April 24, 1816, 3 STAT. 297, and April 14, 1818, 3 STAT. 426, and the office was abolished by the act of March 2, 1821, 3 STAT. 615.

29. 9 STAT. 351.

30. Captain John Fitzgerald Lee, Ordnance Department, graduate of the United States Military Academy in the class of 1830. The subject matter of this

examined records of trials by general courts-martial, rendered opinions on those in which the sentences required confirmation by the President before their transmission to the President, and sent letters of criticism or advice to field commanders.³¹ His functions were, therefore, similar to those of the British Judge Advocate General. That official, however, being a member of Parliament, a member of the ministry in office and a privy councillor with direct access to the sovereign, held a position of much greater prestige, influence and independence than his American counterpart, a junior army officer who was not even a lawyer.

Section 5 of the act of July 17, 1862³² provided,

“That the President shall appoint, by and with the advice and consent of the Senate, a judge advocate general, with the rank, pay and emoluments of a colonel of cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept

paragraph is treated in greater detail in Fratcher, *op. cit.*, note 14, *supra*, 6, 7. The facts stated therein were secured by examination of numerous records in the National Archives and the Office of The Judge Advocate General, individual citation of which is not practicable. The Articles of War of 1806, like those of 1786, provided that, “The judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States. . .” (Art. 69). Brevet Major Lee informed Colonel Winthrop that he never made such a deputation, WINTHROP, *op. cit.*, note 2, *supra*, 265, note.

31. Brevet Major Lee’s position and functions are illustrated by the following letter which he wrote to Brevet Major General John E. Wool, then in command of the Eastern Division (a territorial command), with headquarters at Troy, New York (1 MS Op. JAG, p. 43):

“Headquarters of the Army,
“Washington, D. C., Oct. 21, 1850

“General:—

“I am instructed by the General-in-Chief to invite your attention to that part of the sentence of the General Ct. Martial which convened at Ft. Constitution, N. H. on the 10th ult. approved and ordered to be carried into effect by your Division Order No. 57, current series, which, in the cases of Privates McMahan, Kennedy, Hannever and Smith, directs, ‘for the period of one year, a band of iron about the neck with 7 prongs each 7 inches long.’

“The General-in-Chief is of opinion, that such a collar from the suffering it seems designed and is certainly capable of causing, would inflict a punishment cruel and unusual, and consequently illegal.

“With this opinion I am directed to convey to you the desire of the General-in-Chief that you will direct the remission of that part of the sentence.

“Very respectfully, General

“Your obt. servt.,

“J. F. Lee,

“Judge Advocate of the Army.”

32. 12 STAT. 598. Sec. 6 provided for the appointment of a judge advocate for each army in the field, with the rank and pay of a major of cavalry, to perform his duties under the direction of the Judge Advocate General.

of all proceedings had thereupon. And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President."

It will be recalled that, under the articles of war of 1786 and 1806, the only court-martial sentences which required confirmation by the President in time of war were those imposed upon general officers.³³ By adding all death and penitentiary sentences the act of July 17, 1862 greatly increased the number of cases requiring presidential confirmation. This was modified in 1863 and 1864 by statutory authority to execute sentences of spies, deserters, mutineers, murderers and guerrilla marauders after confirmation by the commanding general in the field.³⁴ The act of July 17, 1862, moreover, made the position of Judge Advocate General one of considerable importance and influence. These were enhanced by President Lincoln's appointment to the office of Joseph Holt, a lawyer of distinction who had been, successively, Commissioner of Patents, Postmaster General and Secretary of War under President Buchanan. They were further enhanced by the act of June 20, 1864³⁵ which accorded the Judge Advocate General the rank and pay of a brigadier general and provided him with an assistant with the rank and pay of a colonel. The result of this legislation was to create an American Judge Advocate General with functions, prestige and influence comparable to those of the British Judge Advocate General. It must be remembered, however, that in the British practice all records of trials by general courts-martial held in Great Britain were reviewed by the Judge Advocate General prior to execution of the sentences whereas in this country the review came

33. Article 89 of 1806 authorized a field commander who had power to order the execution of a sentence of death or cashiering an officer to ". . . suspend, until the pleasure of the President of the United States can be known." This provision was interpreted to confer upon the President in a case so suspended the same powers he had in a case in which his confirmation was required by law, WINTHROP, *op. cit.*, note 2, *supra*, 713-714; DIG. OPS. JAG, 1868, 39-41. The provision was carried into the Revised Statutes of 1874 as Article 111 with the substitution of the word "dismissal" for "cashiering," R. S. § 1342. See note 77, *infra*.

34. Sec. 21, act March 3, 1863, 12 STAT. 735 (spies, deserters, mutineers and murderers); sec. 1, act July 2, 1864, 13 STAT. 356 ("sentences against guerrilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war, as well as sentences against spies, mutineers, deserters and murderers.") The act of Dec. 24, 1861, 12 STAT. 330, had empowered the commander of a division or separate brigade to appoint general courts-martial in time of war, "Provided, That sentences of such courts extending to loss of life or dismissal of a commissioned officer shall require the confirmation of the general commanding the army in the field to which the division or brigade belongs."

35. 13 STAT. 145.

after the sentences had been put in execution, except in the still relatively narrow class of cases requiring confirmation by the President. The significance of this difference will be discussed hereinafter.

The articles of war were rearranged and reworded in the Revised Statutes of 1874. The only important change made in the provisions relative to approval and confirmation of sentences and review of records of trial by the Judge Advocate General was that sentences to confinement in a penitentiary no longer required confirmation by the President, as they had since 1862.³⁶

Proposals to revise the articles of war were made in 1888 and 1903 and a draft of proposed revised articles was prepared in 1903 by Colonel Enoch H. Crowder, Judge Advocate,³⁷ but not enacted. Another draft was prepared in 1912 by Captain Edward A. Kreger, Judge Advocate,³⁸ under the

36. R. S. 1199, 10 U.S.C. § 62 (1946), "The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army. (Still in force.)

R.S. 1201, 10 U.S.C. § 63 (1946), "Judge advocates shall perform their duties under the direction of the Judge Advocate General. (Still in force.)

R. S. § 1342. The pertinent articles follow:

"Art. 104.—No sentence of a court-martial shall be carried into execution until the whole proceeding shall have been approved by the officer ordering the court, or by the officer commanding for the time being. (The act of July 27, 1892, 27 STAT. 277, 278, substituted the word "same" for the words "whole proceeding.")

"Art. 105.—No sentence of a court-martial inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the case of guerilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

"Art. 106.—In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

"Art. 107.—No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.

"Art. 108.—No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President.

"Art. 109.—All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles."

37. B.S., United States Military Academy, 1881; LL.B., Missouri, 1886; Associate Justice, Philippine Supreme Court, 1899-1900; Judge Advocate General, 1911-1923; Ambassador to Cuba, 1923-1927.

38. B.S., Iowa State College, 1890; Acting Judge Advocate General, A.E.F., France, 1918; The Judge Advocate General, 1928-1931.

direction of General Crowder, then the Judge Advocate General, and submitted to Congress by Secretary of War Stimson in April of that year. This draft, with some changes, was adopted on August 29, 1916 to take effect, except as to a few provisions which were effective at once, on March 1, 1917.³⁹ The new articles reworded and consolidated the provisions of the Revised Statutes relative to approval and confirmation of sentences but made no change in them except to include sentences involving suspension or dismissal of a cadet in the class which required confirmation by the President and to exclude wartime death sentences for rape from that class.⁴⁰

The two principal forms of appellate review known to American military law prior to 1920, review by the commander who appointed the court or his successor, usually referred to as the reviewing authority, and additional review by the President or some other superior, usually referred to as the confirming authority, have been traced from the inception of our army. As has been seen, the first has been required since 1776 as to all types of courts-martial and all classes of cases. The latter has been required only in a limited class of cases tried by general courts-martial. As has also been seen, the requirement that general court-martial records be sent to the War Department permitted some review and corrective action even though the

39. Secs. 3, 4, act August 29, 1916, 39 STAT. 650, 670.

40. Special provision as to guerilla marauders was omitted. The provision as to cadets was derived from R. S. § 1326, which was a reenactment of Act Mar. 3, 1873, 17 STAT. 604, and authorized the Superintendent of the Military Academy to convene general courts-martial for the trial of cadets but not to execute sentences of suspension and dismissal. The pertinent provisions of the 1916 articles follow:

"Art. 46. Approval and Execution of Sentence.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"Art. 48. Confirmation—When Required.—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

"(a) Any sentence respecting a general officer:

"(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

"(c) Any sentence extending to the suspension or dismissal of a cadet; and

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or division.

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary."

sentences had already been put in execution. Some other types of appellate review known to our military law should be mentioned.

The British Articles of War of 1774 and the American articles of 1775, 1776, 1806 and 1874 provided that a soldier who thought himself wronged by an officer might complain to his regimental commander. The regimental commander was required to summon a regimental court-martial to investigate the grievance. Either party might appeal from the regimental court-martial to a general court-martial but if the latter considered the appeal groundless and vexatious it could punish the party appealing.⁴¹ An appeal resulted in a hearing *de novo* by the general court-martial. Colonel Winthrop states that this appellate procedure was "comparatively rarely availed of," being discouraged by the threat of punishment for a vexatious and groundless appeal.⁴²

Article of War 104 in the codes of 1916, 1920 and 1948 authorizes commanding officers to impose punishment of a limited character on members of their commands without the intervention of a court-martial unless the accused demands trial by court-martial. A person so punished may appeal to the next superior authority but may in the meantime be required to undergo the punishment. As the waiver of trial by court-martial is virtually an admission of guilt, the appeal may only be on the ground that the punishment is unjust or disproportionate to the offense.⁴³

41. British Articles, 1774, Sec. 12, Art. 2; American Articles, 1775, Art. XIV; 1776, Sec. XI, Art. 2; 1806, Art. 35; 1874, Art. 30.

42. WINTHROP, *op. cit.*, note 2, *supra*, 929, 935. This threat was very real. Captain Hough describes a case in which a private serving in the British army in India complained that his captain had overcharged him for tea, sugar, washing and a pair of boots. The regimental court-martial found the charges proper and the private appealed to a general court-martial, which found that the appeal was vexatious and groundless, "And they do therefore sentence him . . . to receive seven hundred (700) lashes on his bare back, in the usual manner." HOUGH, *THE PRACTICE OF COURTS-MARTIAL AND OTHER MILITARY COURTS* 239 (1834).

43. In its 1916 form this article provided, "The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard." In its 1920 form (§ 1, ch. II, act June 4, 1920, 41 STAT. 808, 10 U.S.C. § 1576 (1946)) the article limited the duration of the punishments of withholding of privileges, extra fatigue, and restriction to one week and empowered commanding officers of the grade of brigadier general or higher, in time of war or grave public emergency, to forfeit up to half of one month's pay of a lieutenant or captain. In its 1948 form (§ 238, Selective Service Act of 1948, Pub. L. 759, 80th Cong., effective Feb. 1, 1949) the article limits the duration of all punishments, other than forfeiture, to one week from the date imposed and empowers a commanding officer who has power to appoint general courts-martial, in war or peace, to forfeit up to half the pay per month for three months of any warrant officer or officer of his command below the grade of brigadier general. At present

Section 7 of the act of July 17, 1862⁴⁴ authorized the trial of persons accused of offenses punishable by a regimental or garrison court-martial by a single field officer of the regiment, who was required to make a record of his proceedings. The sentences of such a field officer could not be carried into execution until approved by the brigade or post commander. This authority, with the same requirement of approval by the brigade or post commander, was given by the Revised Statutes of 1874, but limited to time of war.⁴⁵ The act of October 1, 1890⁴⁶ established a single officer summary court with jurisdiction in time of peace over offenses cognizable by a garrison or regimental court-martial. Unlike that of the wartime field officer, a sentence of a summary court-martial does not require approval by anyone but the commander who appointed it. The act of June 18, 1898⁴⁷ authorized summary courts-martial in time of war and eliminated the field officer sitting as a court.

The act of March 2, 1913⁴⁸ eliminated the ancient regimental and garrison courts-martial entirely and substituted a one-member summary court-martial with power, in war or peace, to impose up to three months' confinement, and a three member special court-martial, with power to impose up to six months' confinement. These courts were to be appointed and their sentences approved and ordered executed by regimental, post and like commanders. The 1920 Articles of War reduced the maximum period of confinement imposable by a summary court-martial to one month.⁴⁹ The

rates, this will permit forfeitures as high as \$900 to be imposed on officers. Frequent appeals by officers who deem forfeitures imposed upon them excessive may be anticipated.

44. 12 STAT. 598.

45. Arts. 81, 110. Approval by a camp commander was authorized by the act of July 27, 1892, 27 STAT. 278.

46. 26 STAT. 648.

47. 30 STAT. 483.

48. 37 STAT. 721. Like provisions were contained in Arts. 6, 7, 9, 10, 13, 14 of 1916.

49. Art. 14. Act Mar. 2, 1913, 37 STAT. 721, and Art. 13 of 1916 provided that special courts-martial could not try officers. This restriction was lifted by Art. 13 of 1920 but the President was authorized to limit the jurisdiction of special courts-martial over persons. He did so limit it until 1943 to persons not above the grade of master sergeant, G.O. 71, War Dept., Dec. 1, 1920; *MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1921, 655; par. 14, M.C.M., 1928* ("MANUAL FOR COURTS-MARTIAL, U. S. ARMY," will be abbreviated in subsequent notes to "M.C.-M.") Since 1943 only commissioned officers have been excepted from the jurisdiction of special courts-martial (par. 14, M.C.M., 1928, 1943 reprint ed.). The 1948 amendment to Art. 13 (sec. 210, Selective Service Act of 1948, effective Feb. 1, 1949) takes away the power of the President to except persons subject to military law from such jurisdiction. Certain superior noncommissioned officers are excepted from

1916 and 1920 Articles of War did not require any approval or confirmation of sentences of special and summary courts-martial, other than that of the commander who appointed the court, but they did provide that, after action by that commander, the records of trials by special courts-martial and reports of trials by summary courts-martial should be transmitted to ". . . such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate."⁵⁰ The original regulations implementing this provision merely designated the headquarters of the commander with power to appoint a general court-martial for the command as the depository of such records and reports.⁵¹ Since 1928 the presidential regulations have contained the following provision:

"The officer immediately exercising general court-martial jurisdiction over a command has supervisory powers over special and summary courts-martial therein. He will cause the records or reports of trial of such courts when forwarded to him as required by 87c to be examined for errors, defects, or omissions. He may take any authorized corrective or modifying action by him deemed necessary or desirable with respect to the sentence, or he may bring the matter to the attention of the authority that approved the sentence or his successor."⁵²

In practice the examination has been made by or under the direction of the staff judge advocate of the superior command, a staff officer learned in the law, of whom more will be said later. There has been doubt as to the validity and scope of the last sentence of the provision, particularly as to whether it empowers a superior commander to vacate a conviction as dis-

the jurisdiction of summary courts-martial by presidential regulation issued under Art. 14 and the article itself provides that other noncommissioned officers may not be tried by summary court-martial without their own consent or the authority of a commander who has power to appoint a general court-martial (M.C.M., 1928, par. 16).

50. Art. 36 of 1916 and 1920. This was amended by sec. 217, Selective Service Act of 1948, effective Feb. 1, 1949, to require that special court-martial records involving approved sentences to bad conduct discharge be forwarded to The Judge Advocate General for review.

51. Par. 367, M.C.M., 1917; par. 367, M.C.M., 1921; par. 87, M.C.M., 1928. As to who has power to appoint general courts-martial, see note 22, *supra*.

52. Par. 91, M.C.M., 1928. The report of a trial by summary court-martial sent to the commander exercising general court-martial jurisdiction is a carbon copy of the record. As such courts are not required to record testimony and arguments, the record consists only of the charges, the pleas, the findings, the sentence and the action of the commander who appointed the court. This being so, the scope of inquiry on examination of a report of trial by summary court-martial is necessarily limited. Par. 86, App. 8, M.C.M., 1928.

tinct from merely reducing the sentence.⁵³ Nevertheless, by requiring examination under the supervision of a superior commander of every record of trial by inferior court-martial the provision has afforded, if not genuine appellate review of the proceedings of such tribunals, at least a desirable check on their activities.

SCOPE AND EFFECT OF REVIEW PRIOR TO WORLD WAR I

The scope of appellate review based on the record of the inferior tribunal, as distinguished from trial *de novo* by the appellate court, is necessarily limited by the scope of that record. The common law record consisted of the judge's commission, the indictment, the plea of the defendant, the verdict, and the judgment. It contained no report of the testimony, proceedings on interlocutory motions, the arguments of counsel or the charge of the judge. Review on writ of error, the only form of appellate review afforded by the common law in criminal cases, was limited to errors appear-

53. An opinion of The Judge Advocate General of 1932 ruled that the jurisdiction of an officer exercising general court-martial jurisdiction over the proceedings of special and summary courts-martial appointed by his subordinates is confined to the remission, mitigation or suspension of sentences and that, therefore, an order of a superior commander purporting to disapprove and set aside the findings and sentence of a special court-martial which had been approved and promulgated by a subordinate commander was a nullity. JAG 220.26, Aug. 30, 1932, DIG. Ops. JAG, 1912-40, sec. 403 (5). But an opinion of 1921 had held that it was ". . . in accordance with the well-established custom of the service . . ." for the superior commander to direct the subordinate commander to disapprove the proceedings of a summary court-martial appointed by the latter. JAG 250.452, Oct. 29, 1921, DIG. Ops. JAG, 1912-40, sec. 403 (5). And it had been ruled as follows when the Articles of War of 1806 were still in force: "The duty devolves upon a department commander of supervising the proceedings of regimental and garrison courts-martial transmitted to his headquarters . . . if he discovers a material error, defect, or omission, he should bring the same to the attention of the proper inferior commander, and if such error is a fatal defect, such inferior commander should issue an order declaring the sentence void. But if such error is not a fatal defect, such inferior commander can remit the unexecuted punishment." 35 Ops. JAG 174, Feb. 1874; DIG. Ops. JAG, 1912, *Discipline*, sec. XVI F. Moreover, in 1945 The Judge Advocate General stated, "When the results of trial by special court-martial have been promulgated and the record of trial forwarded by the reviewing authority under the provisions of par. 87 *c*, MCM, 1928, to the officer exercising immediate general court-martial jurisdiction over the command, and examination thereof under the provisions of par. 91, MCM, 1928 discloses that the evidence adduced upon the trial was legally insufficient to sustain the findings of guilty, or that the record is otherwise legally insufficient to support the findings and the sentence, the officer exercising such general court-martial jurisdiction has legal authority thereupon to direct the reviewing authority of such special court to take supplemental or corrective action to vacate the findings of guilty and the sentence." SPJGJ 1943/19599, 18 Jan. 1945, 4 BULLETIN OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 9 (1945) (In subsequent notes this bulletin will be cited as "BULL. JAG"). This last opinion expressly overruled that of 1932 "insofar as it may appear to be in conflict."

ing on the face of this very limited record and could not extend to such questions as rulings on evidence, the weight or, indeed, the presence of evidence, or the correctness of the judge's instructions.⁵⁴ In civil cases the common law afforded appellate review by bill of exceptions to consider errors as to evidence, instructions, and other phases of the trial. At the time the alleged error was made the injured party would write down the ruling and pertinent matters and have the writing signed and sealed by the court.⁵⁵ Bills of exceptions were not permitted in criminal cases.⁵⁶ So appellate review in criminal cases was exceedingly limited in scope until the passage of modern statutes, such as the English Criminal Appeal Act of 1907.⁵⁷

The traditions of our military law have been quite different, based as they are on the Roman civil law with its broad appellate power in the emperor and even more extensive appellate review by archbishop and pope in the related canon law system.⁵⁸ The British Articles of War of 1774 and the American articles issued prior to 1916 did not specifically require courts-martial to keep records of their proceedings but the provisions for confirmation and other references in these articles assumed that, by the customs of the military service, a record would be kept by or under the direction of the judge advocate.⁵⁹ In fact, the customs of the military service have long re-

54. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 308-313 (1883). See also ORFIELD, CRIMINAL APPEALS IN AMERICA 22-25 (1939).

55. ORFIELD, *op. cit.*, note 54, *supra*, 25.

56. Regina v. Jelly, 10 Cox C.C. 553 (1867).

57. 7 Edw. 7, c. 23.

58. The modern court-martial is descended from the mediaeval English *Curia Militaris* or Court of the Constable and Marshal, which consisted of the lord high constable and the earl marshal, assisted by three doctors of civil law. DAVIS, *op. cit.*, note 1, *supra*, 13. This court proceeded according to the civil law and from its judgments an appeal lay to the king in person. 4 COKE, INSTITUTES *123-128; Parson v Langar v. Conyngsby, SELECT CASES BEFORE THE KING'S COUNCIL (Selden Society) lxxxii, 46 (1361), Rex v. Ramsey, 3 HOWELL'S STATE TRIALS 483 (1631). See STAT. 13 Ric. 2, c. 2; 4 BLACKSTONE, COMMENTARIES * 68; WINTHROP, *op. cit.*, note 2, *supra*, 49; Dean Pound in ORFIELD, *op. cit.*, note 54, *supra*, 6-7; ORFIELD, *ibid.*, 20-21; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 664 (2d ed. 1895); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 577 (3d ed. 1922); Holdsworth, *Martial Law Historically Considered* 18 L. Q. REV. 117 (1902).

59. The Articles of War of 1916 provided as follows:

"Art. 33. Records—General courts-martial.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.

"Art. 34. Records—Special and summary courts-martial.—Each special court-

quired general courts-martial to keep a much more complete record than that kept by common law criminal courts. It includes not only the order appointing the court, the charges, the pleas, the findings and the sentence, corresponding to the judge's commission, indictment, plea, verdict and judgment which comprised the common law record, but a complete and accurate record of the proceedings and action of the court at the trial, including the organization, challenges, arraignment, testimony of witnesses and documentary evidence, motions, objections, arguments, rulings of the court on interlocutory questions, adjournments, continuances, and closing statements—

“. . . in short every part and feature of the proceedings, material to a complete history of the trial and to a correct understanding by the reviewing officer both of the merits of the case and of the questions of law arising in the course of the investigation.”⁶⁰

The entire testimony of each witness must be given in his own language, and as nearly verbatim as possible.⁶¹ For a judge-advocate to assume to

martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the president may from time to time prescribe.”

The 1920 articles made no substantial change in these articles except to substitute the term “trial judge advocate” for judge advocate” and to authorize a member to replace the president in case of the latter's death, disability or absence. The 1948 amendments make no change in articles 33 and 34 but they add to article 13 a proviso, “That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case.” Sec. 210, Selective Service Act of 1948. Presidential regulations have never required summary courts-martial to record testimony and they did not require special courts-martial to do so until 1921, since which testimony before special courts-martial has been required either to be reported at length or summarized. Apps. 7, 8, M.C.M., 1917; Apps. 11, 12, M.C.M., 1921; Apps. 7, 8, M.C.M., 1928.

60. Sec. 2136, DIG. OPS. JAG, 1901. DIG. OPS. JAG, 1880, 412-422; DIG OPS. JAG, 1895, 639-652; DIG. OPS. JAG, 1912, *Discipline, XIII*; WINTHROP, *op. cit.*, note 2, *supra*, 773-774; M.C.M., 1905, 62; par. 357 and app. 6, M.C.M., 1917; par. 357 and app. 10, M.C.M., 1921; par. 85 *b* and app. 6, M.C.M., 1928.

61. DIG. OPS. JAG, 1868, 320. MACOMB, PRACTICE OF COURTS-MARTIAL., § 181 (1841). The form of record given by General Macomb (*ibid.*, p. 102) contemplates a literal rendering of the exact language of each question and answer. The forms given by Captain Hough, representing the British practice in India during the early nineteenth century, omit some of the questions and alter the witness's language so as to make it complete and intelligible without them, thus reducing it to narrative form. HOUGH, *op. cit.*, note 42, *supra*, 261-312. Colonel Winthrop takes issue with Captain Hough on this point. *Op. cit.*, note 2, *supra*, 784 note. The Macomb and Winthrop view, that the recording of testimony should be verbatim, is certainly the American rule. DE HART, OBSERVATIONS ON MILITARY LAW 417-418 (1862); M.C.M., 1905, 142-151; par. 250, M.C.M., 1917; par. 250, M.C.M., 1921; M.C.M., 1928, 264 note.

record only such testimony as he considered material, or to summarize the testimony given, was looked upon as a gross irregularity. Since 1863 there has been express statutory authority for the employment of a shorthand reporter, at Government expense, to assist the judge advocate.⁶² In practice, a general court-martial trial conducted without a reporter is virtually an unheard-of procedure.

When the record of a trial by general court-martial is complete it is submitted to the reviewing authority, that is, the commander who appointed the court or his successor, without whose approval the court-martial sentence has no effect.⁶³ Before acting, that commander undertakes to determine whether the record discloses that the court was properly constituted and had jurisdiction of the person and subject matter, that there was at least some evidence of every element of each offense of which the accused was found guilty, that the sentence is within limits prescribed by statute and presidential regulation, and that there are no errors or irregularities which prejudice the substantial rights of the accused. If he determines these items in the affirmative he may approve the sentence and, if further review is not required, order its execution.⁶⁴ But it does not follow that because he has determined that the record of trial is *legally* sufficient to support the sentence he must approve the sentence. He is free to take any one of a number of other actions and he is not obliged to state any reason for the action he does take.

62. Sec. 28, act Mar. 3, 1863, 12 STAT. 736; R. S. 1203; Article of War 115 in the codes of 1916 and 1920. No change was made in article 115 by the 1948 amendments. Enlisted men detailed as reporters are entitled to extra pay. Act Aug. 24, 1912, 37 STAT. 575, 10 U.S.C. § 644 (1946); act Aug. 25, 1937, 50 STAT. 805, 10 U.S.C., § 699 (1946).

63. As to who has power to appoint general courts-martial, see note 22, *supra*.

64. "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 error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: . . ." Article of War 37 in the codes of 1916 and 1920. (In subsequent notes "article of war" will be abbreviated, "A.W.") No change was made in this article by the amendments of 1948. It merely restates the pre-existing customary military law. WINTHROP, *op. cit.*, note 2, *supra*, 691-692. It would be very difficult to operate the court-martial system if insubstantial errors were not overlooked, as prescribed by A.W. 37, especially in view of the well-settled rule of military law that failure of the defense to object to incompetent evidence does not cure the error of reviewing it. As to this rule, see CM 178446 (1927), DIC. OPS. JAG, 1912-1940, § 395 (2); CM ETO 4756, 4 BULL. JAG 173 (1945).

The reviewing authority may disapprove the sentence in whole or in part. Disapproval of the entire sentence may be based upon a determination that the record of trial is not legally sufficient to support the sentence, upon the reviewing authority's own views as to the weight or credibility of the evidence or the fairness of the trial,⁶⁵ or upon matters dehors the record such as facts disclosed by the preliminary investigation,⁶⁶ the results of psychiatric examination of the accused, inquiry into the family background, civilian career and military record of the accused,⁶⁷ or that the time the accused has spent in confinement already is adequate punishment for the offenses of which he was found guilty. The reviewing authority may disapprove part of the sentence because he determines that it exceeds the maximum limit of punishment set by statute or presidential order for the offenses which the record is legally sufficient to establish.⁶⁸ For example, if

65. For an interesting discussion of the extent to which the reviewing authority should weigh evidence, see Connor, *Reviewing Authority Action in Court-Martial Proceedings*, 12 VA. L. REV. 43. 54-60 (1925). Colonel Connor seemed to feel that the reviewing authority should consider the question of whether the evidence establishes guilt beyond a reasonable doubt as if he were the trial court, that is, without giving any substantial weight to the findings of guilty of the court-martial, which actually saw and heard the witnesses. The official view would give at least some weight to the court-martial's findings. DIG. OPS. JAG, 1912, *Discipline*, XIV E 8 a (1); note 129, *infra*.

66. A preliminary investigation prior to trial by general court-martial has been required by statute since 1916. A.W. 70 in the codes of 1916 and 1920; A.W. 46b in the code of 1948. The report of investigation is attached to the record of trial and submitted with it to the reviewing authority. Par. 357 b 56, M.C.M., 1921.

67. It is customary for the reviewing authority to interview the accused, or have a staff officer do so, before acting on the record, and to have an investigation made into the past life and activities of the accused. This affords a more adequate basis than the record alone for determining such questions as whether the accused is susceptible of rehabilitation for military service and so should be confined in a military institution providing training for that purpose or whether he is a hopeless incorrigible who should be sent to a civilian penitentiary. Psychiatric examination is customary when the possibility of mental disorder is indicated.

68. For certain offenses the articles of war have set mandatory punishments which a court-martial can neither increase or decrease. For example, under the codes of 1916 and 1920, spies must be sentenced to death and officers guilty of conduct unbecoming an officer and a gentleman must be sentenced to dismissal, no more and no less. A.W. 82, 95. For other offenses the articles have prescribed a mandatory minimum punishment, with authority in the court-martial to impose more. For example, under the codes of 1916 and 1920 an officer found drunk on duty in time of war or a commanding officer who makes a private profit from provisions supplied his command *must* be dismissed and *may* be sentenced to additional punishment. A.W. 85, 87. As to most offenses, the articles leave the punishment to the discretion of the court-martial. This discretion is limited in two respects.

First, the articles of war have always contained provisions prohibiting certain punishments. The American articles have always prohibited the imposition of the death penalty unless authorized by the article of war creating the offense. Art. LI of 1775; Art. 3, sec. XVIII, of 1776; Art. 24, sec. XIV, of 1786; Art. 87

the court-martial has imposed ten years' confinement for grand larceny and wilful disobedience of an officer, five years' being the maximum confinement imposable for either offense alone, and the reviewing authority determines that the record is legally sufficient to establish guilt of only one of these offenses, he will disapprove at least five years of the sentence. He may also disapprove part of the sentence because, as a matter of discretion, he deems it excessive. Disapproval of part of a sentence is, of course, impossible when the only punishment is by nature indivisible, such as death, dismissal, dishonorable discharge, reprimand or to make an apology.⁶⁹

If the reviewing authority finds in the record a defect which the court can correct he may return the record to the court-martial which tried the case for proceedings in revision. For example, where a witness for the prosecution was in fact sworn at the trial but the record fails to state that fact, the court-martial can reconvene, correct its record to show the true facts, and resubmit the record. New evidence may not be received in revision proceedings, the record may not be corrected to show the happening of an event which did not take place, and, of course, such defects as illegality in the constitution or composition of the court or lack of jurisdiction of the person or offense cannot be corrected by this means.⁷⁰ Prior to 1920 the reviewing authority could also return the record to the court for proceedings in revision with a view to reconsidering an acquittal, reconsidering findings of not guilty of some of the offenses charged, or increasing the sentence.⁷¹ He could not,

of 1806; Art. 96 of 1874; Art 43 of 1916, 1920 and 1948. Art LI of 1775 prohibited more than thirty-nine lashes; Art. 3, sec. XVIII, of 1776 and Art. 24, sec. XIV, of 1786 prohibited more than 100 lashes; and Art. 87 of 1806 prohibited more than fifty lashes. Act Aug. 5, 1861, 12 STAT. 316, and Art. 98 of 1874 prohibited flogging. Act June 6, 1872, 17 STAT. 259, and act Feb. 18, 1875, 18 STAT. 316, prohibited branding, marking and tattooing. Art. 41 of 1916 and 1920 prohibited flogging, branding, marking and tattooing. Art. 97 of 1874 and Art. 42 of 1916 and 1920 prohibit confinement in a penitentiary except for civil offenses for which a civil court could sentence to a penitentiary. Art. 41 of 1920 prohibits cruel and unusual punishments.

Second, from 1890 to 1920 the President was empowered by statute to prescribe maximum limits of punishment in time of peace and since 1920 he has had power to do so in time of war also. Acts Sept. 27, 1890, 26 STAT. 491; Oct. 1, 1891, 26 STAT. 648; A.W. 45 of 1916, 1920. The current limitations are set out in par. 104, M.C.M., 1928.

69. WINTHROP, *op. cit.*, note 2, *supra*, 685-694; DIG. OPS. JAG, 1912, *Discipline*, XIV. A.W. 47 of 1916, 1920 and 1948 provides that the power to approve a sentence includes power to disapprove the whole or any part.

70. WINTHROP, *op. cit.*, note 2, *supra*, 694-702; par. 352, M.C.M., 1917; pars. 352, 372, M.C.M., 1921; par. 83, M.C.M., 1928.

71. MACOMB, *op. cit.*, note 61, *supra*, pars. 155, 156; DIG. OPS. JAG, 1912, *Discipline*, XIV E, E 4a; CROWDER, *MILITARY JUSTICE DURING THE WAR*, 32-34 (1919). The existence of this power was questioned and its exercise severely criticized.

of course, force the court to make findings of guilty or to increase its sentence and he could not change the findings or increase the sentence himself.⁷² Prior to 1920 the reviewing authority could not, incident to disapproval of a sentence, order a new trial without the consent of the accused.⁷³ This meant that if prejudicial error not correctible by revision proceedings was committed at the trial, the accused went free, regardless of how apparent his guilt might be.

If the court-martial finds the accused guilty of an offense and the reviewing authority determines that the record of trial is not legally sufficient to support a conviction of that offense but is legally sufficient to support findings of guilty of a lesser included offense, he may return the record to the court for proceedings in revision, with a view to changing its findings and sentence accordingly.⁷⁴ The 1916 Articles of War empowered the reviewing authority to make such changes himself, by approving only so much of the findings as involves guilt of the lesser offense and only so much of the sentence as is appropriate to the lesser offense.⁷⁵ For example, if the court-martial finds the accused guilty of murder and sentences him to confinement for life and the reviewing authority determines that the record of trial is legally sufficient only to establish manslaughter, he may approve only so much of the findings as involves guilt of manslaughter and only so much of the sentence as involves confinement for ten years. As might be expected, since 1916 revision proceedings have not ordinarily been used to correct errors of this type.

Having approved some or all of a general court-martial sentence, the

See, for example, Bruce, *Double Jeopardy and Courts-Martial*, 3 MINN. L. REV. 484-509 (1919). It had advantages. For example, if an accused was charged with the murder of *A*, the evidence showed that he shot at *B*, intending to kill him, but the bullet struck and killed *A*, and the court, because of a mistaken belief that intent to kill the person who is killed is essential to murder, acquitted or found the accused guilty of manslaughter only, the reviewing authority could return the record to the court with correct advice as to the law and it could reconsider its findings in the light of this advice. Connecticut and Vermont permit the prosecution to appeal from a judgment of acquittal in a criminal case with a view to reversal and a new trial. ORFIELD, *op. cit.*, note 54, *supra*, 69-72. The United States Supreme Court has held that such an appeal is not a denial of due process of law. *Kepner v. United States*, 195 U. S. 100 (1904). The American Law Institute favors allowing such appeals. 12 PROCEEDINGS 207 (1935); Official Draft, Administration of the Criminal Law § 13 (1935).

72. DIG. OPS. JAG, 1912, *Discipline*, XIV E 1, E 2.

73. 1 Ops. Atty. Gen. 233 (1818); WINTHROP, *op. cit.*, note 2, *supra*, 693; DIG. OPS. JAG, 1912, Articles of War, C I I A.

74. DIG. OPS. JAG, 1912, *Discipline*, XIV E 1.

75. A.W. 47, effective Aug. 29, 1916. A.W. 47 of 1920 and A.W. 47 f of 1948 (sec. 223, Selective Service Act of 1948) confer the same power.

reviewing authority may, if he has power to order the execution of the approved portion of the sentence, mitigate or remit the whole or any part of a sentence not extending to death or the dismissal of an officer.⁷⁶ Under the codes of 1806, 1874, 1916 and 1920 he could suspend the execution of a sentence to death or dismissal until "the pleasure of the President be known."⁷⁷ Remission is the forgiving of all or part of a sentence. Mitigation involves reduction of the punishment in quantity or quality without change in its general nature. It does not include commutation, that is, change in the nature of the punishment. So if the sentence is to confinement at hard labor for six months the reviewing authority can *remit* three months of the punishment or *mitigate* it to hard labor without confinement but he cannot *commute* it to a flogging.⁷⁸

Prior to 1914 a reviewing authority could not suspend the execution of a sentence except in the narrow case just mentioned.⁷⁹ Since then, a reviewing authority with power to order the execution of a sentence has had authority, at the time of approval of the sentence, to suspend the execution, in whole or in part, of any such sentence as does not extend to death, and to restore the person under sentence to duty during such suspension.⁸⁰ In practice, suspension of the entire sentence and restoration to duty are not very common. Where a soldier has been sentenced to dishonorable discharge and confinement for a term of years and the reviewing authority thinks there is a possibility of his rehabilitation, it is usual to suspend the execution of so much of the sentence as involves dishonorable discharge until the soldier's release from confinement and to designate a military institution as the place of confinement. If the accused responds well to disciplinary training the dishonorable discharge can, as a matter of clemency, be remitted and he can be restored to duty as a soldier.

The action of the reviewing authority is attached to the record of trial and authenticated by his sign manual.⁸¹ When the reviewing authority (and

76. A.W. 89 of 1806; sec. 2, act July 2, 1864, 13 STAT. 356; A.W. 112 of 1874; A.W. 50 of 1916 and 1920; A.W. 51 a of 1948, Appendix, *infra*. Cf. A.W. LXVII of 1775 (note 10, *supra*) and A.W. 2, sec. XVIII of 1776.

77. A.W. 89 of 1806; A.W.111 of 1874; A.W. 51 of 1916 and 1920. This power is withdrawn by the 1948 amendments because no field commander has power under them to order the execution of sentences of death or dismissal. A.W. 48, note Appendix, *infra*.

78. WINTHROP, *op. cit.*, note 2, *supra*, 715-728; pars. 380-384, M.C.M., 1921; par. 87b, M.C.M., 1928.

79. DIG. OPS. JAG, 1912, *Discipline*, XIV A 4 e.

80. Act April 27, 1914, 38 STAT. 354; A.W. 52 of 1916 and 1920; A.W. 51a of 1948, Appendix, *infra*.

81. DIG. OPS. JAG, 1912, *Discipline*, XIV c, E 9 1, E 9 m; par. 87b, M.C.M., 1928.

confirming authority, in cases where confirmation is required) has taken final action in a case, the result is announced in published orders.⁸² Prior to such publication or official notification to the accused, the reviewing authority may revoke or modify his action.⁸³ After such publication or notification he could not, prior to 1920, recall or modify his action unless the proceedings were void and subject to collateral attack, as when the court-martial lacked jurisdiction of the person or subject matter or the sentence was not one authorized by law. Therefore, after the publication of an order approving a sentence and ordering it executed there was no remedy for non-jurisdictional errors except executive clemency.⁸⁴

If the reviewing authority publishes an order announcing an acquittal or announcing his disapproval of a sentence the case is at an end, whether or not an approved sentence in the case would have required confirmation by superior authority, and the record of trial is transmitted to The Judge Advocate General for filing.⁸⁵ If the reviewing authority approves a sentence which requires confirmation by superior authority, the record of trial is forwarded to the confirming authority. With respect to that portion of the sentence which the reviewing authority has approved, the confirming authority could, under the codes of 1806, 1874, 1916 and 1920, take any action which a reviewing authority with power to order the execution of the sen-

82. WINTHROP, *op. cit.*, note 2, *supra*, 733-734; par. 87 *d*, M.C.M., 1928.

83. Sec. 2235, DIG. OPS. JAG, 1901; DIG. OPS. JAG, 1912, *Discipline*, XIV E 9 e; par. 87 *b*, M.C.M., 1928.

84. Secs. 2235-2237, DIG. OPS. JAG, 1901; DIG. OPS. JAG, 1912, *Discipline* XIV H 1, XV E 4, XV I 3, I 4. "After the reviewing authority has acted on a case and his action has been promulgated in orders it is too late to urge that the sentence is invalid on account of weight of evidence, credibility of witnesses, or any other matter calling for the exercise of judgment or discretion on the part of the court or reviewing authority." *Ibid.*, XV I 4. "Where, after the reviewing commander had approved a sentence in general orders and the court had been dissolved, it was discovered that there was a fatal defect in the proceedings, held that the commander would properly issue a supplemental order declaring the proceedings a nullity and the original order inoperative and withdrawn on account of the defect." *Ibid.*, XV E 4. Clemency is not an adequate substitute for reversal of a conviction because the conviction still stands. For example, conviction of desertion in time of war entails loss of citizenship and all rights to pensions. Mere remission of the punishment imposed by the sentence does not restore citizenship or pension rights, R. S. 1998, sec. 1, act Aug. 22, 1912, 37 STAT. 356, 8 U.S.C. § 11 (1946), 34 U.S.C. § 1200 (1946).

85. DIG. OPS. JAG, 1912, *Discipline*, XIV E 9 b (1). "Where the original reviewing officer disapproves a sentence, to the execution of which the confirmation of superior authority is made requisite by the articles of war . . . the sentence being nullified in law, there remains nothing for the superior authority to act upon . . ." *Ibid.* If errors are discovered in such a record upon examination in the Office of The Judge Advocate General, The Judge Advocate General may, of course, write the reviewing authority a letter of advice for guidance in future cases.

tence could take.⁸⁶ As an aspect of the constitutional power to pardon, the President, when acting as confirming authority, has the additional authority to commute a sentence, that is, to change its nature, as from death to life imprisonment or dismissal to a reprimand.⁸⁷ If the reviewing authority approves a sentence which he has power to order executed and does order its execution, the record of trial is transmitted to The Judge Advocate General for "revision."⁸⁸

Thus, prior to World War I, the general court-martial records which reached the War Department were of three types:

First, those where the reviewing authority or field confirming authority had announced an acquittal or disapproval of the sentence. As to these, review by the Judge Advocate General could not be directed toward affecting the result.

Second, those where the reviewing authority had approved a sentence requiring confirmation by the President or where the President, having appointed the court-martial, was himself the reviewing authority. There was no legal requirement that the Judge Advocate General review these records prior to approval or confirmation by the President but it came to be customary for him to do so.⁸⁹

Third, those where a field commander had already ordered the execution of the sentence.

As to cases of the second type, those requiring approval or confirmation by the President, if the Judge Advocate General reviewed them prior to

86. Ses. 2040, DIG. OPS. JAG, 1901; DIG. OPS. JAG, 1912, *Discipline*, XIV H 1; A.W. 49 of 1916, 1920 and 1948.

87. Sec. 348, DIG. OPS. JAG, 1901; *Ex parte WELLS*, 18 How. 307 (U. S. 1855). A.W. 50 of 1920 authorized the President to empower certain field commanders to commute sentences in specified cases. A.W. 49 of 1948 empowers any confirming authority to commute; but no field commander is a confirming authority under the 1948 amendments (Appendix, *infra*).

88. R.S. § 1199, act June 23, 1874, 10 U.S.C. § 62 (1946).

89. In the case of Major Runkle the Secretary of War, purporting to act for the President, confirmed a sentence of dismissal, apparently without reference to the Judge Advocate General. The accused then complained to the President, who directed the Judge Advocate General to review the record and submit an opinion. The opinion was to the effect that the record of trial was *not* legally sufficient to support some of the findings but the President (Grant) took no action. *Runkle v. United States*, 122 U. S. 543 (1886). During World War I such records were reviewed by the Judge Advocate General and sent thereafter through the Adjutant General and the Chief of Staff to the Secretary of War for presentation to the President. CROWDER, *op. cit.*, note 71, *supra*, 48-49. Judge Advocate General Swaim seems to have suggested that review of the record by the Judge Advocate General, prior to confirmation by the President, was required. *Swaim v. United States*, 28 Ct. Cl. 173, 211-212 (1893).

action by the President he could, of course, consider anything which the President as reviewing or confirming authority might consider and submit an opinion recommending appropriate action. This would constitute appellate review of broad scope by an officer learned in the law. In cases of the third type, where a field commander had already ordered the execution of the sentence, and those of the second type where the President had already acted, the possibilities of corrective action by the Judge Advocate General were narrowly limited. If, in his opinion, the proceedings were absolutely void for want of jurisdiction he could advise the authority who ordered the execution of the sentence to announce that fact in orders and to treat the accused accordingly. If in his opinion there were errors, irregularities or unfairness in the proceedings of non-jurisdictional type, all he could do was recommend clemency since, as has been seen, a reviewing or confirming authority could not revoke his approval of a sentence, once published.⁹⁰ For example, if in a murder case the Judge Advocate General found no evidence whatever of the *corpus delicti*, all he could do was recommend a pardon or remission of the unexecuted portion of the sentence.⁹¹ Clemency could do nothing for an accused who had already been hanged or flogged under an unjust sentence. Neither a pardon nor remission can restore an officer already dismissed to his place in the Army.⁹²

Although it has been contended that the statutory duty of the Judge Advocate General to "revise" the proceedings of courts-martial included power to vacate approved sentences, no such power was ever exercised.⁹³ Until 1920 the opinions of the Judge Advocate General were merely advisory; neither the President nor a field commander was obliged to conform to them. During World War I, field commanders refused to follow the advice of the Judge Advocate General in 3.3 per cent of the cases in which he recommended modification or disapproval on legal grounds and the President refused to follow 2.2 per cent of like recommendations made to him.⁹⁴

90. DIG. OPS. JAG, 1912, *Discipline*, XIV B, H 5, F 1; see note 84, *supra*.

91. DIG. OPS. JAG, 1912, *Discipline*, XV F 1.

92. *Ibid.*, XV I 2, I 2 A; WINTHROP, *op. cit.*, note 2, *supra*, 1161-1169; see *Ex parte Garland*, 4 Wall. 333, 381 (U.S. 1866); *United States v. Corson*, 114 U. S. 619, 621 (1885). "No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate." R.S. § 1228, 10 U.S.C. § 579 (1946), based on act July 20, 1868, 15 STAT. 125.

93. The duty was imposed by sec. 5, act July 17, 1862, 12 STAT. 598, note 32, *supra*, and continued by R. S. § 1199, 10 U.S.C. § 62 (1946), which is still in force. The contention mentioned in the text was denied in *Ex parte Mason*, 256 Fed. 384 (C.C., N.D. N. Y. 1882). See CROWDER, *op. cit.*, note 71, *supra*, 49-62.

94. CROWDER, *op. cit.*, note 71, *supra*, 9, 49.

The appellate review provided by American military law before World War I displays two marked deficiencies: First, that no review by an officer learned in the law was required in most cases until after irreparable harm could be done to the accused and that, in the cases where timely review by an officer learned in the law was afforded, his opinion was merely advisory. Second, that the appellate review afforded was by officers—the President, the commanding general of the army in the field, commanders of territorial departments, army corps, divisions and the like—whose other duties were so onerous as to preclude their having the time requisite for careful examination of records of trial. The effect of this second deficiency was that, if there was any careful review of the record at all, it was not done by the statutory reviewing or confirming authority himself but by some subordinate of doubtful experience and wisdom.⁹⁵

THE WORLD WAR I DEVELOPMENT

The declaration of war of April 6, 1917 had the effect of empowering commanding generals of territorial departments and divisions to confirm and execute sentences involving dismissal of officers below the grade of brigadier general and death sentences in cases of murder, rape, mutiny, desertion and spying without prior review of the records of trial by the Judge Advocate General.⁹⁶ By general order of December 29, 1917 the War Department directed such confirming authorities to defer publication of the confirmation of any death sentence and execution of the sentence until the record of trial had been reviewed in the office of the Judge Advocate General and the confirming authority had been informed by the Judge Advocate General that such review had been made and that there was no legal objection to carrying

95. The President acted as confirming authority in 1,316 general court-martial cases during World War II. The writer was Staff Judge Advocate of Headquarters Command, United States Forces, European Theater, an organization charged with the discipline of some 30,000 troops and 4,000 American civilians, in 1946. Special and summary courts-martial of this command tried as many as ninety cases a day. Three general courts-martial, sitting continuously, completed the trial of twelve to fifteen cases a month. One record of trial alone, that of Colonel Jack W. Durant, Air Corps, charged with larceny of jewels from Kronberg Castle, contained over 2600 pages of testimony and took the writer six weeks to examine. While few general court-martial records are that large, many are long and difficult. It is manifest that neither the President nor the commander of such a command can, consistently with his other duties, devote enough personal attention to each court-martial record to constitute satisfactory appellate review. As to who has power to appoint general courts-martial, see note 22, *supra*.

96. A.W. 48 of 1916, note 40, *supra*.

the sentence into execution.⁹⁷ This order purported to vest genuine judicial power in the Judge Advocate General: his opinion that a record of trial was not legally sufficient to support the sentence would be more than merely advisory; it would be a bar to execution of the sentence.

The order remained in effect for only a month, being superseded on February 1, 1918 by a more comprehensive order of the same type. This required the commanding general of a territorial department or division who confirmed a sentence involving death or the dismissal of an officer, and any reviewing authority who approved a sentence involving dishonorable discharge of an enlisted man without suspending the execution of the dishonorable discharge until the soldier's release from confinement, to defer publication of his action and execution of the sentence until the record of trial had been reviewed in the office of The Judge Advocate General or a branch thereof "and its legality there determined."⁹⁸ The same order established a Branch Office of the Judge Advocate General in France under an "Acting Judge Advocate General," to operate under the Judge Advocate General, not under any overseas commander.⁹⁹ The order provided for extension of its provisions to the commanding general of the army in the field (General Pershing). Unlike the order of December 29, 1917, the order effective February 1, 1918 did not give the Judge Advocate General judicial power. Under the later order his opinions were merely advisory. A reviewing or confirming authority could and sometimes did order the execution of a sentence despite the opinion of the Judge Advocate General or the Acting Judge Advocate General in France that the record of trial was not legally sufficient to support the sentence.¹⁰⁰ The order was changed on this point in September 1918 by an amendment requiring overseas confirming and reviewing authorities to fol-

97. Sec. I, G.O. 169, W.D. "Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. The general court-martial order publishing the result of the trial shall recite that the date for the execution of the sentence will be hereafter fixed and published in general orders; and the fixing of the date of execution and the publication thereof shall follow the receipt of advice from the Judge Advocate General that there is no legal objection to the execution of the sentence."

98. Sec. I G.O. 7, W.D., Jan. 17, 1918. The order is printed at length in App. 20, M.C.M., 1917, corrected reprint edition of Aug. 1, 1918.

99. Sec. II, *ibid.* See note 38, *supra*.

100. Note 94, *supra*.

low the advice of the Acting Judge Advocate General in France.¹⁰¹ To facilitate the review of records of trial under these orders the Judge Advocate General established boards of review, composed of officers of the Judge Advocate General's Department, in his office and its branch in France, with duties "in the nature of those of an appellate tribunal."¹⁰²

The officer strength of the Judge Advocate General's Department grew from 17 to 426 during World War I¹⁰³ and the Judge Advocate General was accorded the rank of major general.¹⁰⁴ The increase was accomplished chiefly by the appointment of civilian lawyers as Reserve and temporary officers. An officer of the department was assigned to the staff of each commander who had power to appoint general courts-martial and review their proceedings.¹⁰⁵ Although these officers were still nominally the judge advocates of the pre-revolutionary British system, mere prosecuting officials, they had come in practice to be staff legal advisers who seldom if ever engaged in the actual trial of a case. A commander customarily asked the opinion of the judge advocate on his staff before acting as reviewing or confirming authority on a record of trial by general court-martial and the judge advocate usually submitted his views in writing, accompanied by a written review of the evidence.¹⁰⁶ Presidential regulations of July 14, 1919 made this custom mandatory in all cases.¹⁰⁷ This development remedied one of the major deficiencies of the pre-war practice by requiring review of every general court-martial record by an officer learned in the law before irreparable harm could be done to the accused.

Two other developments of the World War I period should be noted. A War Department general order of July 14, 1919 limited the power of re-

101. G.O. 84, W.D., Sept. 11, 1918. General Crowder questioned the legality of this attempt to confer appellate judicial power by War Department order. *Op. cit.*, note 71, *supra*, 56-58.

102. Office Memorandum, J.A.G.O., Aug. 6, 1918; Fratcher, *op. cit.*, note 14, *supra*, 12.

103. Fratcher, *ibid.*, 11.

104. Act Oct. 6, 1917, 40 STAT. 411. A capitalized "The" was prefixed to his title by G.O. 2, W.D., Jan. 31, 1924. Curiously, the capital "T" is used in four sections of Title II of the Selective Service Act of 1948, omitted in eight, and used with respect to the Judge Advocate General's *Department* in one.

105. Fratcher, *op. cit.*, note 14, *supra*, 15, note 10.

106. Bogert, *Courts-Martial: Criticisms and Proposed Reforms*, 5 CORN. L. Q. 18, 34-35, 43-44 (1919). The instructions issued by the Judge Advocate General under G.O. 7 of Jan. 17, 1918, stated that the division or department judge advocate should prepare a review of the evidence in each case by that order. M.C.M., 1917, corrected reprint ed. of Aug. 1, 1918, 413.

107. Par. 370, M.C.M., 1917, as changed by Changes No. 5, July 14, 1919. The change was made upon recommendation of the Judge Advocate General. M.C.M., 1921, vi.

viewing and confirming authorities to return records of trial to courts-martial for proceedings in revision by prohibiting such return for reconsideration of an acquittal or a finding of not guilty of an offense, or with a view to increasing the sentence, unless it was less than the mandatory sentence fixed by law for the offense.¹⁰⁸ An act of Congress approved February 28, 1919¹⁰⁹ removed the old prohibition on mitigation or remission of sentences to death and dismissal by authorities other than the President and empowered the President to authorize the commanding general of the Army in the field or of a territorial division or department to mitigate or remit such sentences and order them executed as mitigated or remitted.

The experience of World War I resulted in general agreement that more adequate statutory provision for appellate review of general court-martial cases was desirable. There was disagreement as to the method of review. A special committee appointed by the American Bar Association to study the problem failed to reach agreement and its disagreement was reflected at the annual meeting of the association held in September 1919.¹¹⁰ Senator Chamberlain of Oregon introduced a bill which would, in effect, have provided a form of trial on the common law pattern, with a "judge advocate" of each general court-martial sitting as a trial judge, empowered to pass finally on all questions of law arising during the trial and to fix and suspend the sentence. This bill would have eliminated the reviewing authority entirely. The judgments of the proposed courts-martial were to be final, not subject to review, except that in cases with sentences involving death, dismissal of an officer, dishonorable discharge of an enlisted man, or confinement for more than six months, unless the accused waived review, there was to be review as to legal sufficiency by a court of military appeals. This court would consist of three civilians, appointed by the President by and with the advice and consent of the Senate, with the tenure, pay and retirement rights of United States circuit judges.¹¹¹ A board appointed by the War Department recommended much less sweeping changes. The chief of these was the addition to the articles of war of provisions authorizing a reviewing or confirming authority to grant a new trial incident to disapproval of the findings or sen-

108. Sec. I, G.O. 88, W.D., July 14, 1919. The change was made upon recommendation of the Judge Advocate General. M.C.M., 1921, v.

109. 40 STAT. 1211; par. 381, M.C.M., 1917, as changed by Changes No. 6, Oct. 29, 1919.

110. 5 A.B.A.J. 176 (1919); 44 AM. BAR ASSN. REP. 44-61, 70-84 (1919). For various views on the controversy see CROWDER, *op. cit.*, note 71, *supra*; Ansell, *Military Justice*, 5 CORN. L. Q. 1 (1919); Bogert, *op. cit.*, note 106, *supra*.

111. S. 64, 66th Cong., 1st Sess.

tence of a court-martial and empowering the President, upon recommendation of the Judge Advocate General, to vacate findings of guilty and the sentence of a general court-martial and order a new trial or restore rights affected by the sentence even though the action of the reviewing or confirming authority had already been published.¹¹²

On June 4, 1920 Congress enacted a revised code of articles of war which constituted a compromise between the divergent views on appellate review but leaned toward preservation of the existing system of military law.¹¹³ The new code gave statutory sanction to the already customary distinction between a judge advocate who is a prosecuting official and one who is legal adviser on the staff of a reviewing or confirming authority by denominating one "trial judge advocate" and the other "staff judge advocate."¹¹⁴ It imposed a statutory requirement that, under regulations to be prescribed by the President, every record of trial by general court-martial received by a reviewing or confirming authority be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General.¹¹⁵ The presidential regulations issued under this provision have required the staff judge advocate to prepare a written review of each case, including his opinion as to the weight of the evidence and any error or irregularity and a specific recommendation of the action to be taken together with his reasons for such opinion and recommendation.¹¹⁶ The staff judge advocate's review has come, in practice, to be a rather elaborate document, somewhat more comprehensive than the opinion of a common law court. It contains a statement of the charges, a complete summary of all the evidence, comment on the weight of the evidence and every possible error or irregularity, a description of the

112. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, 3, 30 (1919). The recommendations of this board were in substantial accord on these points with the views of General Crowder. CROWDER, *op. cit.*, note 71, *supra*, 64; Articles of War—Comparative Print showing changes proposed by the Judge Advocate General as Compared with the Changes Proposed by the Kernan-O’Ryan-Ogden Board and with the Existing Law, Senate Committee on Military Affairs, 66th Cong., 2nd Sess.

113. Sec. 1, Ch. II, act June 4, 1920, 41 STAT. 787, 10 U.S.C. 1472-1593 (1946). This had been H.R. 12775, 66th Cong., 2d Sess., a bill drafted by General Crowder and not radically amended in passage. King, *The Army Court-Martial System*, [1941] WIS. L. REV. 311-342, is an excellent general description of the practice under the 1920 Articles of War. See, also, McNeil, *United States Courts-Martial in Britain*, 60 L. Q. REV. 356-360 (1944); Saden, *Army Justice*, 20 CONN. BAR J. 106-128 (1946); Fratcher, *American Military Justice*, 2 BULL. ADJ. GEN. SCH. 13-16, 55-57 (1943).

114. A.W. 11, 17, 46.

115. A.W. 46.

116. Par. 370, M.C.M., 1921; par. 87b, M.C.M., 1928.

civilian background and military record of the accused, the staff judge advocate's estimation of him based on a personal interview, and a recommendation of the action to be taken.¹¹⁷ The review is accompanied by a proposed form of action, prepared for the signature of the reviewing authority. The reviewing authority is thus enabled to act intelligently in every case, in the light of his knowledge of the disciplinary problems of the command, without himself reading all the records of trial.¹¹⁸ It is rare for a reviewing authority to act against the advice of his staff judge advocate on a point of law but he may do so; that is, the advice of the staff judge advocate is merely that, it is not judicial action.

The 1920 Articles of War embodied in statute the existing prohibition on the return of records of trial to courts-martial for proceedings in revision with a view to reconsideration of an acquittal or findings of not guilty or to increasing a sentence which was not less than the mandatory sentence fixed by law.¹¹⁹ As has been noted, the 1916 Articles of War had eliminated the necessity for revision proceedings in cases where the record of trial was not legally sufficient to establish the offense of which the accused was found guilty but was legally sufficient to support findings of guilty of some lesser included offense, by empowering the reviewing authority to make appropriate changes in the findings.¹²⁰ Presidential regulations issued in 1928 made unnecessary the commonest type of revision proceedings by authorizing the officers who authenticated the record of trial (usually the president and trial judge advocate of the court-martial) to correct clerical errors and omissions in the record without reconvening the court.¹²¹ The cumulative effect of these three changes has been to make revision proceedings relatively rare. They are occasionally necessary, as in the case where a court-martial imposes less than the statutory minimum sentence.

117. A sample of the form of staff judge advocate's review in general use is set out in App. 2, War Department Technical Manual 27-255, MILITARY JUSTICE PROCEDURE (1945). The review in the case referred to in note 95, *supra*, ran to 52 legal cap pages, single-spaced. Four to twelve page reviews are more common.

118. As to the impossibility of his reading every record, see note 95, *supra*.

119. A.W. 40. The article also prohibits a court-martial making such reconsideration or increase on its own motion. It was not changed by the 1948 amendments. It has recently been held that, if the reviewing authority approves the original sentence, but mitigates it, and superior authority directs a rehearing, the sentence on rehearing may not exceed the original sentence *as mitigated*. CM 330-193 (1948), 7 BULL. JAG, 133 (1948). This rule would apply to revision proceedings as well as rehearings.

120. A.W. 47, 49. Note 75, *supra*.

121. Par. 87b, M.C.M., 1928.

It will be recalled that, under the pre-1920 practice, a reviewing or confirming authority who found in a record of trial prejudicial error which was not correctible by proceedings in revision, could do nothing but disapprove the sentence; he could not order a new trial without the consent of the accused.¹²² For example, where findings of guilty were based in part upon consideration of hearsay testimony or an involuntary confession, the accused went free even though other evidence in the record strongly indicated guilt. The 1920 Articles of War corrected this weakness by empowering a reviewing or confirming authority to direct a rehearing incident to disapproving a sentence.¹²³ The rehearing takes place before a court composed of officers not members of the court which first heard the case. Upon rehearing the accused may not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence may be enforced unless based upon findings of guilty of an offense not considered upon the merits in the original trial.

With one exception, the 1920 Articles of War made no change in the existing requirements of confirmation, which had been virtually the same since the Civil War.¹²⁴ Sentences involving a general officer, dismissal of an officer, suspension or dismissal of a cadet, or death required confirmation by the President before being carried into execution except that, in time of war, the commanding general of the Army in the field or of a territorial department or division could confirm sentences involving dismissal of an officer below the grade of brigadier general and death sentences imposed for murder, rape, mutiny, desertion, or spying. The exception referred to was a provision of the 1920 Articles empowering the commanding general of the Army in the field or of a territorial department or division to confirm a sentence which would otherwise require confirmation by the President if he at the same time commuted it to a punishment which would not in itself require presidential confirmation.¹²⁵ The 1920 Articles provided that the record of trial in any case where the sentence required confirmation by the Presi-

122. Note 73, *supra*.

123. A.W. 40, 47, 49, 50 ½. Like provisions are contained in A.W. 47 f (3), 49 e and 52 of 1948, Appendix, *infra*.

124. A.W. 48; Note 40, *supra*. By Executive Order 9556, May 26, 1945, 3 CODE. FED. REGS. 70 (Supp. 1945) the President delegated to the Secretary and Under Secretary of War his powers of confirmation in all except death sentence cases. This order was issued under Title I, First War Powers Act, 1941 (act Dec. 18, 1941, 55 STAT. 838, 50 U.S.C. App. § 601 (1946)). See note 26, *supra*.

125. Par. 3, A.W. 50, 10 U.S.C. § 1521 (1946); "When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate,

dent or where the President had appointed the court-martial should, before submission to the President for his action, be examined by a board of review in the office of the Judge Advocate General.¹²⁶ This board was to consist of at least three officers of the Judge Advocate General's Department designated by the Judge Advocate General and was to submit its opinion in writing to the Judge Advocate General. The Judge Advocate General was then to transmit the record and the board's opinion, with his own recommendations, *directly* to the Secretary of War for the action of the President.

The language of the statute does not appear to make the opinion of the board of review and the recommendations of the Judge Advocate General in presidential cases more than advisory; it would seem that the President could act in disregard of them if he chose to do so. Nevertheless, the Judge Advocate General ruled, with the concurrence of the Secretary of War, that when both the board of review and the Judge Advocate General held a record of trial legally insufficient to support the sentence it should not be submitted to the Secretary of War for the action of the President but returned to the reviewing authority for rehearing or other appropriate action.¹²⁷ The effect of this ruling was to vest power in the Judge Advocate General and the board of review which was judicial, not merely advisory, a distinct change from the pre-1920 practice. The statute expressly changed the pre-existing practice of submitting opinions of the Judge Advocate General intended for the President through the Adjutant General and the Chief of Staff by directing the Judge Advocate General to deal directly with the Secretary of War.¹²⁸ It was soon determined that the scope of review in presidential cases

or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed." Act Feb. 28, 1919, 40 STAT. 1211, had contained a similar provision, but with "remit or mitigate" instead of "commute."

126. Pars. 1, 2, 6, A.W. 50½, 10 U.S.C. § 1522 (1946): "The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

"Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties."

127. C.M. 154185, Dec. 29, 1922, M.C.M., 1928, App. 1, A.W. 50½, note.

128. This provision became very important in 1942 when The Judge Advocate General and The Adjutant General were placed under a Chief of Administrative Services, who was subordinate to the Commanding General, Army Service Forces, who in turn was subject to the War Department General Staff.

had not been changed by the new articles of war. In passing on records of trial prior to action by the President the board of review and the Judge Advocate General could weigh the evidence, judge of the credibility of witnesses, and reach conclusions on controverted questions of fact. The scope of review was as broad as the presidential power to act and so the same as that of the staff judge advocate of a reviewing or confirming authority.¹²⁹

As to non-presidential cases, the 1920 Articles of War provided that a reviewing or confirming authority could not, in a contested case, order the execution of any general court-martial sentence involving death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, prior to review of the record of trial by a board of review and The Judge Advocate General.¹³⁰ If the board of review and The Judge

129. C.M. 153479 (1922), sec. 408 (1), DIG. OPS. JAG, 1912-1940.

"In accordance with the principle that on the question of credibility, the findings of the trial court, which enjoyed the opportunity both to see and hear the witnesses, while not conclusive, are entitled to considerable weight . . . the Board of Review attaches some importance to the fact that the court, in this case has, by its findings, accepted the testimony of the witness Hollister, and rejected the conflicting testimony of accused. As it is the function of the Board of Review to weigh the evidence in Presidential cases the position of the Board in such cases is in some respects analogous to the position of appellate courts in equity, where it is generally held that the findings of the trial court, while not conclusive, are entitled to great respect and deference on appeal." *United States v. Calder*, CM 243466, 27 B.R. 365, 382 (1944), 3 BULL. JAG, 231 (1944).

130. Pars. 3, 4, A.W. 50½:

"Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the

Advocate General agreed that the record of trial was legally sufficient to support the findings and sentence, the reviewing or confirming authority could then order the execution of the sentence. If the board of review and The Judge Advocate General agreed that the record of trial was not legally sufficient to support the findings or sentence, in whole or in part, or that errors of law had been committed injuriously affecting the substantial rights of the accused, the sentence should thereby be vacated in whole or in part. If the sentence was wholly vacated the record should be returned to the reviewing or confirming authority for proceedings in revision or to decide whether he wished to order a rehearing or dismiss the case. If the board of review and The Judge Advocate General did not agree on a case, the record, with the holding of the board and The Judge Advocate General's dissent, should be forwarded to the Secretary of War for the action of the

Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence in whole or in part: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

"When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President."

The first proviso to par. 3 was added by act Aug. 20, 1937, 50 STAT. 724, 10 U.S.C. § 1522 (1946); the second proviso by act Aug. 1, 1942, 56 STAT. 732, 10 U.S.C. § 1522 (1946).

President. The President could then confirm the action of the reviewing or confirming authority, in whole or in part, with or without remission, mitigation, or commutation, or disapprove any finding of guilty in whole or in part, and disapprove or vacate the sentence in whole or in part. Incident to disapproval he could order a rehearing. An amendment of 1937 empowered the Secretary of War or Acting Secretary of War to perform these functions of the President¹³¹ and an executive order of 1943 delegated such power to the Under Secretary of War and the Assistant Secretary of War.¹³²

Under the 1920 Articles of War every other record of trial by a general court-martial, that is, every non-presidential case which did not require examination by a board of review before the sentence could be put into execution, was to be transmitted to the Judge Advocate General for examination in his office after the sentence was ordered executed.¹³³ In practice, such records of trial have normally been examined in the Military Justice Division of the Office of The Judge Advocate General by two officers of the Judge Advocate General's Department called examiners and the work of

131. Act Aug. 20, 1937, 50 STAT. 724, 10 U.S.C. § 1522 (1946).

132. Exec. Order 9363, July 23, 1943, 3 CODE FED. REGS. 34 (Supp. 1943) issued under authority of Title I, First War Powers Act, 1941, act Dec. 18, 1941, 55 STAT. 838, 50 U.S.C. App. § 601 (1946). This order also authorized the Assistant Judge Advocate General in charge of military justice matters to perform the functions of The Judge Advocate General in non-presidential cases.

133. Par. 5, A.W. 50 ½:

"Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the government: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority."

The first proviso was added by act Aug. 20, 1937, 50 STAT. 724; the second proviso by act Aug. 1, 1942, 56 STAT. 732 10 U.S.C. § 1522 (1946).

these examiners checked by a senior officer called the chief examiner. This examination has been as thorough and nearly as formal as review by a board of review except that no written opinion has been prepared unless an examiner or the chief examiner discovered a prejudicial error or irregularity. If the record was found legally insufficient to support the findings and sentence, it was to be transmitted to a board of review.¹³⁴ If the board of review found the record legally sufficient, there was to be no further review; if the board of review found the record legally insufficient, the Judge Advocate General was to transmit the record, together with the board's opinion and his own recommendations, to the Secretary of War. The President or, since 1937, the Secretary of War,¹³⁵ could then take any of the actions described in the antepenultimate sentence of the preceding paragraph and could restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid. It is noteworthy that this is the first time our military law permitted the vacation of a conviction for non-jurisdictional error after the action of the authority competent to order the execution of the sentence had been published. In such a case, however, unlike one reviewed by a board of review before the publication of an order of execution, the President or Secretary of War could not order a rehearing.¹³⁶

Although it is probable that Congress intended to provide broad appellate review of questions of fact in non-presidential cases,¹³⁷ the 1920 Articles

134. The language of the fifth paragraph of A.W. 50½, note 133, *supra*, appears to be mandatory. If the board of review concurs in a finding of legal insufficiency, in whole or in part, the Judge Advocate General "shall" transmit the record, etc. Nevertheless the Judge Advocate General ruled that cases would be forwarded for corrective action by the President only when (a) all findings of guilty were illegal, (b) one or more findings of guilty of an offense involving moral turpitude or affecting civil status were illegal, or (c) restoration of rights, privileges or property were required. In all other cases the old remedy of remission of some or all of the unexecuted portion of the sentence would be used. JAG, 250.404. (Memorandum for the Secretary of War, subject: Article of War 50½), April 13, 1923. This application of paragraph 5 was approved by the Secretary of War. The correspondence is reprinted in McNEIL, HISTORY BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL WITH THE UNITED STATES FORCES, EUROPEAN THEATRE, 467-470 (1945).

135. Act Aug. 20, 1937, 50 STAT. 724. These functions also were delegated to the Under Secretary of War and the Assistant Secretary of War by Executive Order 9363, note 132, *supra*.

136. SPJGJ 1945/2031, 23 Feb. 1945, 4 BULL. JAG, (1945). "When, however, the findings and sentence are vacated because the proceedings were void for jurisdictional reasons, the accused may be tried on the same charges before a properly constituted court." *Ibid*.

137. "Experience has also shown that it is essential, in order to enable just results to be obtained to the greatest possible degree, that the appeal shall include a review and a correction of errors of fact as well as errors of law, a fact the more conspicuously true because the procedure before a court-martial renders especially

of War were construed to permit the Judge Advocate General and the board of review to consider in such a case only the narrow question of whether there was any substantial evidence of each element of the offense charged. They might not weigh evidence, judge of the credibility of witnesses, determine controverted questions of fact, or decide whether an inference which could have been drawn should have been.¹³⁸ If a board of review held a record of trial legally sufficient to support the sentence and the sentence was ordered executed, the board could not thereafter reconsider the case.¹³⁹ Conversely, if a board of review held a record of trial legally insufficient to support the sentence and the Judge Advocate General concurred in the holding, the sentence was at once vacated and the board could not thereafter reconsider the case.¹⁴⁰

In practice the boards of review have permitted counsel for the accused to argue cases before them and present briefs in much the same manner

difficult an exact discrimination between findings of fact and rulings upon questions of law, a discrimination which even in nonmilitary criminal courts has presented great difficulties; but that the review upon questions of fact should, of course (as in the equity practice), be restrained by the presumption of the correctness of such findings as turn upon the credibility of witnesses who are seen and heard by the lower court, but not by the appellate court."—Articles of War—Comparative Print showing changes proposed by The Judge Advocate General as Compared with the Changes Proposed by the Kernan-O’Ryan-Ogden Board and with the Existing Law, Senate Committee on Military Affairs, 66th Cong., 2d Sess.

138. "In cases in which the President is neither reviewing nor confirming authority, it is not the province of either the Board of Review or The Judge Advocate General, and neither has the right, to weigh the evidence. In passing upon the sufficiency of the evidence in such cases, it is their province merely to determine whether or not there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the court-martial, including the reviewing, and if there be one, the confirming, authority to weigh evidence, judge of its credibility, and determine controverted questions of fact." CM 145791 (1921), sec. 408 (2), DIG. OPS. JAG, 1912-1940.

"In a case in which the President is neither the reviewing nor the confirming authority, the Board of Review may not legally weigh evidence to determine whether or not certain inferences *should* have been drawn therefrom. It is sufficient if the inferences drawn by the court *could* legally have been drawn from the evidence." CM 161833 (1924), sec. 408 (2), DIG. OPS. JAG, 1912-1940.

"In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice." CM 192609 (1930), sec. 408 (2), DIG. OPS. JAG, 1912-1940.

139. JAG, 210.81, Apr. 24, 1933, sec. 408 (1), DIG. OPS. JAG, 1912-1940 (presidential case); CM 250309, 3 BULL. JAG. 282 (1944) (non-presidential case).

140. CM 196526 (1931), sec. 408 (2), DIG. OPS. JAG, 1812-1940.

as a common law appellate court. In presidential cases the boards of review have prepared opinions comparable in form and scope to a staff judge advocate's review. In non-presidential cases involving a holding of legal insufficiency or a question of law of some importance, they have prepared "long holdings" which discuss the problems involved and the precedents bearing on them and give reasons for the result reached. In non-presidential cases held legally sufficient in which there is no serious legal question, the boards have usually prepared only a "short holding," a mere statement that the record of trial has been examined and found legally sufficient and free from prejudicial error. Dissenting members of boards may file dissenting opinions. While not absolutely bound by their own previous decisions, they have tended to follow the doctrine of *stare decisis* quite strictly. Their holdings and opinions have been reported at length in a set of reports which has been given limited circulation but which is available to all parties concerned at principal military headquarters in this country and abroad. Those of general interest to the service have been published in abbreviated form in the *Digest of Opinions of The Judge Advocate General, 1912-1930* and *1912-1940*, and in the *Bulletin of The Judge Advocate General of the Army*, a periodical published monthly from 1942 to 1946 and bimonthly since then. The *Digest* and the *Bulletin* have been given wide distribution throughout the military service and are readily accessible. Holdings and opinions of the boards of review are cited and used as precedents by military lawyers in the same way in which decisions of courts of common law and chancery are cited and used by members of the civilian bar.

One further provision of the 1920 Articles of War requires mention. It empowered the President, whenever he deemed such action necessary, to direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command and to constitute a board or boards of review in such branch office.¹⁴¹ The Assistant Judge Advocate General and boards of review in a branch office could per-

141. Par. 7, A.W. 50½:

"Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President."

form for the distant command the functions which would otherwise be performed by the Judge Advocate General and boards of review in his office in cases not requiring action by the President. An amendment of 1942 provided that, in cases of disagreement between the Assistant Judge Advocate General and a board of review, the functions which would be performed by the President or the Secretary of War in cases of disagreement between The Judge Advocate General and a board of review could be performed by the commanding general of the distant command, unless he was the reviewing or confirming authority.¹⁴² This provision made it possible to carry into execution in an overseas command in time of war all sentences except those which required presidential confirmation, that is, those respecting a general officer, extending to dismissal or suspension of a cadet, and those involving death imposed wholly or in part for an offense other than murder, rape, mutiny, desertion or spying.¹⁴³

The provision mentioned in the preceding paragraph was not used until 1942. During World War II branch offices of The Judge Advocate General were established with the European Theater of Operations, the North African (later Mediterranean) Theater of Operations, the China-Burma-India Theater of Operations, and the United States Army Forces in the Pacific Ocean Area. The commander of each of these theaters was designated a "commanding general of the Army in the field," with power to confirm sentences of dismissal of officers and death sentences imposed exclusively for murder, rape, mutiny, desertion and spying. Toward the end of the war, when the great bulk of our land and air forces was in these overseas theaters, most of the work of appellate review of records of trial by general courts-martial was performed in the branch offices of The Judge Advocate General.¹⁴⁴ The proce-

142. Act. Aug. 1, 1942, 56 STAT. 732, 10 U.S.C. § 1522 (1946). The text is set out in notes 130 and 133, *supra*.

143. A theater commander could not confirm a death sentence based on findings of guilty of murder, rape, mutiny, desertion or spying *and* some other offense punishable by death. For example, a death sentence imposed for misbehavior before the enemy *and* desertion could not be confirmed by the theater commander and required review by a board of review in Washington and The Judge Advocate General and action by the President. CM 274990, 4 BULL. JAG, 275 (1945). During World War II no commander except the President acted as confirming authority within the continental limits of the United States, the territorial departments and divisions no longer forming part of our domestic military organization.

144. During the month of June 1945 the Branch Office of The Judge Advocate General with the European Theater of Operations received 1731 records of trials by general courts-martial and completed the review of 1698. Of these 1698 records, 409 were examined by a board of review, including some which had been examined in the Military Justice Division and there found legally insufficient. McNEIL, *op. cit.*, note 134, *supra*, 6. There were three boards of review sitting in the office at the

dures followed in the branch offices was the same as that in the Office of The Judge Advocate General with one exception. Death and dismissal cases were presidential confirmation cases in Washington and, hence, examined by a board of review and The Judge Advocate General before transmission to the President. That being so, the type of review given them was of the broad type, including weighing of evidence and judging the credibility of witnesses. Overseas, however, records of trial involving sentences to death or dismissal did not reach the branch office of The Judge Advocate General until after confirmation by the theater commander. In consequence, they were accorded the narrow form of review used in the main office in non-presidential cases.¹⁴⁵ This disparity of treatment was counteracted in large measure by the fact that such records were given review of the broad type by the overseas Theater Judge Advocate prior to confirmation.¹⁴⁶

THE 1948 AMENDMENTS TO THE ARTICLES OF WAR

The system of appellate review established by the 1920 Articles of War worked smoothly under the pressure of World War II. It did not require major changes during the war, as had been the case during the Civil War and World War I. The records of the more than 88,000 trials by general courts-martial held during the war were examined for legal sufficiency by officers learned in the law in the office and branch offices of The Judge Advocate General, far removed from the pressure of combat and the influence of field commanders. There has been relatively little complaint as to the operation of the system so far as determination of the legal sufficiency of records of trial is concerned. That is to say, there is little contention that many innocent men were punished or guilty men denied the forms of law and a proper trial.

There has been criticism of the operation of the system of military justice in World War II, to some extent justified, on the ground that the sentences imposed were sometimes unduly severe and that there were gross

beginning of that month and five at the end. *Ibid.*, 45. There were then 36 officers on duty in the office, one of whom was assigned to administrative duties. The remaining 35 officers constituted, in effect, a very large and very busy appellate court, sitting in sections.

145. *United States v. Pepper*, CM ETO 1631, 20 May 1944, 1 DIG. OPS. BOTJAG ETO 200 (1945); McNEIL, *op. cit.*, note 134, *supra*, 83-93.

146. The Theater Judge Advocate was an officer of the Judge Advocate General's Department on the staff of the theater commander, whereas the Assistant Judge Advocate General in charge of a branch office of The Judge Advocate General was responsible directly to The Judge Advocate General and was not subject to the theater commander.

inequalities in standards of punishment as between commands and as between officers and enlisted men.¹⁴⁷ The evil, so far as it existed, was due in part to the system and in part to the way in which it was operated. The sentence of a court-martial is determined by the court, subject to the restrictions imposed by the articles of war and limitations upon maximum punishments imposed by the President.¹⁴⁸ These restrictions and limitations leave a wide field for the operation of the court's discretion, notably in the case of the commonest military offense, absence without leave, which was punishable during the war by anything short of death.¹⁴⁹ As has been seen, reviewing and confirming authorities have always had power to remit and mitigate and, since 1914, to suspend sentences, in whole or in part, incident to approving or confirming them.¹⁵⁰ The staff judge advocate of a tactical division sees all the general court-martial records which arise in the division, advises the division commander as to the exercise of these powers which he has as reviewing authority, and so is in a position to secure a reasonable degree of equality of punishment for like offenses within the division. His judgment as to the propriety of a sentence is necessarily influenced to some extent by the pressure of combat and the views of his commander. Moreover, he does not know what is being done in like cases in other commands similarly situated.

Exact equality of punishment for like, or superficially like, offenses as between commands is by no means desirable. A command suffering from an epidemic of barracks thefts must stamp it out with punishments more severe than would be warranted in a command where such offenses are rare. A command engaging in combat or about to do so properly considers absence without leave in a much more serious light than a command performing garrison duty in peaceful territory. A command whose men operate bombing planes should punish drunkenness on duty more severely than a command whose men collect garbage and dig ditches. But some measure of equality of punishment between commands is requisite to justice. If, when two divi-

147. Holtzoff, *Administration of Justice in the United States Army*, 22 N. Y. U.L.Q. REV. 1, 8-10 (1947).

148. See note 68, *supra*.

149. The limitations on punishments for absence without leave were suspended by Executive Order 9267, Nov. 9, 1942, 3 CODE FED. REGS. 1225 (Cum. Supp. 1943). They were restored by Executive Order 9683, 19 Jan. 1946, 3 CODE FED. REGS. 88 (Supp. 1946), and Executive Order 9772, Aug. 24, 1946, 3 CODE FED. REGS. 159 (Supp. 1946). The limitations were too strict for wartime (3 days' confinement for each day's absence up to 60 days; 6 months confinement for more than 60 days' absence) but the President might well have imposed some limitations.

150. Notes 76, 80, *supra*.

sions have similar missions and disciplinary situations, one habitually punishes for a week's absence without leave by confinement for six months and the other by confinement for thirty years, corrective action is indicated.

The only agencies which see all the records of trials by general courts-martial from different commands are the Office of The Judge Advocate General and its overseas branches. Under the 1920 Articles of War neither The Judge Advocate General nor anyone in his office or its branches had power to mitigate, remit, commute or suspend sentences. Their powers of appellate review were limited to determining the legal sufficiency of records of trial and did not extend to modifying sentences which were within legal limits. After a reviewing authority had acted, power to mitigate, remit and suspend the sentence was vested in the commander exercising court-martial jurisdiction over the place where the accused was confined, superior commanders, the Secretary of War and the President, none of whom saw or had custody of the record of trial.¹⁵¹ Equalization of sentences and the extension of clemency were handled by The Adjutant General, perhaps as a carry-over from the period before 1849 when he reviewed and filed court-martial records.

In Washington there was cooperation between the offices of The Adjutant General and The Judge Advocate General and the latter always felt free to make recommendations for modifications of sentences suggested by review of records of trial in his office. A large measure of equalization of sentences between commands located within the continental limits of the United States was secured during World War II through the sending by The Adjutant General, under authority of the Secretary of War, of letters to all domestic reviewing authorities suggesting appropriate punishments for the more common offenses.¹⁵² In overseas commands, however, the matter was left to the theater commanders on the theory that they were in the best positions to know the disciplinary needs of their commands. In the European Theater, the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General¹⁵³ suggested the promulgation by the Theater Commander of a policy for equalization of sentences and

151. A.W. 50, 10 U.S.C. §1521 (1946); A.W. 52, as amended by act Dec. 15, 1942, 56 STAT. 1051, 10 U.S.C. § 1524 (1946); A.W. 53, 10 U.S.C. § 1525 (1946).

152. Ltr. AGO, file AG 250.4 (2-12-43) OB-S-SPJGJ-M, subject: Uniformity of sentences adjudged by general courts-martial, Mar. 5, 1943; ltr. AGO, file AG 250.4 (16 May 45) OB-S-USW-M, subject: Uniformity of Sentences Adjudged by General Courts-martial, 18 May 1945.

153. Brigadier General Edwin C. McNeil, B.S., United States Military Academy, 1907; LL.B., Columbia, 1916; Graduate, Army War College, 1923; Executive to the Staff Judge Advocate, A.E.F., France, during World War I.

offered to assist in the program by making recommendations as to modifications of sentences incident to appellate review of records of trial. The Theater Commander replied, in effect, that he would not promulgate such a policy and did not want recommendations from the Assistant Judge Advocate General looking toward equalization of sentences. Thereafter the Assistant Judge Advocate General made such recommendations to The Judge Advocate General and a policy of equalization was carried out by boards operating under the Under Secretary of War.¹⁵⁴ The practical result was that each record of trial was reviewed twice, first in Paris for legal sufficiency and again in Washington for propriety of sentence, an unnecessary duplication of effort.

Another source of inequality arose from the fact that some sentences required confirmation by the President, some by a theater commander, and some required none. If two men ran away in battle under similar circumstances, one was charged with desertion and the other misbehavior before the enemy (they being equally appropriate charges under those circumstances), and both were sentenced to death, the sentence for desertion could be confirmed and carried into execution by the theater commander; that for misbehavior required confirmation by the President. Similarly, if an officer and an enlisted man participated together in the commission of a crime in this country, say embezzlement, under circumstances of equal guilt, and the officer was sentenced to dismissal and five years' confinement and the enlisted man to dishonorable discharge and five years' confinement, the officer's sentence required confirmation by the President; that of the enlisted man could be carried into effect by the reviewing authority after review by a board of review and The Judge Advocate General as to legal sufficiency only. During World War II the President was more lenient than most reviewing and confirming authorities. He tended to suspend the execution of sentences of dismissal of officers in cases of first offenders where military commanders would not do so. This disparity of treatment was probably indicative of the difference between the civilian and the military viewpoint: the civilian concentrating attention on the officer being punished; the military on the danger and unfairness of placing in command of men, with the enormous power and influence which that entails, officers who had demonstrated tendencies toward crime or instability. The difference in attitude between the President, who acted finally on officer cases, and field commanders, who

154. McNEIL, *op. cit.*, note 134, *supra*, 295-325, 512-521, 525-533.

acted finally on the cases of enlisted men, tended to foster an impression that the system of military justice dealt more harshly with enlisted men than with officers.¹⁵⁵

Early in 1946 the Secretary of War appointed an advisory committee, whose membership was nominated by the American Bar Association, to study the administration of military justice and recommend as to changes.¹⁵⁶ The committee held a number of hearings and rendered a report in December 1946.¹⁵⁷ The committee rejected the suggestion, which had again been advanced, for appellate review of court-martial proceedings by a civilian court of appeals.¹⁵⁸ It recommended that general courts-martial be appointed and their proceedings be reviewed by field representatives of The Judge Advocate General, normally the staff judge advocates of field armies. The commanders who now appoint such courts (notably commanders of field armies, army corps, tactical divisions and independent brigades) would retain only authority to direct the trial of charges, designate trial judge advocates, and mitigate, suspend or set aside sentences.¹⁵⁹ To the end that officers of the Judge Advocate General's Department might have sufficient independence to perform these functions properly, the committee recommended certain

155. See Wiener, *The Court-Martial System*, 60 *INFANTRY J.* 31, 36-37 (1947).

156. Memorandum No. 25-46, W.D., 25 Mar. 1946. The chairman of the committee was Dean (now Chief Justice) Arthur T. Vanderbilt.

157. Report of War Department Advisory Committee on Military Justice, 13 December 1946. A summary of the report was published in 33 *A.B.A.J.* 40-41, 92 (1947).

158. *Ibid.*, Part II, par. I. The proposal for review of court-martial proceedings by the civil courts has been raised and rejected in Great Britain also. See Griffith, *Justice and the Army*, 10 *MOD. L. REV.* 292-303 (1947).

The civilian court of appeals proposal was revived by H.R. 5675 and H.R. 6612, 79th Congress, 2d Session, which would establish a five judge civilian court, directed to examine the record and hear "any additional evidence" as to every Army and Navy general court-martial case in which a sentence was rendered during World War II (H.R. 5675 excepted presidential cases), and authorized to review sentences of special, summary and deck courts. The court was to complete its work by December 31, 1950. The impracticability of this proposal is manifest when it is noted that, if the court succeeded in disposing of 25 cases a week, it would take some 70 years to complete the review of the Army general court-martial cases alone. S. 1160, 80th Congress, 1st Session, would have empowered United States Circuit Courts of Appeals to review general court-martial cases.

By vesting appellate judicial functions in the senior officers of the Judge Advocate General's Department, the existing system of military justice ensures, so far as possible, that they will be performed by persons with long and intimate experience with military law. That its judges were selected from among experienced leaders of the bar was one of the greatest sources of strength of the English common law system. It would be difficult to devise a system of review by civilian courts of appeals which would preserve this advantage of the present court-martial system.

159. Report *cit.* note 157, *supra*, part II, pars. 6, 7.

changes in their status.¹⁶⁰ The committee recommended that all records of trials by general courts-martial continue to be reviewed in the office or a branch office of the Judge Advocate General and that cases in which dishonorable discharge is suspended be reviewed in the same way as are cases in which it is not suspended. It suggested that the article of war governing such review be rewritten for clarification and said,

"This reviewing authority shall have the power to review every case as to the weight of the evidence, to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentences and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences."¹⁶¹

The War Department accepted the committee's recommendations as to appellate review in the Office of The Judge Advocate General and its branches with the qualification that the powers of mitigation and remission should be exercised by The Judge Advocate General under the direction of the Secretary or Under Secretary of War. The Department did not accept the committee's recommendations for appointment of courts-martial and review of their proceedings by field representatives of The Judge Advocate General or for special separate status for officers of the Judge Advocate General's Department.¹⁶²

After extensive House of Representatives committee hearings the Congress enacted a number of amendments to the 1920 Articles of War, to become effective February 1, 1949.¹⁶³ In general, these amendments reflect the views of the War Department, except that the status of the Judge Ad-

160. *Ibid.*, par. 8. Something like this proposal has been adopted in Great-Britain, where the appointment and supervision of the Judge-Advocate-General have been transferred from the Secretary of War to the Lord High Chancellor. 45 — PARL. DEBATES (COMMONS) — (Sept. 21, 1948).

161. *Ibid.*, par. 5.

162. Memorandum of the Secretary of War, Feb. 20, 1947, 33 A. B. A. J. 319-322 (1947). See also, Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269-88 (1947).

163. Title II, Selective Service Act of 1948, approved June 24, 1948, Pub. L. 759, 80th Congress. A bill containing the same provisions (H.R. 2575) had been passed by the House but action on it by the Senate seemed hopeless. The provisions were proposed from the floor of the Senate as an amendment to the Selective Service Bill by Senator James P. Kem of Missouri, whose vigorous support was probably responsible for the enactment of the measure. 94 CONG. REC. 7747-7762 (June 9, 1948). For a pungent discussion of this legislation, see Wiener, *The New Articles of War*, 63 INFANTRY J. 24-31 (1948). The articles which govern appellate review are printed in the Appendix, *infra*.

vocate General's Department and its officers is changed slightly more than the Department favored. They change the name of the Judge Advocate General's Department to Judge Advocate General's Corps.¹⁶⁴ The list of commanders with power to appoint general courts-martial and review their proceedings is changed slightly, but the power is still vested in commanders, not in field representatives of The Judge Advocate General.¹⁶⁵ Convening (*i.e.*, appointing and reviewing) authorities are directed to communicate directly with their staff judge advocates in matters relating to the administration of military justice.¹⁶⁶ This has long been the procedure in most commands although, in a few, the staff judge advocate was allowed to communicate with the commander only through the chief of staff or an assistant chief of staff. Apart from this, there is no material change in the relation between a reviewing authority and his staff judge advocate, that is, the recommendations of the staff judge advocate are still merely advisory and need not be followed, even on questions of pure law.¹⁶⁷ The new articles of war do not change the functions or powers of the reviewing authority. They do include an admonition to him which merely puts in statutory form pre-existing customary military law:

164. Secs. 223, 246-249. The changes in the status of the Judge Advocate General's Department are, in general, beyond the scope of the present article. It should be noted, however, that the act provides that officers shall be permanently appointed in the Judge Advocate General's Corps of the Regular Army by the President, by and with the advice and consent of the Senate (sec. 246). This restores the procedure followed from 1862 to 1947. The Officer Personnel Act of 1947 provided that a person entering the Regular Army with a view to judge advocate duties should be appointed in the Army at large and merely assigned by military orders to the Judge Advocate General's Department. Under this arrangement, known as the "detail" system, a career lawyer could be transferred to a non-legal branch of the Army without his own consent or that of the Senate and officers with no legal training could be assigned to the Judge Advocate General's Department without the consent of the Senate. Sec. 502, act Aug. 7, 1947, 61 STAT. 883, 10 U.S.C. § 506 (Supp. 1947). This "detail" system has long been in use in the Navy, with the result that the Judge Advocate General of the Navy and his staff have often been officers without legal training and trained lawyers have been shifted back and forth from sea duty to legal work. This same "detail" system has been adopted for the Air Force by the act of June 25, 1948, Public Law 755, 80th Congress, which provides for a Judge Advocate General of the Air Force and sets up a system of military justice for the Air Force. It is to be hoped that the Air Force will adopt a policy of having legal work done only by trained lawyers permanently assigned to legal duties.

165. Note 22, *supra*.

166. A.W. 47 a, Appendix, *infra*.

167. A.W. 47 c, Appendix, *infra*. The language of the statute is not as clear on this point as would be desirable. It might be contended that the "found legally sufficient" refers to a finding by the staff judge advocate or The Judge Advocate General.

“. . . no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.”¹⁶⁸

The 1948 Articles create a new form of punishment for enlisted men, the “bad-conduct discharge,” which is intended to be less severe than a dishonorable discharge. It may be imposed by either a general or a special court-martial. If imposed by a special court-martial there must be a complete record of the proceedings and testimony, the sentence requires approval by a commander exercising general court-martial jurisdiction, the record of trial must be reviewed by the staff judge advocate of the command exercising general court-martial jurisdiction before his commander acts, and the record receives appellate review in the Office of The Judge Advocate General or one of its branches.¹⁶⁹

Under the new articles action by the convening authority (*i.e.*, as reviewing authority) may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.¹⁷⁰ This provision was designed to cover the situation, common in World War II, where a command is inactivated or sails overseas while a record of trial is being typed.

Apart from the minor changes mentioned, initial appellate review by the reviewing authority and his staff judge advocate remains under the 1948 amendments as it was under the 1920 Articles of War.

With respect to appellate review in the Office of The Judge Advocate General the 1948 Articles of War make much more extensive changes. Every record of trial by general court-martial must still be reviewed in that office. The amended articles retain the boards of review established by the 1920 Articles and create a new appellate tribunal in the Office of The Judge Advocate General, the Judicial Council, which is to consist of three general officers of the Judge Advocate General's Department (Corps) designated by The Judge Advocate General.¹⁷¹ The new articles make no distinction between war and peace as to the requirement and power of confirmation. They require confirmation by the President as a prerequisite to the execution of any sentence of death or involving a general officer and do away with

168. A.W. 47 c, Appendix, *infra*.

169. A.W. 13; A.W. 36; A.W. 47 c, d, Appendix, *infra*.

170. A.W. 47 d, e, Appendix, *infra*.

171. A.W. 50 a, b, Appendix, *infra*.

the former powers of confirmation of the commanding general of the Army in the field and the commanding generals of territorial departments and divisions. Sentences involving imprisonment for life, dismissal of an officer below the grade of brigadier general, or dismissal or suspension of a cadet of the United States Military Academy require confirmation by the Judicial Council, with the concurrence of The Judge Advocate General, or, in the event of their disagreement, by the Secretary of the Army. Other sentences do not require confirmation unless The Judge Advocate General or a board of review deems modification of the findings of guilty or the sentence necessary to the ends of justice or The Judge Advocate General does not concur in a holding of a board of review that a record of trial is legally insufficient. In such cases, confirmation by the Judicial Council alone is sufficient, unless The Judge Advocate General has directed that his participation in the confirming action is required or the action of the Judicial Council is not unanimous. In these last events, confirmation by the Judicial Council, with the concurrence of The Judge Advocate General, is required, or, in the event of their disagreement, by the Secretary of the Army.¹⁷²

These changes in the location of authority to confirm eliminate one of the chief sources of disparity in sentencing policy which existed under the 1920 Articles of War. All death sentences and all sentences affecting general officers require confirmation by the President under the new articles. All other sentences may be confirmed in the Office of The Judge Advocate General or one of its branches. The Judge Advocate General will be able to maintain uniformity of policy within his office and as between it and its branches.

The new statute provides that power to confirm a sentence includes power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of an offense as involves a finding of guilty of a lesser included offense; to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence; to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated; to order the sentence to be carried into execution; and to direct a rehearing.¹⁷³ This list of powers of a confirming authority differs in three respects from the former powers of confirming authorities. First, power to commute sentences is extended to confirming authorities other than the President. Second, power to remit, mitigate and suspend sentences

172. A.W. 48, Appendix, *infra*.

173. A.W. 49, Appendix, *infra*.

is not included in the list. Third, power to direct a rehearing is conferred even in cases where an order directing the execution of the sentence has already been issued by a field reviewing authority. The new articles provide that the power of the President, the Secretary of the Army and any "reviewing authority" to order the execution of a sentence shall include power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended.¹⁷⁴ Although it is not wholly clear from the context, it would seem that the term "reviewing authority," as used in this provision, does not include the Judicial Council acting as a confirming authority. The Judge Advocate General is empowered, incident to review of the record of trial in his office, to remit, mitigate or suspend any sentence which does not require approval or confirmation by the President, but the power to remit or mitigate is to be exercised by The Judge Advocate General under the direction of the Secretary of the Army.¹⁷⁵

Records of trial in presidential cases, that is, those involving death sentences and sentences affecting general officers, upon arrival in the Office of The Judge Advocate General, are to be examined by a board of review. If the board of review holds that the record is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and The Judge Advocate General concurs in the holding, the findings and sentence are thereby vacated and the record of trial is to be returned to the reviewing authority for a rehearing or such other action as may be proper.¹⁷⁶ This constitutes clear statutory sanction for the practice followed under the ambiguous provision of the 1920 Articles of War on this point. If, in a presidential case, the board of review is of the opinion that the record of trial is legally sufficient or The Judge Advocate General does not concur in the board's holding of legal insufficiency, the record of trial and the board's opinion go to the Judicial Council. If the Judicial Council holds the record legally insufficient and The Judge Advocate General concurs, the findings and sentence are thereby vacated and the record of trial is to be returned to the reviewing authority for rehearing or other appropriate action. If the Judicial Council is of the opinion that the record of trial is legally sufficient or The Judge Advocate General does not concur in the Council's holding of legal insufficiency, the record of trial, the opinions of the board of review and the

174. A.W. 51 a, Appendix, *infra*.

175. *Ibid.*

176. A.W. 50 d (3), Appendix, *infra*.

Judicial Council, and The Judge Advocate General's recommendations go to the Secretary of the Army for the action of the President.¹⁷⁷

Records of trial in non-presidential confirmation cases, that is, those involving sentences to imprisonment for life, dismissal of an officer below the grade of brigadier general, or dismissal or suspension of a cadet, upon arrival in the Office of The Judge Advocate General, are to be examined by a board of review. If the board finds the record legally insufficient and The Judge Advocate General concurs, the findings and sentence are thereby vacated, as in a presidential case. If the board of review is of the opinion that the record is legally sufficient or The Judge Advocate General does not concur in its findings of legal insufficiency, the record of trial goes to the Judicial Council for confirming action. If The Judge Advocate General concurs in the confirming action of the Judicial Council, that action becomes effective, whether it involves disapproval of the sentence, modification of the sentence, or execution of the sentence as pronounced. If The Judge Advocate General does not concur in the confirming action of the Judicial Council, the record of trial goes to the Secretary of the Army for confirming action.¹⁷⁸

As under the 1920 Articles of War, a reviewing authority may not order the execution of a sentence involving dishonorable discharge not suspended or confinement in a penitentiary prior to examination by a board of review. The new articles add sentences to bad-conduct discharge not suspended to the category of cases requiring appellate review by a board of review prior to being put in execution. Moreover, as suggested by the War Department Advisory Committee, the new articles require examination by a board of review of all cases involving suspended sentences to dishonorable or bad conduct discharge. These are reviewed after the reviewing authority has promulgated his action in orders. He may not vacate the suspension prior to such review. If, in a case of any of these types, the board of review holds the record of trial legally insufficient, and The Judge Advocate General concurs, the sentence is thereby vacated and the record of trial is returned to the reviewing authority for rehearing or other appropriate action. If the board of review holds the record of trial legally sufficient and does not deem modification of the findings of guilty or the sentence necessary to the ends of justice, and The Judge Advocate General concurs, no further action is required. If the reviewing authority has not already ordered the execution of the sentence, he may do so. If the board of review finds the record of trial

177. A.W. 50 d (1), Appendix, *infra*.

178. A.W. 50 d (2), (4); A.W. 48 b, c, Appendix, *infra*.

legally insufficient and The Judge Advocate General does not concur or if either the board or The Judge Advocate General deem modification of the findings of guilty or the sentence necessary to the ends of justice, the record goes to the Judicial Council for confirming action. In this class of cases the confirming action of the Judicial Council is effective without more unless the Council is not unanimous or The Judge Advocate General has directed his own participation in the confirming action. In these events, the confirming action of the Judicial Council is not effective unless The Judge Advocate General concurs and, if he does not concur, the record of trial goes to the Secretary of the Army for confirming action.¹⁷⁹

Every other record of trial by general court-martial is to be examined in the Office of The Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, is to be transmitted to a board of review for treatment like that accorded records dealt with in the preceding paragraph.¹⁸⁰ This means that the Military Justice Division of the Office of The Judge Advocate General still has a place in the system of appellate review. That place will be, however, much smaller than it has been heretofore, because the great bulk of its work has been the examination of records of trial involving suspended sentences to dishonorable discharge. These require examination by a board of review under the new articles.¹⁸¹

The new articles provide explicitly that, in the appellate review of records of trials by courts-martial, The Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.¹⁸² This means that the scope of review in all cases will now be that accorded presidential cases under the 1920 Articles of War.¹⁸³

The 1948 Articles contain a provision, similar to that of the 1920 Articles, authorizing the establishment of a Branch Office of The Judge Advocate

179. A.W. 50 e; A.W. 48 b, c, d, Appendix, *infra*.

180. A.W. 50 f; A.W. 51 b, Appendix, *infra*.

181. Some very severe sentences can still be carried into effect without examination of the record of trial by a board of review either before or after they have been ordered executed. This would be so in the case of a civilian newspaper correspondent sentenced to confinement for 80 years in an institution other than a penitentiary, an officer sentenced to suspension from rank, command and pay for ten years, or an officer sentenced to forfeit half his pay for the remainder of his natural life.

182. A.W. 50 g, Appendix, *infra*.

183. See note 129, *supra*.

General, under an Assistant Judge Advocate General, with any distant command. The Assistant Judge Advocate General in charge of such a branch office and the boards of review and Judicial Council in it are empowered to perform for the distant command in non-presidential cases, under the general supervision of The Judge Advocate General, the functions which The Judge Advocate General and the boards of review and Judicial Council in his office would otherwise perform. The Assistant Judge Advocate General is required to be a general officer of the Judge Advocate General's Department (Corps). Under this provision it will be possible to carry into execution in an overseas theater, without reference to Washington, any sentence which does not involve death or affect a general officer.¹⁸⁴

The statute contains a proviso that the power of mitigation and remission of sentences shall not be exercised by an Assistant Judge Advocate General in charge of a branch office or by agencies in his office, but that he may make recommendations as to mitigation and remission to The Judge Advocate General.¹⁸⁵ The Judge Advocate General is empowered to remit, mitigate and suspend sentences in non-presidential cases, after they have been ordered executed, but he is to exercise this power under the direction of the Secretary of the Army.¹⁸⁶ The result of these provisions is that the Assistant Judge Advocate General in charge of a Branch Office of The Judge Advocate General with an overseas theater will not be able to establish or carry out a program of equalization of sentences for that theater but that, unless the Secretary of the Army objects, The Judge Advocate General will have power to establish and carry out such a program on an Army-wide basis. As suggested before, such an arrangement involves duplication of effort, in that the overseas records of trial are examined twice, once in the overseas theater to determine legal sufficiency and again in Washington to determine the propriety of the sentence. However, there may be advantages to having equalization of sentences carried out on an Army-wide rather than a theater-wide basis and The Judge Advocate General will be able to reduce the burden of double examination by promulgating general sentencing policies and relying on his branch offices' recommendations as to their application to particular cases. The chief disadvantage is that, if sentences are not reduced to proper severity before they are given publicity, the public is likely

184. A.W. 50 c, Appendix, *infra*.

185. *Ibid.*

186. A.W. 51 b, Appendix, *infra*.

to get the impression, prevalent during World War II, that the military justice administered in overseas theaters is harsh and unduly severe.

It will be recalled that, under the 1920 Articles of War, the boards of review and The Judge Advocate General could not reconsider their holdings and opinions after they had been acted upon.¹⁸⁷ It followed that there was no remedy except executive clemency for a serious mistake in the process of appellate review or in case of the discovery of new evidence indicating that a conviction constituted a miscarriage of justice. The new articles of war authorize The Judge Advocate General, under such regulations as the President may prescribe, 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 the sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge already executed a form of discharge implying no dishonor. This power is to be exercised upon application of the accused made within one year after final disposition of the case upon initial appellate review.¹⁸⁸ The statute does not impose the limitations which apply to rehearings¹⁸⁹ upon the new trials authorized by this provision. Therefore it would seem that, on such a new trial, the accused might be found guilty of an offense of which he was acquitted at the first trial and given a more severe sentence than that originally imposed. It is probable that the presidential regulations will prohibit this.¹⁹⁰

The changes made in the system of military justice in 1862, 1920 and 1948 have given increasing influence and control, through the process of appellate review, to persons learned in the law who devote their full time to legal work. All lawyers will agree that this increase is desirable, so far as it is consistent with the efficient performance of the Army's primary mission of winning battles. All lawyers are not agreed that, under the law as it will be on February 1, 1949, the Army's appellate judges, the officers of the Judge Advocate General's Corps, will have tenure secure enough and freedom from

187. Note 138, *supra*.

188. A.W. 53, Appendix, *infra*. Applications with regard to World War II cases may be made within one year after the termination of the war.

189. Cf. A.W. 52, Appendix, *infra*. See note 119, *supra*.

190. Presidential regulations prescribing the rules of evidence in trials by courts-martial, details of procedure, and maximum punishments are promulgated by executive order and published in the MANUAL FOR COURTS-MARTIAL, U. S. ARMY. A 1949 revised edition of this manual, enlarged and largely rewritten under the direction of The Judge Advocate General, designed to implement the amended articles of war, is in process of publication.

pressure sufficient to ensure that they will be completely independent and fearless in the discharge of their judicial duties.¹⁹¹ Although lawyers may differ on this question they may well agree that the Congress has been wise in entrusting appellate judicial review of court-martial proceedings to officers learned in military law rather than to judges whose background and training are wholly civilian.¹⁹² By so doing it has ensured the administration of military justice by men who understand the peculiar needs of the Army and who will not import into military law procedures developed in the civilian courts which are not suited to the military situation. Under the officers of the Judge Advocate General's Corps our military law, like the common law, will continue to be a gradually developing system, adapting itself steadily to new conditions and needs of the military service.

191. See *Courts-Martial Reform Has Been Delayed*, 34 A.B.A.J. 702 (1948); *Objects to Editorial on Military Justice*, 34 A.B.A.J. 1142 (1948).

The merits of the controversy on this question are beyond the scope of the present article. It may be noted, however, that one ground for complaint as to the status of the officers of the Judge Advocate General's Corps is that a career officer of the Corps, until he completes twenty years' service, may be summarily discharged from the Army and denied retirement benefits without charges, hearing or even a statement of the cause of discharge. After completion of twenty years' service he is entitled to limited retirement benefits in the event of such summary removal. In either case the removal is effected through the action of a board of officers which need not include any lawyer in its membership, which can act in secret, and which need not confront the officer concerned with the evidence against him or give him a chance to rebut it. Secs. 507, 509, 514, act Aug. 7, 1947, 61 STAT. 883, 10 U.S.C. §§ 511, 513, 518 (Supp 1947). In consequence his tenure has less legal protection than that of a civil servant and, of course, far less than that of a federal judge. In the past the War Department has used such statutory summary removal procedures with care and restraint. It is probable, therefore, that the tenure of an officer of the Judge Advocate General's Corps will be more secure than the statute appears to make it.

192. See A.W. 50 h, A.W. 53, Appendix, *infra*. The writer hopes to supplement the present article with a study of the extent to which the Federal civil courts have been willing to review court-martial cases through the medium of *habeas corpus* proceedings. This problem raises interesting questions of policy and of interpretation of the Federal Constitution. See Lieber, *The Supreme Court on the Military Status*, 31 AM. L. REV. 342-362 (1897); *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L. J. 483-489 (1948).

APPENDIX

ARTICLES OF WAR GOVERNING APPELLATE REVIEW AS AMENDED BY
 TITLE II. SELECTIVE SERVICE ACT OF 1948
 (PUBLIC LAW 759, 80TH CONGRESS)

"ART. 47. Action by Convening Authority.—

"a. Assignment of judge advocates; channels of communication.—All members of the Judge Advocate General's Department will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

"b. Reference for trial.—Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial 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. Action on record of trial.—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"d. Approval.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: *Provided*, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

"e. Who may exercise.—Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

"f. Powers incident to power to approve.—The power to approve the sentence of a court-martial shall include—

"(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"(2) the power to approve or disapprove the whole or any part of the sentence; and

"(3) the power to remand a case for rehearing under the provisions of article 52."

"ART. 48. Confirmation.—In addition to the approval required by article 47, 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: *Provided*, That when the President has already acted as approving authority, no additional confirmation by him is necessary;

"b. By the Secretary of the Department of the Army with respect to any sentence not requiring approval or confirmation by the President, when The Judge Advocate General does not concur in the action of the Judicial Council;

"c. By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

"(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or

"(2) involving imprisonment for life, or

"(3) involving the dismissal of an officer other than a general officer, or

"(4) involving the dismissal or suspension of a cadet;

"d. By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action."

"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 approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense:

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

"c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

"d. The power to order the sentence to be carried into execution;

"e. The power to remand the case for a rehearing under the provisions of article 52."

"ART. 50. Appellate Review—

"a. Board of review; judicial council.—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer.

"b. Additional boards of review and judicial councils.—Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

"c. Branch offices.—Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer of The Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Ad-

vocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

“d. Action by board of review when approval by president or confirming action is required.—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

“(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board’s and Council’s opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

“(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

“(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holdings to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

“(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

“e. Action by board of review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement

in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

- “(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.
- “(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.
- “(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.
- “(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

“f. Appellate action in other cases.—Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.

“g. Weighing evidence.—In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

“h. Finality of court-martial judgments.—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War,

shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

"ART. 51. Mitigation, Remission, and Suspension of Sentences.—

"a. At the time ordered executed.—The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of the Department of the Army. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. Subsequent to the time ordered executed.—

"(1) 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 military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, 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 military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army: *Provided*, That no sentence approved or confirmed by the President shall be mitigated, remitted, or suspended by any authority inferior to the President: *And provided further*, That no order of suspension of a sentence to dishonorable discharge or bad conduct discharge shall be vacated unless and until confirming or appellate action on the sentence has been completed as required by articles 48 and 50.

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

"(3) 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 the Department of the Army or by the Judge Advocate General under the direction of the Secretary of the Department of the Army."

"ART. 52. Rehearings.—When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for

any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

"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 the 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."