

To Professor "Eddie Morgan",
the greatest court-martial
reformer of us all with
thousands of good wishes.

Orlinda, N. Y. Sept 26/48 Arthur J. Keeffe

**Universal Military Training
With or Without Reform
of Courts Martial?**

By

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UNIVERSAL MILITARY TRAINING WITH OR WITHOUT REFORM OF COURTS MARTIAL?

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Military men are very sensitive to the criticism which we lawyers have been making of the administration of justice by the Army and Navy courts-martial.¹ Some of their resentment is justifiable. A great deal of what has

*In writing this piece I have had the great benefit of the criticism of my chief, Dean Robert S. Stevens, and also Robert S. Pasley, Donald Harter and John J. Roscia, all three of whom were so closely associated with me on my Navy trick. Needless to say, the responsibility for what is said is my own. It comes from my heart and is written in an effort to realize the maximum reform of courts martial for which I and my good friends named in footnote 13 have battled so long and hard. In the preparation of the footnotes, I have had the invaluable aid of the editors of the *CORNELL LAW QUARTERLY*. This article is not a complete expression of my views. The detailed report of the General Court Martial Sentence Review Board of the United States Navy filed with the Secretary of the Navy in January, 1947, does that. A number of the recommendations of this Board are summarized in *The Navy Court Martial: Proposals for its Reform*, by Robert S. Pasley and Felix E. Larkin in 33 *CORNELL L. Q.* 195 (1947).

¹The Secretary of War appointed in 1946 the War Department Advisory Committee on Military Justice to study and recommend changes in the Army's court-martial system. Arthur T. Vanderbilt, Dean of the New York University School of Law, was the chairman, and the committeemen were Justice Alexander Holtzoff, Walter P. Armstrong, Chief Judge Frederick E. Crane, Joseph W. Henderson, William T. Joyner, Jacob M. Lashly, Circuit Judge Morris A. Soper and Floyd E. Thompson.

In December 1946 the committee filed its report, recommending primarily checks on attempts by commanding officers to influence the decisions of courts martial they appointed. It urged that the Manual for Courts Martial prohibit attempts to influence or reprimand courts martial in reaching verdicts or pronouncing sentence; that a general court martial's "law member" and defense counsel be trained lawyers; that final review of all general court-martial cases be placed in the Office of the Judge Advocate General; that the division commander have a judge advocate to advise him, and retain control of the prosecution and appoint the trial judge advocate; and that the commander who referred the case for trial should have the power to mitigate or suspend sentence. Other recommendations by the committee refer to discrimination in officer punishment; the eligibility of enlisted men to serve on courts martial; summary courts; and preliminary investigations. *REPORT OF WAR DEPT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR (Dec. 1946)*.

In May 1947 the Association of the Bar of the City of New York appointed a committee to consider needed reforms in military justice. Its members were Frederick P. Bryan, chairman, Arthur E. Farmer, George A. Spiegelberg, Leonard M. Wallstein Jr. and Richard H. Wels. In an interim report issued in February 1948 on the pending Army bill, this committee expressed approval of the provisions that the "law member" of the court must be a lawyer and that his rulings be final; that appellate review extend to the facts as well as to the law; that a rehearing may be requested within a year

been said is not true; other things that are true have been sensationally exaggerated. Likewise, the fact remains that the citizen army performed nobly in World War II in spite of the creaky court-martial system.

The time has come, however, when at the risk of resentment and mis-

after conviction; that officers be subject to special courts martial; and that enlisted men be included in courts martial in certain instances.

But the committee urged that the bill be amended to provide that the power to appoint courts, assign defense counsel and review sentences be transferred from command to an independent Judge Advocate General's department; that both prosecutors and defense counsel be lawyers; that defense counsel have the chance to present their views on review; and that a permanent civilian commission be set up to make periodic recommendations for the improvement of military justice. REPORT OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MILITARY JUSTICE (1948).

After a full dress debate at a stated meeting of the Association of the Bar on March 9, 1948 a resolution was adopted approving the report of the committee by a vote of 130 to 48. There was vigorous opposition by former Secretary of War Robert P. Patterson, former Justice Phillip J. McCook and others. The argument of the opponent is to some extent reflected in a letter addressed to the New York Times, appearing on the editorial page (8B) of the issue of Sunday, March 28, 1948 and signed by Judge McCook, Arthur Levitt and Archibal G. Thacher. Judge McCook is Chairman of a Special Committee on the Administration of Military Justice of the New York State Bar Association. In the above letter to the New York Times it is stated that the pending Army bill "while not perfect, is essentially sound and contains . . . almost every important suggestion from any of the responsible bar groups for improving the system of military justice". The other members of the New York State Bar Association's special committee on the Administration of Military Justice are: Morris Berman, Luke A. Burns, Jr., J. Walter Carlin, Knowlton Durham, William H. Gambrell, Frederick F. Greenman, Arthur Levitt, Gerald W. O'Connor, Omar G. Olds, John F. Skivington, Abel I. Smith, Jr. and Arthur E. Sutherland, Jr. This committee filed a report under date of January 23, 1947 in which all members unqualifiedly joined except Omar G. Olds and Luke A. Burns, Jr. Mr. Olds in a letter of January 22, 1947 states that, while he cannot agree entirely with the report, he feels he should "abide by the decisions of the majority and therefore go on record as approving it generally". Mr. Burns in a letter of January 21, 1947 states he could not agree entirely with the report and is in complete agreement with the Vanderbilt Committee's report. Mr. Burns states, "I particularly disagree with the New York State Bar Association Committee's report in connection with the principle of separation of command function from the administration of military justice". Space does not permit a detailed summary of the conclusions of this New York State Bar Association Committee. It is fair to say that the report opposes some of the reforms urged by the Vanderbilt Committee and that the New York State Bar Association committee found the court-martial "system is not only fair but free from technicalities and highly flexible". It states (p. 5) "With respect to these particular qualities, we have never seen its superior in any civilian system of law". There is no discussion in this report of the Army or Navy bills because at its date (January 23, 1947) neither bill had as yet been introduced into Congress. The report of the Association of the Bar Committee states that its views as to reform are shared by not only the Vanderbilt Committee and the Navy board of which the writer was President but also by the American Bar Association, the Veterans of Foreign Wars, the New York County Lawyers' Association, the War Veterans Bar Association and the Judge Advocates Association. The Special Committee on Military Justice of the Association of the Bar of the City of New York in its report also points out that Great Britain "has found it desirable to recommend the complete divorcement of judicial functions from command." The House of Commons on June 24, 1947 directed that that recommendation be put into effect.

understanding, those of us who are informed should stand up, be counted and speak out for the reforms we believe are necessary. The alternative is that the court-martial system will continue unreformed.

Just as in the time of Dickens, a legal machine with defects is capable of great injustice to the individual. So today with the defects in the court-martial system. Law reform is not an idle pastime for the cloistered Professor. It is the obligation of every citizen.

In 1920, after the first World War, the Chamberlain Bill proposed real reforms in the Army court-martial system.² It was defeated over the bitter protest of such able lawyers as Edmund M. Morgan³ and Samuel T. Ansell.⁴ Some slight changes were made in the Army system,⁵ but none at all were

²S. 64, H. R. 367, 66th Cong., 1st Sess. (1919). It proposed safeguards against the preferring of unfounded charges, by requiring that every charge be sworn to by a person subject to military law and that a thorough investigation precede an order of trial. Before reference for trial, the charge was to be approved by the judge advocate. If trial was not had within a specified period after arrest, the accused was to be released, and could not thereafter be tried for that offense. Where enlisted men were to be tried, three-eighths of a general court martial and one third of a special one were to be enlisted men. An officer of the Judge Advocate General's department, or an officer recommended thereby, was to be the trial judge and rule on all questions of law and impose sentence. The court was to be bound by his advice and rulings. An accused was to have the privilege of securing civilian counsel, or of having assigned to him well-qualified military counsel. Neither the Convening Authority nor any other superior military authority might review or control in any way the finding of a court. A court of military appeals, located for convenience in the office of the Judge Advocate General, consisting of three judges appointed by the President, was recommended for the purpose of reviewing automatically every proceeding of a general court martial carrying a sentence of death, dismissal, dishonorable discharge, or confinement for over six months.

³Morgan, *The Existing Court Martial System and the Ansell Articles*, 29 YALE L. J. 52 (1919).

⁴Ansell, *Military Justice*, 5 CORNELL L. Q. 1 (1919). In reply: Bogert, *Courts Martial: Criticism and Proposed Reforms*, 5 CORNELL L. Q. 18 (1919).

⁵41 STAT. 759-812 (1920), 10 U. S. C. §§ 1471-1593 (1940). The principal changes were as follows: Enlisted men were allowed to prefer charges. Commanding officers were allowed to dispose of minor offenses without trial. Inferior courts were preferred to general courts, and their jurisdiction restated for that purpose. An impartial pre-trial investigation was required before every trial by general court martial, with the accused present. The Convening Authority was required to submit charges to his judge advocate for advice before ordering trial. He was required to appoint on courts-martial officers "best qualified by reason of age, training, experience and judicial temperament," preferably not those with less than two years' service. A minimum of five and three officers was fixed for general and special courts-martial respectively. A "law member" was provided for every general court-martial, with power to rule on interlocutory questions, subject to being overruled by the court on all but questions of evidence. A defense counsel was required to be appointed to each court-martial. A two-thirds vote for findings and sentence was required, with a unanimous vote for the death sentence. Boards of Review were provided for in the office of the Judge Advocate General, to review certain types of serious cases; all other records of trial by general court-martial were to be reviewed in that office.

made in the Navy court-martial system, which has remained substantially without change since its creation.⁶

The greatest reform in the Army court-martial system in 1920 was the addition of a law member to Army courts and yet during World War II, because of a shortage of judge advocate officers, it was the exception rather than the rule for such an officer to be appointed. The statute of 1920 permitted the substitution of an officer from another branch when a judge advocate officer was not available. By this statutory exception the reform of 1920 of placing a law member on every court was in effect lost.

Are we to allow the same thing to happen in 1948?

If we do, the price of our neglect may be the unjust trial, conviction and dishonorable discharge of many a young man drafted into the next citizen army and navy.

The American public out of a desire to protect the youth of this nation and the American military out of a desire to unify this country should see to it that certain major revisions in the court-martial system are made.

It is the job of the lawyers of the nation to point out at least the major defects in the existing system and insist on their immediate correction: What are those defects?

1. *Unification of Army and Naval Courts Martial*

To date, there have been introduced into the Congress two court-martial bills, one relating to Army courts martial⁷ and the other to Navy courts martial.⁸

⁶Pasley and Larkin, *The Navy Court Martial: Proposals for Its Reform*, 33 CORNELL L. Q. 195, 198 (1947).

⁷H. R. 2575, 80th Cong., 1st Sess. (1947), passed House Jan. 15, 1948; sent to Senate as S. 2229, 80th Cong., 3d Sess. (1948).

⁸S. 1338, H. R. 3687, 80th Cong., 1st Sess. (1947). The draftsman of the Navy bill was Admiral Oswald S. Colclough, USN, Judge Advocate General. In connection with its preparation he made special studies of his own with respect to reforms proposed by Arthur Ballantine, Judge Matthew F. McGuire, Father Robert J. White and the Board of which the writer was President, and the Vanderbilt Committee for the Army. In comparison with the Navy bill, the Army bill is very bad indeed. It is a great tribute to the Judge Advocate General of the Navy, Admiral Colclough, and Secretary of the Navy, John L. Sullivan, that the Navy bill embodies as many reforms as it does. So also with many other reforms that the Judge Advocate promises to make administratively. In drafting the Navy bill, Admiral Colclough had the assistance of Colonel James M. Snedeker of the Marines. In making its study of naval justice, the board of which the writer was president had the advantage of using the notes of Colonel Snedeker. Elihu Root once said that Al Smith was the best informed man he ever knew about the business of the State of New York. Colonel Snedeker is in my judgment the man best informed with respect to naval justice, and it is a pleasure to acknowledge his great assistance. His liberal views as to reform can be judged by his joining Judge McGuire and Judge Holtzoff in the preparation of rules for court-martial procedure. His gallant battle for reform is in the grand tradition of the Marine Corps.

Hearings were held on the Army bill before a sub-committee of the Armed Services Committee of the House of Representatives, and the bill was reported and passed by the House. It is presently before the Senate but no Senate Committee hearings have been held. Nothing has been done about the Navy bill since its introduction into the House and Senate. Hearings were scheduled before the sub-committee of the House Armed Services Committee in the summer of 1946 but later cancelled. There has been no apparent effort to hold hearings in the House or Senate and there is every likelihood that both bills will go over until the next session of the Congress.

Since the summer of 1946, we have unified the Armed Services. No court martial legislation should be passed until the Secretary of Defense testifies as to the effect of unification on the court-martial systems of the Army and Navy. The plans, if any, of the Air Forces court-martial system should also be made public. Moreover, the testimony on the Army bill was confined to Army procedures and witnesses did not testify as to unification or compare the provisions of the Navy bill.⁹ The two bills have radical differences and, despite a basic similarity, there have always been important differences between Army and Navy court-martial procedures.¹⁰

So far as I know no one has made a careful comparison of Army and Navy sentences. We all know that the Navy has not executed a man since 1842¹¹ whereas the Army executed over 100 men in World War II. I am told that all the Army executions were for brutal murders and rapes except for one desertion in battle. To my own personal knowledge similar naval cases ended with sentences of life imprisonment in accordance with a naval tradition that has in effect abolished capital punishment.

This difference in punishment in serious cases is disturbing but even more disturbing is the fact that such investigations as I have made reveals a dif-

⁹*Hearings before Committee on Armed Services, Subcommittee No. 11, on H. R. 2575, 80th Cong., 1st Sess. 1903 (1947).*

¹⁰REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § III, pp. 40-41 (1947). Since the 1920 legislation, there has been a law member on Army Courts; none on Navy courts. Votes to convict are different and there are other differences.

¹¹In November, 1842 Commander Alexander S. Mackenzie, while in command of the brig Somers at sea, court-martialed Midshipman Philip Spencer and two others, found them guilty of conspiring to mutiny and, on the advice of his officers, hanged them from the yard-arm. Spencer and one other had pleaded guilty, but the third man had pleaded innocent. Mackenzie himself was court-martialed for this in New York in 1843. Public sentiment ran high against him, but he was acquitted. That his position was delicate is understandable from the fact that Midshipman Spencer was a nephew of the Secretary of War, John C. Spencer. 33 U. S. NAVAL INST. PROC. 1476 (1907). Before becoming a midshipman, Spencer was a student at Hobart College; and when Andrew D. White entered that institution, he occupied Spencer's room. AUTOBIOGRAPHY OF ANDREW D. WHITE, Vol. 1, pp. 17, 18 (1906).

ference in the length of sentence between the two services for the same offense when it was less serious. Differences such as these are difficult to explain to American parents because if one service gives a three year sentence to a man that goes over the hill from boot camp, the other service should do the same in a comparable case. And if, by tradition, capital punishment has been abolished in the Navy, then the Army should either follow suit or convert the Navy to its point of view.

Take another important matter, the trial of a case. The Army bill requires the law member to be a judge advocate officer or a member of the bar of a federal court or of the highest court of a state and certified by the Judge Advocate General as qualified for the detail. Quite to the contrary, the Navy bill follows the British system under which an independent officer, known as the Judge Advocate, is appointed. He will rule on all legal matters arising during the trial but he will not be a member of the court and he does not have any vote. In addition the Navy bill provides that in every general court martial the Convening Authority shall appoint a prosecutor and a defense counsel each of whom shall be certified by the Judge Advocate General as qualified. The Army bill provides that "where the trial judge advocate is a lawyer the defense counsel must also be a lawyer" and "if available" both shall be lawyers. Likewise, under both the Army and Navy bills the appointment of the Court can be made *ad hoc* by the Convening Authority. A suggestion to the Navy that consideration be given to a panel system of selecting court members has not been acted upon. Suggestions to the Army that the appointing power be lodged in the Judge Advocate General have been rejected.

With the services unified and a third service, to wit, the Air Corps created how are all these matters to be resolved? Will the Army court-martial system bog along with the law member while the Navy follows the British system and uses an independent Judge Advocate? Despite our experiences in World War II will we permit legislation to pass that does not specifically, clearly and unequivocally compel a lawyer to act as defense counsel? And will we have the Army on one system, the Navy on another and the Air Corps on a third?

On any basis differences of this kind between the services are undesirable, and the conclusion is inescapable that the present bills in Congress should be withdrawn and one bill presented in their stead to reform courts martial for the unified Armed Services.

The able and conscientious Secretary of Defense James D. Forrestal doubtless knows this and intends to present such a bill^{11a} when the pressures of his

^{11a}As this article goes into print, July 1, 1948, I learn that Secretary Forrestal has ordered a Joint Study by John Kenny, Undersecretary of the Navy, Gordon Gray,

many duties permit. And this perhaps accounts for the failure of Congress to hold any more hearings.

Be that as it may, when the time comes the Secretary will study court-martial legislation in the light of the unification and report to the Congress. Such a study is bound to reveal that trial and appellate procedures can be made uniform and in many particulars consolidated. Perhaps the same prisons can be used and the same clemency methods employed.

Let us hope that from unification will come not only an economy of administration, but also a uniformity of procedure that is most desirable in courts administering justice.

2. *Abolish the Review of the Convening Authority*

The Army bill preserves intact the review of the Convening Authority¹² whereas the Navy bill restricts it to clemency.¹³

Assistant Secretary of the Army, and Eugene Zuckert, Assistant Secretary of the Air Force, of the systems of military justice with the idea of settling on a unified system and code.

¹²H. R. 2575, 80th Cong., 1st Sess. § 23, Art. 47 (d), (f) (1947), *passed House Jan. 15, 1948*; *sent to Senate as S. 2229, 80th Cong., 3d Sess. (1948)*.

The "Convening Authority" is that officer empowered by law or by order of the Secretary of War or of the Navy to convene general courts martial. For instance, in the Navy the "Convening Authority" is not a man's immediate commanding officer but rather at sea a flag officer commanding divisions, squadrons or flotillas, and on land the commandant, usually an admiral, of one of the various naval districts in the United States. Similarly, in the Army the "Convening Authority" is the commanding officer of a territorial division or department, or of an army, an army corps, a division or a separate brigade.

The War Department's Vanderbilt Committee recommended that the Convening Authority have power only "to mitigate, suspend, or set aside" a sentence: REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § 111 A (7), p. 10 (Dec. 1946). But the Army rejected this.

¹³S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 39, Art. 39 (b) (1947). The board of which the writer was president urged that review by the Convening Authority be abolished: REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (1), p. 206 (1947). Other members of this board at the time its final report was submitted were: Felix E. Larkin, Vice-President, Adm. C. P. Snyder, USN, Capt. Hunter Wood, Jr., USN, Capt. John A. Glynn, USCG, Capt. Clifford Hines, USN, Lt. Col. E. N. Murray, USMC and Cmdr. A. W. Dickinson, USNR. The Board was organized on April 9, 1946, and dissolved on June 12, 1947. Between April and September, 1946, the Board reviewed and made final recommendations in some 2,115 cases. It reviewed almost all cases in which a prisoner in 1946 was confined in a naval prison as a result of a general court-martial sentence imposed between Pearl Harbor and one month after VJ-Day, September 15, 1945. The review work of the Board was under the direction of Frank T. Cotter, Administrative Assistant to the President and Vice-President of the Board. His staff consisted of 18 civilian lawyer reviewers, each an ex-serviceman. They were: Samuel M. Schatz, Herman Schechter, Eugene M. Feinblatt, Hulbert A. Reiter, John M. Reynolds, Leonard M. Sindeband, Edward F. Kiernan, Howard P. Shugerman, Frank F. Reynolds, Charles C. Slaght, Sidney S. Finston, Narcisco Puente, Jr., George Rosenbluth, Allen Wolfson, Frank L. Murphy, John J. Sullivan, Joseph V. Gallagher and Amos K. Wylie.

The research work of the Board, which went along with the review work, was under the direction of Robert S. Pasley with Donald Harter as his principal assistant. Other

Both provisions are untenable and the Congress should see to it that any review by the Convening Authority is eliminated once and for all.

Without doubt the review of trial courts by local command is the most bitterly criticized feature of the court-martial system. To illustrate, in a series of 37 naval courts martial trying desertion cases at Norfolk, the general court imposed a sentence of 15 years in each. Then the Admiral at Norfolk who acted as Convening Authority reduced each of the 37 cases mentioned from 15 to 3 years.¹⁴ An analysis of over 2000 naval court martial cases shows that the greatest reduction in sentence is made by the Convening Authority.

The result is that the accused is not sentenced by the court that tries him. Under the present Army and Navy systems that court is robbed of independence of judgment upon the evidence it hears. It finds the accused guilty as charged by the Convening Authority, fixes a long sentence and refers the case to the Convening Authority, knowing full well it will be reduced. Worse than this, many Convening Authorities are too busy to do court martial work so that the legal officer on their staff who drew the charges in the first place, fixes the reduced sentence for the Convening Authority to sign.

The sentence of an accused is thus often determined by the signature of a Convening Authority who not only does not hear the evidence but does not even read the record.

A system that permits such a result is unconscionable and ought to be changed. The only way to correct it is to abolish entirely any review, be it legal or for clemency, by the Convening Authority. If he were left any review at all, better by far leave him legal review instead of clemency review as the Navy bill does. Under the guise of clemency the Convening Authority still can do as he pleases. For instance, in the 37 cases at Norfolk, the Admiral could under the Navy bill, reduce each 15 year sentence to 3.

The retention of the clemency review by the Convening Authority represents a failure to entrust to the court the responsibility of deciding the case and fixing the sentence on the evidence before it. As a result, the court is encouraged to give every man who comes before it a long sentence (5 years is not unusual) and let the "old man" reduce it to what he wants.

members of the research staff were: Lemuel C. Bryan, Frederick W. Whiteside, Jr., Kenneth B. Hamilton, David Bolton, John C. Weld, James J. Clynes, Jr., William J. Greer, Torrence Brooks and John J. Roscia.

REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VI, (11), pp. 175-176 (1947).

¹⁴REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § I, pp. 1-12 (1947).

This is in line with the military viewpoint that the court-martial system is an arm of the commanding officer in the enforcement of discipline. It arises out of the continental origin of the court-martial system which unlike our common law, comes down to us from Gustavus Adolphus and has its basis in the military law of ancient Rome. This represents a basic clash in philosophy with the Anglo-Saxon law under which we give preponderant emphasis to the rights of the individual in protecting him before courts and juries.

Perhaps this historical origin of our court-martial system offers some explanation of why in this day and age an American military trial court would return 37 cases to an Admiral at Norfolk with a sentence of 15 years in each for the Admiral to reduce to 3. Whatever the explanation, the trial becomes a mockery under such a system and is a far cry from the good old American trial by a court and jury that hears the evidence and sees the witnesses. Our military trial courts must be free to act as courts in the American sense and must not be instruments of discipline in the hands of any Admiral.

This sort of business does not aid discipline. It may scare men, but it causes them to distrust the system. To me, the greatest aid to discipline would seem to be confidence that the general court will do justice on the evidence it hears. A man cannot respect a trial court that gives an unjustly long sentence. Courts which arbitrarily and consistently in case after case fix over-long sentences fall into disrepute. Not all such sentences are corrected on review.

It is not that the Convening Authority has a personal interest but rather his lack of it. He is seldom the immediate commanding officer of the accused or personally acquainted with him. Without this personal interest and without having been present in the court room to see and hear the accused and the witnesses, he fixes the sentence. In his position he is not well enough informed about the facts of the particular case to do the job. It would be one thing if he heard the evidence. It is quite another when he does it as routine paper work with a legal officer similarly handicapped.

A just sentence by the trial court without undue severity is a major reform upon which the Congress should insist. It should no longer be an excuse that sentences, as reduced, are fair. There is now opportunity afforded to make sentences fair in the first place, in the trial court, by eliminating the review of the Convening Authority.

What is needed most is abolition of the review of the Convening Authority

and stern direction to the trial courts to decide the cases on the evidence and impose sentence accordingly. If this is made a matter of professional honor and obligation, then, instead of passing the buck to the Convening Authority, the trial courts will decide the cases on the evidence, as they should.

Those of us who have worked with senior officers of the Army and Navy in peace time and in war time, know that these men are of the highest type. Dealing with men is their work. The officer who happens to be Convening Authority is a brother officer. He selects a panel of officers to sit on courts martial. He makes the charges against the accused. For these reasons he should be the last one to question the court's ability and demand the right to review its judgments. His brother officers can decide the cases competently and fairly upon the evidence they hear if the system is changed so that they will be free to do so. No group of men, if possessed of its own discretion, can do its duty better. But unless the review of the Convening Authority is abolished we will always have too severe sentences in the trial court.

3. *Review Every General Court Automatically Before an Impartial Board of Legal Review*

The Navy bill preserves the present system of review in the office of the Judge Advocate General but permits an accused to appeal to a newly created Board of Legal Review within one year after his conviction has been affirmed by the Judge Advocate General.¹⁵

The Army bill provides that the Judge Advocate General shall set up in his office a Board of Review composed of not less than three officers as well as a Judicial Council composed "of three general officers of the Judge Advocate General's department." A sentence of death or one involving a general officer must be confirmed by the President. In such cases, when the Board of Review acts, it is to submit its opinion in writing through the Judicial Council which, in turn, is to submit its opinion to the Judge Advocate General. The Judicial Council with the concurrence of the Judge Advocate General is to have power to judge legal insufficiency. In other cases, if the Board of Review affirms the conviction and confirming action is not deemed necessary by it or by the Judge Advocate General, then the Judge Advocate General can transmit its decision to the Convening Authority for execution. If, how-

¹⁵S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 39, Art. 39 (e), (g) (1947).

ever, the Board of Review or the Judge Advocate General affirms and modifies, then the case goes to the Judicial Council for confirming action. If the Board finds the conviction legally insufficient, and the Judge Advocate General concurs, the case is transmitted to the Convening Authority for rehearing or other appropriate action. When, however, the Board of Review finds a conviction legally insufficient and the Judge Advocate General does not concur, then the case goes to the Judicial Council.¹⁶ There are still other possible situations covered by the bill but no attempt will be made here to explain them all.

The question for the Congress is which of these proposals, if either, it should adopt.

Let us begin by saying that there are few indeed who try to defend the present court-martial review procedures of either the Army or the Navy.

But between the review procedure in the pending Navy bill and that in the Army bill it is quite evident that the proposed Navy Board of Legal Review is infinitely superior.

The House Committee report on the Army bill prefaces its discussion of the review sections in the Army bill by stating that "any system of review is complicated, technical and difficult to understand."¹⁷ The simplicity of the Navy bill's review procedure shows this need not be true but the Committee's characterization is apt for the Army bill. It understates it.

As can be seen from the above summary, the proposed Army review system has wheels within wheels. It even superimposes upon a Board of Review, a further review by the Judge Advocate General and a Judicial Council of Generals. This latter body is probably the only Judicial Council of Generals that has ever been suggested in America.

It is quite unnecessary to have any review beyond one competent Board of Legal Review. And certainly we want lawyers, not generals.

The difficulty with the present Navy review procedure is that once a case has been approved in Section A, Military Law Division of the office of the Judge Advocate General, it is not likely to be seen by the top reviewing officers.¹⁸ This results in some cases being thoroughly reviewed and other cases receiving very little review. Frequently, letters of inquiry from Con-

¹⁶H. R. 2575, 80th Cong., 1st Sess., § 24, Art. 48 (a), § 26, Art. 50 (a), (d), (e) (1947) passed House Jan. 15 1948; sent to Senate, as S. 2229, 80th Cong., 3d Sess. (1948).

¹⁷H. R. REP. No. 1034, 80th Cong., 1st Sess. 7 (1947).

¹⁸REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (2) A (1), p. 207 (1947).

gressmen to the Secretary result in a re-review. The system cannot be defended.

Significantly, the Army bill perpetuates this mistake by allowing those cases where conviction is affirmed by its Board of Review to pass at once to the Convening Authority to become final. It is only in certain cases where the Board of Review either modifies or sets aside the sentence of the trial court, that either the Judge Advocate General or the Judicial Council of Generals need look at the record.¹⁹

Why give two or three appellate reviews to a case where the Board of Legal Review modifies or sets aside the conviction and only its own review when it affirms? Further review would seem to be far more appropriate in the case of an affirmation.

What is most needed by both services is one competent top review board of non-partisan character, preferably headed by an experienced civilian lawyer to which cases can come simply and quickly without the necessity of any separate review by either the Convening Authority or the Judge Advocate General.²⁰ I have discussed fully the reasons why review should not be

¹⁹H. R. 2575, 80th Cong., 1st Sess. § 26, Art. 50 (e) (1947), *passed House Jan. 15, 1948; sent to Senate as S. 2229, 80th Cong., 3d Sess. (1948).*

²⁰RECOMMENDATION REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (2) C, pp. 217 f., 222 f., synopsis p. 16 (1947).

This was urged as far back as 1919 in the Chamberlain Bill. Article 52 of that bill would have created a court of military appeals which for convenience was to be located in the Office of the Judge Advocate General. It was to consist of three judges appointed by the President with the concurrence of the Senate. They were to be "learned in the law," hold office during good behavior, and have pay equal to that of a United States circuit judge. The review court was to review the record of every general court martial carrying the sentence of death, dismissal, dishonorable discharge or confinement for over six months, looking for errors of law appearing in the record, whether objected to or not. The review court was to have the power to disapprove a finding of guilty or a sentence, or any part of either; to advise the Convening Authority of any further proceedings that should be had; and to report to the Secretary of War for transmission to the President any recommendation of clemency. S. 64, H. R. 367, 66th Cong., 1st Sess., Art. 52 (1919).

Bogert approved that provision of the bill, if one of the three members were an Army officer who was also a lawyer, and if the action of the review court were to be advisory to the President. Bogert, *Courts Martial: Criticisms and Proposed Reforms*, 5 CORNELL L. Q. 18, 46 (1919).

Today, Royall believes that Article 50½ presently in force proved so satisfactory during World War II that it should be continued and strengthened. He feels that the Vanderbilt Report exaggerates the pressure exerted by commanders on courts martial. Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269, 275, 281 (1947).

Wallstein, on the other hand, believes that the agency entrusted with appellate review should have the power to weigh evidence, and to reopen cases when new evidence has come to light; and he believes that death sentences should require confirmation by the President. To this extent he approves the Army bill. But he doubts that that bill's

delayed for a review by the Convening Authority. There is less reason to delay review by the Board of Legal Review for a review in the office of the Judge Advocate General.

First and foremost, the Judge Advocate General is not an *impartial* reviewing officer. This can be seen from the Army bill provisions that in certain cases there must be a further review by the Judge Advocate General and the Judicial Council of Generals when the Board of Review modifies or sets aside a conviction.

The horrible truth is that the Judge Advocate General acts in as inconsistent a role on review as the Lord Chancellor in *Iolanthe*. And it is equally ridiculous.

The magnificent provisions of the Navy bill which provide for an independent trial Judge Advocate in addition to counsel for the defense and prosecution recognize this. The law member was put on Army courts for the same reason. This prevents either from acting both as judge and prosecuting attorney. Yet review the Judge Advocate General acts in a triple capacity. He is Judge, prosecuting attorney and defense counsel.

How can such an officer be an impartial judge of the merit of an appeal?

The English have recognized this conflict of interest to a degree by dividing their Judge Advocate General's office into two sections so that no one who has worked on the prosecution of a case can review it.²¹

The Judge Advocate General of the Army and Navy should not have this review power at all. He has important enough duties without it and duties so exacting that he cannot review but a few of the cases in his office. Aids act for him in his triple capacity.

If the system were sound, in civilian life we would refer all our criminal cases to the District Attorney after conviction and charge him with the duties of Judge and defense counsel on review. No one would consider such a procedure for civilians and there is less reason to consider it for the Armed Services.

The Chamberlain bill of 1920 saw clearly this inconsistent position of the Judge Advocate General and sought to overcome it by establishing a Board

creation of a Judicial Council of three generals (§ 26, Art. 50 [a], [d]) is justified, and would prefer to see all of the authority intended to be given to it vested in the Judge Advocate General. Wallstein, *The Revision of the Army Court Martial System*, 48 COL. L. REV. 219, 232 (1948).

²¹REPORT OF [BRITISH] ARMY AND AIR FORCE COURTS MARTIAL COMMITTEE 7-8 (1938); REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (3), pp. 241-242 (1947).

of Review composed of three judges appointed by the President to review sentences automatically.

The Army bill retains intact review by the Judge Advocate General.²² The Navy bill retains it completely but allows a man whose conviction has been approved by the Judge Advocate General to appeal within one year to a board of review.²³

The Army bill's provisions for review cannot be defended at all. The Navy bill to the extent that it retains the review of the Judge Advocate General cannot be defended.

The only question with respect to the Navy bill is whether giving a man whose conviction is approved by the Judge Advocate General one year in which to perfect an appeal cures the defect of retaining the present review in the office of the Judge Advocate General which is in effect, a review by the Judge Advocate General alone.

To my mind this retains the principal vice in both the Navy and Army review system. *It does not insure the same review for every case.*

It is argued by the proponents of the Navy bill that giving a year after approval by the Judge Advocate General of the conviction, still gives an appeal to every man who wants it and since in civil life a fraction of cases are appealed, this is sufficient and will cut down the number of appeals.

The difficulty in meeting this argument is a complete difference in approach.

For the reasons given, the present review system is not fair in any sense of the word. It is a review by an officer charged in part, with the duties of a prosecuting attorney, not by a board charged with the obligations of a court of justice. And as pointed out under both Army and Navy review procedures, the Judge Advocate General reviews only a few of the cases. Subordinates review the bulk so that each case does not get the same review.

As for the point that not all civilians appeal and that permitting appeal only on application within one year and not automatically cuts down the volume of cases for an appeal board there is a good answer. Civilians are a different class. So are professional soldiers for that matter. In framing court-martial procedure, however, we must plan it for great citizen armies. For the most part these are young men drawn quickly from civilian life to military life in periods of great national emergency. The change is severe. The adjustment is great. Yet the penalty of dishonorable or bad conduct

²²H. R. 2575, 80th Cong., 1st Sess., § 26, Art. 50 (1947), passed House Jan. 15, 1948: sent to Senate as S. 2229, 80th Cong., 3d Sess. (1948).

²³S. 1338 H. R. 3687, 80th Cong., 1st Sess., § 39, Art. 39 (e), (g) (1947).

discharge is civil death. When such discharges are given, we owe these men and their families the obligation to review every case automatically before a Board of Review. It is the least the country can do. The fact that few cases are appealed from civilian criminal courts is beside the point.

Limiting appeal to a Board of Review to one year after approval of the sentence by the Judge Advocate General is also unwise. In many cases a man who believes he has been unjustly convicted would be informed that his conviction had at long last been approved by the Judge Advocate General at a time when he might have less than six months to serve. It might seem pointless for him then to appeal. Yet the conviction remains on his record.

You can be sure that the right to appeal within one year after approval of the sentence by the Judge Advocate General, will be exercised by the wicked and the well connected. The likelihood is that the ordinary fellow will not exercise the right. Review of courts martial has depended too long upon chance and political intervention. The Congress should set up a system that gives to every man of high or low degree the same review. The way to do this is to provide for the review of *every* case in the same way, automatically by a Board of Legal Review composed of experienced lawyers and headed by a distinguished civilian lawyer as President.²⁴

The Navy bill is defective in not providing for such automatic review and not specifying at all as to the composition of the Board of Legal Review.

And there is still another reason. When once there is established a Board of Legal Review, then any review by the Judge Advocate General becomes superfluous. Why have one review of the case by him and a second by the Board of Legal Review? On this basis every case the Board of Legal Review hears gets a duplicate review. What a waste of time and effort! It perpetuates another vice of the present system under which cases are reviewed by passing the file from officer to officer.

²⁴The Navy board of which the writer was president recommended that a Board of Legal Review be established by statute in the Office of the Secretary of the Navy, not of the Judge Advocate General. It urged that the membership be set at three, with a well-qualified civilian lawyer or judge as its head, all appointed for terms of six years. It suggested that the Board of Legal Review automatically review all convictions by general court martial and any conviction by inferior court which is appealed to it. It should have power to inquire into and reweigh the facts, and its determinations of matters of law should be final. REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (2) C (5), pp. 222-230 (1947).

Other commissions, on the other hand, have recommended that the power of review be continued in the Office of the Judge Advocate General: REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § III A 5, p. 8 (1946); REPORT OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MILITARY JUSTICE 2 (1948).

4. Use a Chief Defense Counsel

Strange indeed it is, that although appeals were prosecuted to the Supreme Court of the United States on behalf of our enemies, such as Homma, Yamashita and the German saboteurs, not one appeal has been heard by the Supreme Court of the United States on behalf of an American service man.²⁵

The cases were there to be heard. Of this you can be sure. Why weren't they heard?

One reason is that the machinery to appeal is cumbersome. A convicted service man has to file a writ of habeas corpus in the district court and he cannot appeal directly to the United States Court of Appeals of the District of Columbia or to the Supreme Court of the United States.²⁶

But the procedural complexities were overcome for our enemies and would have been overcome for convicted American service men were there not a fatal defect in the system.

That defect is the organization of the offices of the Judge Advocate General of the Army and Navy for review. Under the set up the Judge Advocate General is Judge, prosecuting attorney and defense counsel combined and his judgment governs when confirmed by the Secretary. There is no other good explanation because it is in the highest tradition of the services to give a defense to an accused. Accordingly, the remedy is simple. Lodge defense on review in the hands of a Chief Defense Counsel appointed by the Secretary of Defense.²⁷ If we do this, we can be sure that in the future, cases

²⁵REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, p. 248 (1947).

²⁶The proceedings of a court martial are always open to review in the civil courts to determine whether it was properly convened, appointed and constituted; whether it had jurisdiction over the person of the accused; whether it had jurisdiction of the offense charged; or whether it exceeded its power in imposing sentence. In addition, the courts have lately begun to examine proceedings to see whether basic constitutional guarantees have been afforded an accused. The review is normally taken by collateral attack, by petitioning for a writ of habeas corpus, at any stage of the proceedings or afterward, so long as the accused is still confined. The petition must be brought in a federal district court, and is subject to appeal to the circuit court and the United States Supreme Court. All this causes confusion, delay and uncertainty.

The board of which the writer was president urged the system be simplified by authorizing petitions for review of the findings and decision of the Board of Legal Review to be filed directly with the Supreme Court, on the same grounds on which writs of habeas corpus are now granted. REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (4), pp. 246-252 (1947).

Wallstein has suggested the possibility of providing for appeals to the U. S. circuit courts of appeals, or to a special bench of federal judges designated by the Chief Justice of the United States. Wallstein, *The Revision of the Army Court-Martial System*, 48 COL. L. REV. 219, 235 (1948).

²⁷Recommended in REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (5), p. 254 (1947).

involving doubtful and important legal points will be appealed to the Supreme Court of the United States when they should be.

Neither the Army nor the Navy bills provide for a Chief Defense Counsel although the Navy has promised to appoint one administratively. However, on a matter of this fundamental importance the Congress should not leave the matter to administrative discretion. Any court-martial bill, Army or Navy, should provide for the appointment of such an officer, and his qualifications and duties should be specified. And no bill should be considered that does not do so.

5. *The Sentence Review Board*

There are two kinds of review of courts martial: legal review and clemency review.

The pending Navy bill recognizes this and provides for a Board of Legal Review and a Board of Sentence Review,²⁸ whereas the Army bill leaves the establishment of clemency boards to the discretion of the Secretary of War.²⁹

The Navy bill is much the better, but it does not specify what the composition of the Board of Sentence Review shall be nor how it is expected to operate.

Clemency is a mixed question. It involves primarily the consideration of

The Vanderbilt Committee made no recommendations as to defense counsel on review. The Association of the Bar Committee has, however, asked that provision be made for defense attorneys in the trial court to make known their views when cases are on appeal. REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § III A 4, p. 8 (1946); REPORT OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MILITARY JUSTICE 3 (1948).

The person who first suggested the need for a Chief Defense Counsel to the writer was Samuel M. Schatz, who from April to July 1, 1946, was head of the section of the reviewers of the General Court Martial Sentence Review Board that reviewed cases presenting legal questions. Mr. Schatz is a former editor-in-chief of the CORNELL LAW QUARTERLY and now a lawyer in Hartford, Conn.

A plea for a "public defender's corps" by Bogert in 1919 went unheeded. He urged that such a corps be created wholly independent of the office of the Judge Advocate General, not even sharing office space with it. It should be composed of officers who were also lawyers, with at least three years' experience at the bar. A public defender from that corps should be assigned to each division, argued Bogert, and every accused should be told about this defender and advised to get his services. Bogert, *Courts Martial: Criticisms and Proposed Reforms*, 5 CORNELL L. Q. 18, 36 (1919).

²⁸S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 39, Art. 39 (f), (g) (1947).

²⁹H. R. 2575, 80th Cong., 1st Sess., § 28, Art. 51 (1947), passed House Jan. 15, 1948; sent to Senate as S. 2229, 80th Cong., 3d Sess. (1948). The legal subcommittee of the House Committee on Armed Services had proposed that the clemency power be vested in the Judge Advocate General, to the exclusion of the Secretary of War; but the Secretary appeared before the full committee and urged that the final power of clemency be restored to his office, which was done. H. R. REP. No. 1034, 80th Cong., 1st Sess. 8 (1947).

a legal offense and for this reason should be under the direction of a lawyer. It involves mercy, and to retain public confidence should be under the direction of a *civilian*. In other words the head of the Sentence Review Board should be a civilian lawyer. Such a Board of Sentence Review, as outlined in the Navy bill, should take cases directly and automatically from the Board of Legal Review so that in cases where conviction is affirmed, the clemency aspects can be presented before that Board by the Chief Defense Counsel.³⁰

To some it may seem captious to ask that the Congress specify in some detail the composition and duties of a Board of Sentence Review. The matter is much more important than first appears. A civilian lawyer President is needed for reasons that have been stated. A civilian penologist is essential because an adequate study of conditions in the military prisons should be continuously made.³¹ One of the best ways to check on the work of the prisons is by sitting on a clemency review board. This Sentence Review Board ought to have such broad representation that it will bring to bear on prison reform the best thought, civilian and military, lay and expert. With the coming of universal training the importance of this board cannot be overemphasized.

6. *A Permanent Advisory Council*

A permanent Advisory Council should be established along the lines of the Advisory Committee to the Supreme Court of the United States, the Judicial Council and the Law Revision Commission of the State of New York.

Neither the Navy bill nor the Army bill provides for such an Advisory Council although it was suggested to each service.³² Both the Navy and the

³⁰REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VII (2) C (6), pp. 230-233 (1947).

³¹*Id.* at 232.

³²The board of which the writer was president urged that such a council be composed of a representative of the Judge Advocate General, a man from the Bureau of Naval Personnel, at least one officer of general line experience, and one or more persons from outside the service. It would consider current proposals for revision of the court-martial system, and would study continuously its operation. REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Introduction pp. 2-5 (1947).

The Vanderbilt Committee recommended a similar Board of Officers for the Army. REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § IV p. 14 (1946). A civilian advisory commission for the Army is advised in REPORT OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MILITARY JUSTICE 5 (1948), and in Wallstein, *The Revision of the Army Court-Martial System*, 48 COL. L. REV. 219, 235 (1948).

Similar state advisory bodies to aid civil courts were eloquently championed by Mr. Justice Cardozo in a celebrated law review article. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

Army promise to adopt the suggestion administratively but to date this has not been done and all reform studies by boards of this character appear to have ended.

This is most unfortunate because many of the reform suggestions made to each service were tentative and subject to study by an Advisory Council which has never been set up. Are these tentative reform suggestions to be forgotten until the end of the next war when some future committee will dig up the unread reports from the file?

This is what has happened to the excellent law review article of Edmund M. Morgan of the Harvard Law School who after World War I pleaded for the Chamberlain bill that abolished review of the Convening Authority and set up an independent board of review.³³

The only way to avoid a similar catastrophe now is for the Congress to set up in the pending bills a permanent Advisory Council, quarter it in the office of the Secretary of Defense, specify its composition and duties carefully and compel it to file an annual report with Congress.

Experience indicates that unless the Congress acts, a permanent Advisory Council of this character may never be established. The unification and the basic similarity of the court-martial systems of the Army and Navy make it most desirable that this Advisory Council be established in the office of the Secretary of Defense. Unless this Advisory Council is headed by a disinterested civilian lawyer as President and composed predominantly but not exclusively of civilian lawyers, there is little use in having it. Its chief purpose should be to bring a civilian point of view to bear at a top level. It is important that the Judge Advocate Generals of both the Army and Navy be members and that there be a broad representation on the council of military as well as civilians interested and informed as to military law, criminal law and court-martial procedures. In other words, this Council should be the place for a give and take of civilian and military points of view so that out of such study and discussion will come reforms that are practical and in step with latest developments.

It would have been much better if the framing of bills for the reform of courts martial had been done by such an Advisory Council instead of by the Judge Advocate Generals of the Army and Navy. The result is, that many reforms which such an Advisory Council probably would have insisted upon have been rejected.

³³Morgan, *The Existing Court-Martial System and the Ansell Articles*, 29 YALE L. J. 52 (1919).

Consider the valuable work that such a body can do in the future.

One provision of the present Navy bill permits the members of the Court to overrule the new trial Judge Advocate on law points.³⁴ It was feared that the ruling of a young legal officer acting as Judge Advocate would be resented by a court of senior naval officers. The bill therefore permits the court to overrule providing it spreads on the record its reasons for so doing. The design is to invite the adoption of the ruling by the trial Judge Advocate. It may well be that this will work out the way the Judge Advocate General believes it will. But if it does not, it should be the task of the Advisory Council to correct it.

There should be a thorough study of the statute of limitations. So far as it is known, such a study was not made but nevertheless the Navy bill provides that the statute of limitations may be tolled by the simple expedient of filing charges.³⁵ Either there should be a statute of limitations or there should not be. If we feel there should be a statute of limitations, there is no excuse for permitting its defeat by the hypocrisy of filing charges. Matters such as these should be decided after careful study by an Advisory Council and not by haphazard piece-meal legislation.

Again, the present Navy bill preserves the harsh and unjust method of dating a man's sentence from the day it is given instead of from the day he was arrested and jailed.³⁶ This causes resentment and ill will. And quite rightly. We are told that many reviewing authorities and sentencing courts take into consideration the time spent in both civilian and military jails. The fact is that there are cases where the time is not taken into consideration.³⁷ And the one sure way to see that the time is counted is to provide that sentence shall run from incarceration. This is the way modern civilian criminal courts compute sentences and it is difficult to see any military reason why the Army or Navy should act differently. Leaving it to the discretion of the general court or the reviewing authorities to adjust for time so spent, invites them to ignore the adjustment, since no two men spend the same amount of time in jail before sentence. The line of least resistance is not to adjust for such time. Under these circumstances it is difficult to

³⁴S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 29, Art. 24 (b) (1947). See REPORT OF GENERAL COURT MARTIAL SENTENCE BOARD TO THE SEC'Y OF THE NAVY, § IV (5), pp. 79-80, 84 (1947).

³⁵S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 47, Art. 5 (b) (1947). See REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VIII (4), pp. 266-270 (1947).

³⁶REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § VI (12) (b), pp. 184-186 (1947).

³⁷*Ibid.*

understand why the pending Navy bill does not date sentences from arrest. Congress should make the change. But if Congress neglects to do so, an Advisory Council can recommend the change at the next session. But with no Advisory Council, the need for change may be ignored.

These are features of the pending Navy bill that justify the existence of an Advisory Council.

But the need for an Advisory Council is more important with respect to changes not in the Navy bill. For example, we have in the court-martial system a court system comparable to civilian criminal courts. Our civilian experience confirms the statements of Dean Pound that legislation codifies poor rules and makes changes difficult. Since our society is dynamic, a procedural system is best when it is flexible.

For this reason code making seems to be passé and the modern approach is to vest rule making powers in our courts. Dean Pound has shown us the way, and one cannot deny that embalming rules of procedural law in statutes makes change very, very difficult.³⁸ Judge Matthew McGuire not only suggested to the Navy the use of rules promulgated by the Secretary of the Navy but he actually drew and submitted a draft of such rules.³⁹

Once created, an Advisory Council can consider reducing to a minimum legislative regulation of the court-martial system and using in lieu thereof court rules in the manner suggested by Dean Pound long ago and more recently by Judge McGuire. Such rules could be promulgated by the Advisory Council with the approval of the Secretary of Defense and the Congress.

³⁸Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 10 J. AM. JUD. Soc'y. 113 (1926).

³⁹REPORT OF THE MCGUIRE COMMITTEE TO THE SEC'Y OF THE NAVY (Nov. 1945). The other members were Hon. Alexander Holtzoff, U. S. District Judge for the District of Columbia and Col. James M. Snedeker.

A committee headed by Mr. Arthur A. Ballantine, former Under-Secretary of the Treasury and prominent New York attorney, has submitted two reports, one in 1943 and the other in 1946. REPORT OF BALLANTINE COM. TO THE SEC'Y OF THE NAVY (Sept. 1943); REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY (April 1946). The latter report was signed by all members of the Ballantine Committee, but was accompanied by a special report by one member, Hon. Matthew F. McGuire, and a minority report by two other members, Lt. Comdr. Richard L. Tedrow, USNR, and Lt. John J. Finn, USNR. The other members of the Ballantine Committee were: Professor Noel T. Dowling of Columbia Law School, Major General Thomas E. Watson, USMC, Rear Adm. George L. Russell, USN (Assistant Judge Advocate General of the Navy), Rear Adm. John E. Gingrich, USN, Rear Adm. George C. Dyer, USN, and Capt. Leon H. Morine, USCG.

Father Robert J. White, Dean of Catholic University Law School and a Commodore in the Navy during the war, has made several studies of the Articles for the Government of the Navy, and has conducted a survey of the Navy prison system. His final report contained a number of recommendations for reform of the Navy court-martial system. WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (Jan. 1947).

Quite apart from rules, an Advisory Council is the more necessary because of what both the Navy and Army bills omit to do.

In the first place, we are told by both the Navy and the Army that they intend to make a number of changes "administratively." Who will see to it that promises of reform "administratively" are made? The answer clearly is an Advisory Council obligated to publish an annual report to Congress and the people as to changes made.

Not only is there need of an Advisory Council to supervise legislation, study the use of procedural rules, watch that changes are made administratively as promised and suggest the correction of any changes that do not work out well, but there is desperate need that something be done about other matters not covered at all by the pending bills and promised administrative changes. For example, one important subject is the form of discharge and the court that should be empowered to give discharges.⁴⁰ At present there is little practical difference between the Navy's dishonorable discharge and its bad conduct discharge. In most cases, the recipient of either becomes ineligible for all G.I. benefits, and for employment by State and Federal governments and by leading corporations. To any person of self-respect this is a sentence of civil death. On the false assumption that a B.C.D. is less severe in every case than a D.D., the Navy has long permitted one of its lowest courts, the Summary Court Martial, to give a B.C.D. and the Army bill permits its Special Court to give a B.C.D. Similarly, reviewing authorities have thought they were extending clemency when they changed a sentence from a D.D. to a B.C.D.

Despite many weary hours of research into the practical consequences the writer has not been able to discover any significant practical difference between a D.D. and a B.C.D.⁴¹

Certainly the Advisory Council should study the discharge problem and make recommendations based on a careful study of the practical consequences to the recipient of each form of discharge.

Without question both the Navy Summary Courts martial and the Army Special Courts should forthwith be required to confine their sentences to those of confinement (at present six months and a suggested period of one year) and forfeiture of pay and the like and leave all discharges to the General Courts Martial.

⁴⁰REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § X (3), pp. 318-325 (1947).

⁴¹*Id.* at 322-325. The Vanderbilt Committee recommended the introduction of an additional type of discharge for unfitness, so that dishonorable discharge might be reserved for exceptionally grave offenses: REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § III F 5, p. 13 (1946).

There are other important problems completely omitted from either the pending bills or the promised administrative changes. For instance, the Navy bill does not propose any different handling of officer cases. Officer cases should be studied by the Advisory Council and they should decide whether the accusations of favoritism to officers are true or false.⁴² But unless Congress establishes an Advisory Council, there seems little likelihood that anything will be done.

What is everybody's business is nobody's business. The time for sporadic voluntary effort is past and the Army and Navy do not want any more committees. Neither does the country.

The job is up to the Congress and its duty is clear.

Above every other reform, establish in the pending Army and Navy bills a permanent Advisory Council. Prescribe its composition carefully. Give its members substantial annual salaries, the way the state of New York does the Law Revision Commission. Give it rule making powers. Then compel it to publish annual reports to the Congress so that there will be a permanent and constant study of the court-martial system.

And the time for well considered reforms is now while we are at peace with the world and yet have fresh at hand the experience and lessons of World War II.

True reform lies this way.*

⁴²REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, § XI, pp. 327-333 (1947). The Vanderbilt Committee found some foundation for the complaint that officers were not prosecuted as consistently nor punished as severely as enlisted men, and recommended that trial of officers by special courts be authorized and that in time of war a general court martial be authorized to punish them by reducing them to the ranks: REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR, § III B, p. 11 (1946).

*In the dying days of the session the 80th Congress enacted the Army's Elston bill as Title II of the Selective Service Act of 1948. Despite the public statement of Secretary of War Kenneth C. Royall of June 28, 1948, that infers the contrary (see page 18 New York Times June 29, 1948). As pointed out by Richard H. Wels of the Association of the Bar's Committee on Military Justice, the Elston bill "fails to enact the basic reforms in military justice which have been recommended by all but one of the bar associations which have considered the problem, by all the veterans organizations, and by the committee appointed by the Secretary of War and headed by Chief Justice Vanderbilt of New Jersey. The power and influence of Command and the abuses which that power and influence make possible, still exist. If that fact is recognized by the 81st Congress, and the Senate Committee on Armed Services makes the study of that problem its first order of business in the next session, as Senator Gurney has promised, this danger may be averted. But if the Elston bill is to be the end of the road for court-martial reform, its enactment will have been a blow at and not for military and naval justice". (See p. 24 New York Times of June 30, 1948). The only encouraging word that can be said is that Title II of the Selective Service Act does not become effective until eight months after the President signed the Act. We can hope with Mr. Wels that in the interim the interdepartmental committee will propose genuine reforms in a new unified court-martial system for all services.