MILITARY JUSTICE AND THE MASS ARMY: A STUDY OF THE APPLICATION OF MILITARY LAW IN THE UNITED STATES ARMY, 1776-1920

THESIS

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BY

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PREFACE

> Juries undoubtedly may make mistakes; they may commit errors; they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The espirit du corps will not be introduced among them; nor will society experience from them those mischiefs, of which the espirit du corps, unchecked, is sometimes productive.[1]

But there are no juries in the military judical process. Instead, military defendants face a board which usually consists of senior officers and non-commissioned officers who have a vested interest in the military structure.

Several years ago, I became interested in the composition of the boards which adjudged the biggest courts-martial in army history, the trials of the "Houston Rioters." While researching these trials, I was surprised to discover how little information was available to the layman about military-legal history. Standard works on military history make little, if any, mention of the activites of the legal department. Scholarly studies of military law presuppose background knowledge and use specialized terms to the extent that the lay reader might well think himself reading in a foreign language. The few readable authors, such as Joseph W. Bishop, concern themselves with

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[1]"II Wilson's Works (Andrews ed. 1896) 222," quoted in the opinion of Justice Hugo L. Black, United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8 (1955).

[2]Joseph W. Bishop, Jr., Justice Under Fire: A Study of

the practice of "modern" military law under the Uniform Code of Military Justice. Thus, a significant void exists in the area of historical studies of American military-legal history.

This thesis makes no pretension of reducing this void in historical scholarship; however, the author hopes that it will present the reader with a brief, understandable survey of the early history of military law. It is also intended to provide an insight into a little-known, but significant, event in military-legal history, the "Ansell/Crowder controversy" of World War I. Most importantly, the author hopes that this brief introduction to the system of military justice will stimulate scholarly interest in a long neglected area.

For footnote simplicity, the author has elected to omit the designation "U.S." in second or later references to government documents without personal authors. Because this thesis topic is predominately legal, the style of footnote reference given under the heading "Special Forms" in the style manual is used for court cases and government documents.[3] In addition, the author has elected to use the modern hyphenated spelling of "court-martial" (plural, "courts-martial") and to use the single letter rather than the double letter "l" for the past tense (i.e., court-martialed rather than court-

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Military Law (New York: Charterhouse, 1974).

[3]Kate L. Turabian, A Manual for Writers of Term Papers, Theses, and Dissertations, 4th ed. (Chicago: University of Chicago Press, 1973), pp. 112-16.

martialled). When contemporary quotes or titles make use of other forms or spellings, the original will be retained without comment.

A final word on the use of terms. In this work, it was necessary to refer to that vast area of law practiced outside the military system. A possible choice of descriptive terms was "civilian law," but, by strict interpretation, we have no law written just for civilians, whatever they may be. Non-military law is further divided into "civil" law, involving private rights, and "criminal" law, involving public rights. However, as one of the acceptable definitions of the word "civil" the dictionary gives: "not military, naval, or ecclesiastical: as, civil law."[4] In the belief that it will cause the least confusion among both lay readers and those knowledgeable of the judical processes, the author uses the term "civil law" in this connotation, more as identification than as a description.

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[4] Webster's New World Dictionary of the American Language, College ed. (Cleveland and New York: World Publishing, 1968), p. 268.

CHAPTER I

THE DEVELOPMENT OF THE SYSTEM OF MILITARY JUSTICE[1]

On 11 December 1917, an amazing scene took place in the midnight blackness of the scrub thickets near San Antonio, Texas. While soldiers of the United States Sixth Cavalry and Nineteenth Infantry Regiments stood guard, men of the 402d Battalion of Engineers assembled a complex scaffold designed to accommodate thirteen simultaneous hangings. The scaffold had been secretly designed, built, and tested in a closed quartermaster warehouse at Fort Sam Houston by order of the Headquarters, Southern Department of the United States Army. Later, as the early morning darkness gave way to dawn, the scaffold was used for the first time. At a signal from the officer-in-charge, the traps were sprung and thirteen men of the third battalion, Twenty-fourth Infantry

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[1] The system of Military Justice, and of Military Law, in its most comprehensive sense, may be deemed to embrace the law governing the Navy; however, for the purposes of this work it is intended to be used only in the sense of its application to the Army, unless otherwise specified. The terms used are meant to encompass the entire compendium of the written law and statutes; Army regulations and orders; and the established customs, usages, and traditions of the unwritten law. For a complete discussion of their place and relationship in the government of the military services, see William W. Winthrop, Military Law and Precedents, 2d ed. rev. (n.p., 1895; reprint ed., Washington, D.C.: Government Printing Office, 1920), chaps. 1-4.

Regiment, dropped to their death, bodies twitching momentarily. Within a few seconds, the silence was relieved only by the quiet clinking of the manacles and chains swinging to and fro from the hands and feet of the lifeless soldiers.[2]

At 7:17 a.m. the medical officer ruled that the men were officially dead. The silence of the clearing immediately gave way to the shouts of the engineers as they hurried to remove all traces of the event. By mid-morning the scaffold had been disassembled, the death site had been cleared, and the only signs of the grim night's work were thirteen mounds of freshly turned earth. The only sound remaining was the occasional jangle of harness as the khaki-coated cavalrymen continued to patrol the area to turn away the curious.[3]

Two hours after the surreptitious execution, a spokesman for the Southern Department belatedly announced the findings of the General Court-Martial Board which had tried the men of the Twenty-

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[2]Interview with Harold Kayton, 18 August 1976, San Antonio, Texas. Mr. Kayton was one of two Master Engineers, Senior Grade, in the Southern Department in 1917. Together with a Captain Kirby, he designed the scaffold used for the executions. He was also present and witnessed all three hangings, being responsible for the proper connection of the trip ropes to the triggers of the trap doors.

[3]Ibid. The bodies of the executed men were buried at the site without ceremony, the graves having been dug by civilian gravediggers the night before. In the case of the first hanging, the superstitious Mexican laborers refused to dig the thirteenth grave, and a special detail had to be sent to get another gravedigger from San Antonio, in order to finish the job. After the hanging, the site, near Salado Creek on the military reservation, was restored as nearly as possible to its original condition.

fourth. At the same time, the army spokesman also informed the press that the sentences already had been carried out for those men condemned to die.[4] In Washington, when newsmen sought comments from leading officials of the Army, the War Department, and the White House, they were startled to find that the nation's capital had been kept equally uninformed about both the court-martial findings and the plans for the executions. Reporters were even more surprised to discover that, in accordance with the provisions of the existing Articles of War, the doomed men of the Twenty-fourth had no right of appeal of their sentences of death. They also had not been given any opportunity to ask for presidential clemency.[5]

This execution made public one of the major faults in the existing system of military justice; however, absence of appellate rights was not the only problem to surface concerning the legal complexities of military service. Before the echoes of gunfire stopped reverberating across the battlefields of France, the halls of Congress were filled with the sound of charges and counter-charges over the numerous judicial inequities and injustices of World War I. As part of the controversy over America's role in this war, there were more than fifty congressional investigations of the

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[4] San Antonio Express, 12 December 1917, p. 1.

[5] "The Hanging of the Negro Soldiers," Messenger 2 (January 1918):7 (microform, Westport, Conn.: Greenwood Publishing, n.d.); 58 Cong. Rec. 3942 (1919) (letter, Samuel T. Ansell to Senator George E. Chamberlain, 16 August 1919), 6495 (1919) (remarks of Senator Chamberlain).

War Department, not the least of which were the hearings into the administration of justice and the procedures of courts-martial. Military boards and committees of concerned private citizens probed the faults and failures of the program of military jurisprudence, which was referred to as "unAmerican," "archaic," "lawless," and the result of "witless adoption" of the system of the British Army, by its detractors.[6] Yet the problems and procedures these various groups were investigating were neither new nor particularly the fault of the British system.

The basis for the American system of military justice was the Articles of War, which had existed without significant change from the American Revolution to World War I. Criticism of these articles, as a product of British intolerance and injustice, was unfair and showed a lack of awareness of the history of this code, which was older than the Constitution. While it was true that the American articles were directly plagiarized from the British Code of 1774, that system for the preservation of discipline and good order had a distinguished lineage.[7]

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[6]C. H. Cramer, Newton D. Baker, A Biography (Cleveland and New York: World Publishing, 1961), p. 153; Samuel T. Ansell, "Military Justice," Cornell Law Quarterly 5 (1919):1 (quotations).

[7]John Adams, who was chiefly responsible for drafting the code of law for the Continental Army, later explained the origin of this code by stating that he had primarily adopted the British Articles of War totidem verbis, since "it would be vain for us to seek in our own invention or the records of warlike nations of a more complete system of military discipline." Charles F. Adams, The Works of John Adams, Second President of the United States, with a Life of the Author, Notes and Illustrations, 10 vols. (n.p., 1850-

The Code of 1774 was only slightly changed in intent from the "Statutes, Ordinances and Customs" of Richard II, adopted in 1385, which was, in turn, little more than an expansion of the principles governing military life in Roman times, the magistri militum. In addition, the great continental military justice systems of the sixteenth, seventeenth, and eighteenth centuries, especially the elaborate articles of Gustavus Adolphus of Sweden, had influenced the British codes to a considerable extent.[8] At a time when the armies of Europe were mainly composed of professional mercenaries, these stern codes were designed to promote discipline, not justice. Thus, when the American colonies broke away from the mother country, it was not surprising that they adopted a code which had successfully promulgated that which the colonial militia lacked most, discipline.

56; reprint ed., Freeport, N.Y.: Books for Libraries Press, 1969), 3:68.

[8]Winthrop, Law and Precedents, pp. 18-19, 21-22; Rollin A. Ives, A Treatise on Military Law and the Jurisdiction, Constitution, and Procedure of Military Courts, with a Summary of the Rules of Evidence as Applicable to such Courts (New York: D. Van Nostrand, 1879; microbook, Chicago: Library Resources, LAC 15438), p. vii; George B. Davis, A Treatise on the Military Law of the United States, Together with the Practice and Procedure of Courts-Martial and Other Military Tribunals, 2d ed., rev. (New York: John Wiley & Sons, 1899; microbook, Chicago: Library Resources, LAC 16716), p. iv. The major continental justice systems included the penal code of Emperor Charles V (1532), the articles of Maximilian II (1570), the Articles of War of the Free Netherlands (1590), the articles of Gustavus Adolphus (1621), the Regulations of Louis XIV (1651 and 1665), the Articles and Regulations of Czar Peter the Great (1715), and the Theresian penal code of the Empress Maria Theresa (1768). Winthrop, Law and Precedents, p. 18.

Two weeks before the clash of arms at Lexington and Concord, Massachusetts enacted fifty-three articles for the management of her troops. Similar regulations were soon passed by Connecticut, Rhode Island, and New Hampshire. These articles were based on a combination of the English code and the Mutiny Act of 1754.[9] The army which gathered on the hills around Boston was regulated by these New England enactments until the Second Continental Congress ratified the "Sixty-nine Articles for the Government of the Army" on 30 June 1775. This ordinance was replaced in 1776 by John Adams' newly rewritten Articles of War, expanded to 102 articles, which were organized on the British form; and the same articles were later accepted under the new Constitution by the First Congress on 29 September 1789.[10]

Significantly, Adams' much more lenient version of the British codes levied the death penalty only for "abandoning a post,"

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[9]The enactment dates were: Massachusetts, 5 April 1775; Connecticut, 31 May 1775; Rhode Island, 12 June 1775; and New Hampshire, 29 June 1775. Ives, Treatise, pp. 17-18; The Mutiny Acts, first passed in 1689, were statutory disciplinary measures, while the Articles of War were royal acts. The two were complementary in nature and together provided the rules for administration and discipline of the military forces of Great Britain. Davis, Military Law, pp. 3-4.

[10]Worthington C. Ford, ed., Journals of the Continental Congress: 1774-1789, 34 vols. (Washington, D.C.: Government Printing Office, 1905), 3:330-34; John F. Callahan, comp., The Military Laws of the United States, Relating to the Army, Marine Corps, Volunteers, Militia, and to Bounty Lands and Pensions, from the Foundation of the Government to the Year 1858 (Baltimore: J. Murphy & Co., 1858; microbook, Chicago: Library Resources, LAC 14255), pp. 51-55, 59.

"making known the watchword to unauthorized persons," and "compelling a surrender."[11] The Adams Committee also limited the number of lashes that could be imposed in one court-martial sentence to a maximum of thirty-nine. George Washington immediately complained to the President of Congress that this act restricted his power to discipline his men.[12] Washington was only the first of a long line of military commanders to resist any congressional abridgement of their authority.

On the other hand, non-military capital crimes, such as murder and assault to commit murder, were left to the judgment of the civil courts. This practice again followed the example of Great Britain where jurisdiction over soldiers who committed civilian offenses was given to civil, not military, tribunals. Indeed, it was the "evasion and erosion of this principle by colonial-based officials" that was one of the grievances protested by the American colonists in the pre-Revolutionary period.[13] The question of the relationship between military and civil jurisdiction was even the

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[11]American Articles of War of 1775, Articles 25, 26, 31. Reprinted in Winthrop, Law and Precedents, pp. 955-56.

[12]American Articles of War of 1775, Article 51. Reprinted in Winthrop, Law and Precedents, p. 957; Letter from George Washington to the President of Congress, 24 September 1776, reprinted in John C. Fitzpatrick, ed., The Writings of George Washington from the Original Manuscript Sources, 1745-1799, 39 vols. (n.p., 1932; reprint ed., Westport, Conn.: Greenwood Press, 1970), 6:114-16.

[13]Cited from opinion delivered by Justice William O. Douglas, O'Callahan v. Parker, 395 U.S. 258, 23 L. Ed. 291 (1969).

basis of one of the charges against the king in the Declaration of Independence.[14]

American independence , however, did not resolve this jurisdictional conflict; nor did the new republic clarify the judicial status of the "citizen/soldier." At the insistence of many of the ratifying states, the newly formed Congress wrote a Bill of Rights in 1789, which provided certain safeguards for the rights and privileges of the citizen. Unfortunately, the members of the "land and naval forces" were specifically excluded from the protections of the Fifth Amendment, and excluded by implication from the Sixth.[15] When Congress subsequently passed the 1789 Judiciary Act and the 1790 Federal Crimes Act, the principles of the system of civil justice for the United States were established. However, again these acts made no provision for incorporating the previously passed military justice program into the national scheme, despite the fact that the same individuals were involved in the formulation and passage of both programs. Thus, the framers of the Constitution, from the beginning, accepted contrary principles for the regulation of civil and military life.[16]

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[14]The twelfth charge against the king in the Declaration of Independence is the accusation that he had attempted to "render the military independent of, and superior to, the civil power."

[15]U.S. Const. amends. I-X; quotation is from the Fifth Amendment.

[16]1 Stat. 92 (1789) and 2 Stat. 118 (1790), cited in S. Sidney Ulmer, Military Justice and the Right to Counsel (Lexington: University Press of Kentucky, 1970), p. 24; Ulmer points out that the

Not only had two systems of law been created for two classes of Americans, military as opposed to all others, but also serious conflicts had been created in the areas of rights and jurisdiction. Military men were not entitled to the rights of trial by jury, indictment by Grand Jury, appointment of counsel in capital cases, or the appellate procedures of the civil system. Higher civil courts could not review or mitigate the acts of military tribunals. Military men, if their actions were in violation of both civil and military codes, could be held liable under both systems, contrary to laws against the liability for double jeopardy. Additionally, despite the prohibition of the Constitution against cruel and unusual punishment, members of the armed forces were sentenced to floggings, brandings, spread-eagling, having their ears cut off, and other severe penalties. Military personnel also could be punished by court-martial for offenses having no connection whatever with military affairs on the excuse that the act reflected discredit on the armed forces. The more common peacetime practice for civil crimes was for the military to deliver the individual to civil authorities for trial, if so requested. In time of war, however, the military ordinarily asserted exclusive jurisdiction, even in civil cases, and there was no way by which the civil authorities could compel the surrender of an individual to

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acceptance of contrary principles was not because of a difference in the individuals who drew up the programs because the Committee of the Second Continental Congress chosen to revise the 1775 Articles of War consisted of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston. Ibid., p. 17 n. 31.

them.[17]

These harsh punishments and arbitrary court decisions usually caused little serious citizen complaint as long as they only applied to the few members of the permanent military forces. On the other hand, Congress realized the increased potential for adverse reaction, both at the polling place and in the number of volunteers for service when it was necessary to enroll large numbers of ordinary citizens in the armed services in time of war. Thus in April 1812, under threat of imminent war, Congress enacted an ordinance which prohibited for the next two years the use of "corporal punishment by whipping" for militiamen ordered to active duty.[18] This act did not apply to members of the regular establishment; and, with the departure of the citizen soldiers to their homes in 1814, the law was not renewed.[19] After this period, the lash was freely used again. Only occasionally would an isolated voice be heard complaining of the excessive penalties that were levied in the name of justice. Proposed changes to the penal limits of the Articles of War met with indifference and

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[17]Dynes v. Hoover, 20 Howard (U.S.) 65, 15 L. Ed. 838 (1858); Ex parte Milligan, 4 Wallace (U.S.) 23, 18 L. Ed. 281, 302 (1866); U.S. Const. amend. V and amend. Viii; John S. Hare, "Military Punishments in the War of 1812," Military Affairs 4 (1940):229; Lewis Mayers, The American Legal System: The Administration of Justice in the United States by Judicial, Administrative, Military, and Arbitral Tribunals (New York: Harper & Brothers, 1955), pp. 505-6.

[18]Act of 10 April 1812, Statutes at Large, II, 707, cited in Hare, "Military Punishments," p. 230.

[19]Ibid.

disinterest in Congress.[20]

Not until another national crisis arose did military justice again become an issue, this time, surprisingly, because of a commanding officer who became concerned over the rights of enemy civilians in a foreign country. General Winfield Scott, conqueror of central Mexico and commander of the Army of Occupation, found it necessary to create an entirely new level of military law and jurisprudence in order that the "unwritten code" of martial law could be applied to crimes committed "by hostile individuals against soldiers, and by soldiers against the Mexicans, not punishable by courts martial [sic] as organized under the Articles of War."[21] A series of military commissions were empowered to try those crimes which were not properly in the jurisdiction of either the existing Mexican courts or the courts-martial boards. Among other factors that General Scott had to consider, was the problem that his forces

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[20]Representative Johnson of Virginia noted in the House on 22 January 1818 that Article 14 of the Act of 23 April 1800 allowed a penalty of death for disobedience of the lawful orders of a superior officer. He commented that a civilian assault case, even on a member of Congress, would not be punished so severely. The Congressman proposed that the penalty be changed to dismissal instead of death; however, no action was taken by Congress. Niles' Register 13 (1818):415-16.

[21]General Orders No. 287, Headquarters of the Army of Occupation, National Palace of Mexico, 17 September 1847, quoted in William Whiting, War Powers under the Constitution of the United States. Military Arrests, Reconstruction, and Military Government. Also, now first published, War Claims of Aliens. With Notes on the Acts of the Executive and Legislative Deaprtments During Our Civil War and a Collection of Cases Decided in the National Courts, 43d ed. (Boston: Lee and Shepard; New York: Lee, Shepard and Dillingham, 1871; microbook, Chicago: Library Resources, LAC 13498), pp. 282-83.

consisted not only of regular army and naval personnel, but also of temporary soldiers drawn from the civilian environment.[22]

Although many who opposed the war were prepared to protest even the slightest appearance of injustice on Scott's part, the short duration of the war and the rapid demobilization of the volunteers prevented any excessive outcry over the military system of law. In addition, Scott reserved his harshest punishments for regulars who had gone over to the enemy. As these men were deserters and traitors, there was little chance that even the most fervent anti-war advocate would support them; thus, Scott was on safe ground when he ordered the hanging of fifty of the so-called Battallon San Patricio of United States regular army men who deserted and fought for Mexico in 1846-47. Those who were not executed were treated only somewhat less gently by the American commander when he sentenced them to receive "50 lashes . . . the letter D branded on the cheek with a red-hot iron . . . hard labor . . . for six months" wearing an eight pound iron collar with six inch spikes, and then "to have the head shaved and be drummed out of the service."[23]

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[22]Russel F. Weigley, History of the United States Army (New York: MacMillin, 1967), pp. 183, 186-87; Emory Upton, The Military Policy of the United States (Washington, D.C.: Government Printing Office, 1917), pp. 214-15.

[23]For the extent and influence of the opposition to the war, particularly in Congress, see Louis Smith, American Democracy and Military Power: A Study of Civil Control of the Military Power in the United States (Chicago: University of Chicago Press, 1951), pp. 187-93; General Order Number 340, cited in Edward S. Wallace, "The Battalion of Saint Patrick in the Mexican War," Military Affairs 14 (1950):84. Of approximately 260 deserters who defended the convent

These harsh punishments, although undoubtedly deserved, did little to attract recruits to the ranks; and in 1861, faced with the need to expand the Union army rapidly in order to meet the Southern challenge of secession, Congress finally outlawed flogging and the use of the lash on American soldiers. Military leaders, who had previously struggled with a suspicious and tight-fisted Congress in their attempts to make changes in rules and regulations, suddenly found the legislative branch eager to do their bidding. While the armed forces were mushrooming from a pre-war strength of approximately 16,000 men to a peak in excess of one million, the military system of law was levied simultaneously with the additional task of administering huge blocks of captured Confederate territory until civil control could be re-established.[24] In the process, the judicial program received its first real modifications since 1786.

On 5 August 1861, the appointment authority for general courts-martial was lowered to the level of commanders of divisions or separate brigades. A more significant change took place the following year when the Act of 17 July 1862 created the office of

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of San Pablo at Churubusco, all but 65 were killed. The captured deserters were all sentenced to hang, but Scott pardoned two men outright, remitted the sentences of two others, and reduced the death sentences of eleven men to that shown in the text above. Ibid., pp. 88-89.

[24]Act of 5 August 1861, Statutes at Large, XII, 317, cited in Hare, "Military Punishments," p. 230 n. 11; Weigley, History of the Army, p. 567; James G. Randall and David Donald, The Civil War and Reconstruction, 2d ed. (Boston: D. C. Heath, 1961), p. 301.

Judge Advocate General of the Army and the Corps of Judge Advocates.[25] However, this was not the first time that this position had been authorized.

On 29 July 1775, just a month after adoption of the first Articles of War, the position of Judge Advocate General was created and staffed. At various times during the war, Congress appointed replacements and assistants to this position, and many notable figures in the field of jurisprudence served their country in this office, including Lieutenant John Marshall of later fame as Chief Justice of the Supreme Court. With the reduction in the size of the army following the war, the office of Judge Advocate General became a detail position from the line of the army, and a series of lieutenants and captains occupied it until Congress abolished the position by the Act of 16 March 1802.[26]

When the army was increased again in 1812, authorization was provided for a Judge Advocate in each division, a not unimportant office since it was granted the pay and emoluments of a major of infantry. Congress continued the roller-coaster existence of the judge advocates when it increased the authorization per division to three in 1816, reduced it to one in 1818 (with the pay of a

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[25]Whiting, War Powers, p. 280; U.S., War Department, A Digest of Opinions of the Judge Advocates General of the Army: 1912, by Capt. Charles R. Howland (Washington, D.C.: Government Printing Office, 1912), p. 501 n. 1; George J. Stansfield, "A History of the Judge Advocate General's Department, United States Army," Military Affairs 9 (1945):237.

[26]Ibid., pp. 219-20, 222.

topographical engineer), and finally discontinued the office entirely once more as of 1 June 1821.[27]

Although army regulations continued to emphasize the importance of "the manner in which military courts are conducted, and justice administered," there was no representation of the military legal system on the General Staff of the War Department from 1821 to 1849.[28] The only "legal" officers of this period were those "fit persons" whom the President was authorized to appoint as trial judge advocates whenever a general court-martial was ordered. Responsibility for the preservation of trial records was levied on the Secretary of War until 1835 when this duty was transferred to the office of the Adjutant General. The Adjutant General also acted as reviewing officer in cases of military justice between 1842 and 1849, in the process of which he personally wrote several opinions concerning procedural irregularities; however, most of the work was done by a series of acting Judge Advocates in the Adjutant General's office. Congress regularized this procedure by authorizing in 1849 the appointment of a Judge Advocate of the Army, thus finally giving the military judicial system an official head again. This authorization remained in force until superseded by the previously mentioned creation of the office of Judge Advocate General in 1862; however, the incumbent for this entire period was not a lawyer, but an officer

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[27]Ibid., pp. 223-24.

[28]Army Regulations of 1835, cited in ibid., p. 225.

of the Ordnance Department, Captain John Fitzgerald Lee.[29]

Another change in the military program in 1862 was the creation of the Field Officers Court. This court, authorized to try offenses within a regiment, was an attempt to reduce the paper-work, red-tape, and disruption of regular courts-martial trials for lesser offenses. Although the Field Officers Court was an effective action, the idea was not new since its historical precedent was the "drum head court-martial" of 1830 in the English service.[30] The biggest change, however, came in 1863 when Congress broadened the scope of military judicial authority to include the areas of civil crimes and civil responibilities.

Section 30 of the Act of 5 March 1863 gave courts-martial jurisdiction in time of war over cases of "murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny, when committed by persons who are in the military service of the United States, and subject to the articles of war."[31] This application of military trial to civil offenses, even though it was effective only "in time of war, insurrection, or rebellion,"

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[29]Ibid., pp. 228, 230, 232-33.

[30]Act of 17 July 1862; C. M. Clode, Military and Martial Law (1872), p. 81, cited in Ives, Treatise, p. 26.

[31]Winthrop, Law and Precedents, p. 833; Whiting, War Powers, p. 283.

meant that the military justice system no longer applied just to the offenses which effected military order and discipline, but to the larger body of civil crime.[32]

Section 75 of the same act also recognized the "military commissions" created by Winfield Scott in 1847, and prescribed their role in the system of military law. A major dispute ensued over the right of these commissions to pass judgment on civilians not otherwise connected with the army, but the Supreme Court later upheld the legality of these commissions and their decisions. This act was a departure from the use of British precedent, where the general rule was that courts-martial jurisdiction was granted "only over mutiny, sedition, and desertion. In all other respects, military personnel were to be subject to the 'Ordinary Processe of Law.'"[33]

With the end of the Civil War, and the rapid exodus of the temporary civilian membership from its ranks, the army once again reverted to that small, semi-mercenary force whose abuse of individuals on the excuse of discipline would not evoke any great outcry from the general public. Despite this return to an attitude of community indifference toward the military, the changes brought

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[32]Willis E. Schug, ed., United States Law and the Armed Forces: Cases and Materials on Constitutional Law, Courts-Martial, and the Rights of Servicemen (New York: Praeger, 1972), p. 192.

[33]Whiting, War Powers, pp. 282-83; Ex parte Vallandigham, 1 Wallace (U.S.) 243, 17 L. Ed. 589 (1864); Coleman v. Tennessee, 97 U.S. 509, 24 L. Ed. 1118 (1879); 1 W. & M., c. 5, quoted in O'Callahan v. Parker, pp. 268-69 (quotation).

about because of its contact with that first mass army continued to influence the direction of military justice toward a limited degree of liberalism.

In 1874, the Articles of War were revised to provide that a judge advocate be appointed for all general courts-martial, and that the judge advocate have more responsibilities toward the defendant. On the other hand, this revision gave no statutory requirement for separate counsel for defense, and military courts had no authority to assign counsel to a prisoner; thus military personnel still were left without rights in criminal actions that civilians had enjoyed for over three-quarters of a century. The leading military law textbook of the period pointed out that the defendant was permitted representation by counsel, if he so requested. However, the defendant's counsel "was not permitted to address the court." Any arguments or questions by the defense had to be submitted in writing to the trial judge advocate. If the judge advocate deemed the submitted material proper and applicable, he then read it in court.[34] This limitation on the defense counsel allowed the prosecuting judge advocate to be the sole determinant of what evidence and testimony was presented during the trial.

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[34]American Articles of War of 1874, enacted 22 June 1874, reprinted in Winthrop, Law and Precedents, pp. 986-96; Opinion of the Judge Advocate General 200 (1880), cited in Ulmer, Right to Counsel, pp. 28-29; Both the 1789 Judiciary Act and the 1790 Federal Crimes Act provided specific rights to counsel for defendants in criminal actions. Ibid., p. 24; Davis, Military Law, p. 38; Ives, Treatise, pp. 125-27; Maurer Maurer, "Military Justice under General Washington," Military Affairs 28 (1964):10 n. 8.

A significant advance by the 1874 revision of the Articles of War was in the area of punishments. While floggings had been prohibited in order to encourage volunteers in 1861, the extreme practices of branding with hot irons and tattooing, had been continued. The use of this permanent stigma was finally forbidden by Article 98 of the Act of 22 June 1874.[35] Article 105 of the same act also provided for mandatory review of all sentences of death by the President of the United States. Possibly as a reaction of high ranking ex-military members of Congress to President Lincoln's lenient pardoning policy during the recent war, the review requirement contained a large number of wartime exceptions. In these excepted cases, execution of sentence could be carried out after review and approval by the Commanding General in the field, or the Commander of a Department, without reference to the preferences of the President.[36] This limitation on the authority of the Commander-in-Chief continued until the traumatic early days of World War I.

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[35] American Articles of War of 1874, reprinted in Winthrop, Law and Precedents, p. 994. The marking of deserters had been authorized under Roman law, and was later used on British soldiers under the terms of the Mutiny Act; but it was left to the American Army to develop this practice to a fine art. Soldiers were commonly sentenced to be branded or tatooed with the letters "D" for desertion or drunkenness, "HD" for habitual drunkard, "M" for mutineer, "C" for coward, "I" for insubordination, "R" for robber, "T" for thief, and "W" for worthlessness. Sometimes entire words were used instead of just letters. The marking was usually placed on the hip, but also was ordered to be branded on the thigh, cheek, or forehead in some sentences. Ibid., p. 440.

[36] Ibid., p. 994.

The late 1800's brought further increasing interpretations of military law by the Judge Advocate General; however, his opinions did little to liberalize the strict codes and regulations. Indeed, his opinions were more favorable to the system of command than to the rights of the individual. While the Army Regulations of 1895 specified that the Commanding Officer of a post at which a court-martial convened would "on request of the prisoner . . . detail as counsel for defense a suitable officer,"[37] the Judge Advocate General cautioned the officer detailed to keep his actions "within the well-understood limits proscribed, in the interest of discipline, by the established procedures of court-martial." If he failed to "conduct the defense . . . with due regard for authority," the Army's chief legal officer continued, "his position will not give him immunity" from being himself court-martialed.[38] The Judge Advocate's cautioning words hardly encouraged aggressive defenses by career-minded officers.

When disagreement arose between the court-martial board and the convening officer, the Judge Advocate General ruled that the officer who disapproved the proceedings could reconvene the court and furnish them with the reasons for his disapproval. If the court refused to change its findings, the reviewing authority could

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[37]Army Regulations of 1895, paragraph 926, quoted in Davis, Military Law, p. 39; See also, Winthrop, Law and Precedents, p. 1036.

[38]Opinion of the Judge Advocate General, quoted in Davis, Military Law, p. 31 n. 1.

continue reconvening the court-martial board and providing the members with additional guidance until they arrived at a decision which met with his approval. It was also held proper that the reviewing officer could "reflect upon the refusal of the court [to change its mind] as ill-judged, and as having the effect to impair the discipline and prejudice the interests of the military service."[39] Since the convening authority out-ranked the members of the court, and was usually responsible for completing the annual efficiency report on the individual members, this "reflection" would effectively sound the death knell for the professional career of any officer brash enough to disagree with the wishes of the convening officer in a court-martial.

In another opinion, the Judge Advocate General recommended the remission of all extreme punishments; however, their use was not specifically forbidden. Even as late as 1898, the punishments of "ball and chain," "shaving the head," and "drumming out of the service" were still occasionally ordered in court-martial sentences.[40]

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[39] Digest of the Judge Advocate General, 673, par. 4, quoted in Davis, Military Law, p. 203 n. 2. Domination of the court-martial board by a commander was not new in the American Army. During the early days of the Republic, when a court-martial did not impose a severe enough penalty to please General George Washington, he "ordered a Reconsideration of the matter." On second thought, the obedient board members "made Shift to Cashier" the accused and Washington had him put out of the army immediately. Letters from General George Washington to the President of Congress, 24 September and 5 October 1776, cited in Fitzpatrick, Writings of George Washington, 6:114-18.

[40] Digest of Opinions: 1912, p. 546 n. 1. The continued use of harsh punishments perhaps is better understood after reading a

The 1890s evidenced some progress in the matter of limitation of penalties when the President, under authority granted by Congress, published an executive order setting maximum punishments which could be levied for specific offenses under the Articles of War. A major change also was made in the court-martial system when the Garrison and Regimental Courts were replaced, in peacetime, by a new judicial level to try minor offenses, the Summary Court.[41]

As the end of the nineteenth century approached, America's system of military law and justice appeared to have met the challenges of this period of western growth and development. The infrequent problems which had cropped up resulted in minor modifications, but the program established by John Adams during the American Revolution remained basically unchanged. The army, scattered in isolated

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passage from one of the best early histories of the army. The author wrote that:

> "When the commanding officer had too great a proportion of illiterates and desperadoes in his organization, when savagery, rudeness and the outbreaks of the lawless loomed on every hand, he had to have a hard discipline that looks severe in the New York Library. He had at times to resort to the ball and chain, to close confinement and the harshest restrictions of his officers and men (William A. Ganoe, The History of the United States Army [New York: D. Appleton, 1924; rev. ed., New York: D. Appleton-Century, 1942], p. 353).

[41]Executive Order, 26 February 1891, published in General Orders No. 21, 1891, Headquarters of the Army, as amended by Executive Order, 20 March 1895, published in General Orders No. 16, 1895, Headquarters of the Army; "An Act to Promote the Administration of Justice in the Army," 1 October 1890, reprinted in Winthrop, Law and Precedents, pp. 999, 1001-5.

garrisons throughout the western areas of the nation, received little attention from the general public. There were, however, disturbing winds of change on the horizon.

During most of the nineteenth century, the United States had accepted the idea, in the words of the great English historian, Thomas Babington Macaulay, that:

> A strong line of demarkation must therefore be drawn between the soldiers and the rest of the community. For the sake of public freedom, they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code, and to a more stringent code of procedure, than are administered by the ordinary tribunals. Some acts, which in the citizen are innocent, must in the soldier be crimes. Some acts, which in the citizen are punished with fine or imprisonment, must in the soldier be punished with death.[42]

Now at the dawn of a new century, some people began to question this idea and to ask whether an individual who entered military service must leave behind his rights as a citizen, contending that the soldier should be provided with "the same safeguards as are demanded by the law for the protection of all other American citizens."[43] Even so prestigious a military figure as Admiral David D. Porter, in discussing courts-martial, remarked that: "There may be sometimes too much law and not enough justice."[44] The system of law which had been

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[42]Macaulay, History of England, ii 34, quoted in G. Norman Lieber, "The Independence of the Military System," Forum 25 (May 1898): 277.

[43]Earl M. Cranston, "The Existing Court-Martial System," North American Review 168 (1899):251.

[44]David D. Porter, "Discipline in the Navy," North American Review 150 (1890):416.

adequate for the small, professional, frontier-based army of the nineteenth century, would be faced in the subsequent century with the challenge of the amateur, mass conscript army of citizen soldiers.

CHAPTER II

PROFESSIONALISM AND MUCKRAKERS: MILITARY JUSTICE ENTERS THE TWENTIETH CENTURY

In the late 1890s, the United States finally embarked upon Alfred Thayer Mahan's and Theodore Roosevelt's dream of "aggressive navalism" in the Caribbean.[1] With the sinking of the out-dated, ten-inch gunned battleship Maine in Havana Harbor during a "friendly" visit on 15 February 1898, American imperialism became a reality. The army, typically ill-prepared to meet the crisis, was forced by Congress to absorb an unwieldy number of patriotic citizens, and the formation of the volunteer army for the Spanish-American War was accomplished amid incredible confusion and mismanagement.[2]

Once again an influx of civilians into the armed forces exposed the system of military justice to the pitiless light of

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[1] Walter Millis, Arms and Men: A Study of American Military History (New York: New American Library, Mentor Book, 1956), pp. 144-46, 151-52.

[2] Walter Millis, The Martial Spirit (Cambridge, Mass.: Literary Guild of America, Riverside Press, 1931), pp. 153-60; Although the regular army was expanded by two artillery regiments by Congress on 8 March 1898, this still left the army at a paper strength of only 28,747. Congress then authorized the President to call for 125,000 volunteers to supplement the regular forces to a strength capable of war with Spain. At the same time, they also authorized the regular army to increase its regiments by a third battalion in each, something which had been recommended by Emory Upton previously; however, this authorization was too late and these regular recruits were not much more valuable than the volunteers. Ganoe, United States Army, pp. 371-73.

public opinion. Americans who ordinarily did not worry about what happened to the small, transient, and stateless members of the regular army, suddenly became highly concerned and vocal when their sons and relatives became subject to the caprices of martial adjudication. Although some cases of injustice occurred during the war, the bevity of the conflict in the Caribbean, the isolation of the confrontation in the Philippines, and the massive public outcry over reported medical and quartermaster inefficiency in Cuba, all served to divert community attention away from the military justice system, leaving the discussion to a few intellectual theorists. Both the public and the politicians were primarily concerned with getting the volunteers out of uniform, to the exclusion of all other problems. Even so disquieting an event as the failure under fire of the elite Seventy-first New York Volunteers was quickly hushed up by order of Secretary of War Russell Alger, without charges being preferred against any of the officers or men.[3]

Unlike the wartime difficulties, however, the post-war problems which arose in the Philippines could not be so easily concealed. Filipino nationalists, under the leadership of General Emilio Aguinaldo, refused to accept the change in masters as American forces replaced those of Spain. In late 1898, the nationalists set up a revolutionary government and made Aguinaldo President of the Philippine Republic. The fighting which broke out between American

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[3]Weigley, History of the Army, pp. 309-11; Ganoe, United States Army, pp. 381-82.

soldiers and Filipino insurgents soon became characterized by vicious and unconscionable acts by both sides. The conflict was further compounded by atrocities committed by independent tribal and outlaw groups, owing allegiance to neither side and operating outside the realm of the accepted rules of war. Under these provocations, some American officers and men exceeded the permissible limits of the law in their treatment of captured enemy soldiers and suspected collaborators. When rumors of such excesses reached the United States, anti-imperialist committees, including highly respected men from all walks of life, demanded that these acts be halted and the perpetrators be punished.[4] United in their dislike of American territorial expansion in the Caribbean and the Pacific, men such as Charles Francis Adams and Andrew Carnegie became vitriolic in their criticism of the measures the army had taken in the Philippines and of the failure of the military courts to be anything but sympathetic to the officers and men brought before them.[5]

The pressure brought to bear by these influential individuals caused Congress, in turn, to demand action from the newly appointed

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[4]Philip C. Jessup, Elihu Root, 2 vols. (n.p.: Dodd, Mead & Co., 1938; reprint ed., n.p.:Archon Books, 1964), 1:331, 335-39.

[5]Letter to President Roosevelt from Charles Francis Adams, C. Schurz, Edwin Burritt Smith, and Herbert Welsh, 23 July 1902, reprinted in U.S., Congress, Senate, Letter from the Secretary of War in Response to Senate Resolution of Feb. 23, 1903, Transmitting a Report showing the Trials or Courts-Martial had in the Philippine Islands in Consequence of the Instructions Communicated to Major-General Chaffee on April 15, 1902, Together with the Action of the President or the Secretary of War thereon, S. Doc. 213, 57th Cong., 2d sess., 1903 (microbook, Chicago: Library Resources, LAC 16083), p. 153; Jessup, Elihu Root, 1:329, 355.

Secretary of War, Elihu Root. Root, who would be widely acclaimed for his administrative reforms of the army, was an outstanding lawyer in the field of business and corporate law, but had no previous military experience. He had been appointed Secretary of War by President William McKinley for the primary purpose of formulating a colonial policy and to organize the administration of the United States' new insular possessions. Occupied with these problems, and the reorganization of the army staff system, Root apparently chose to leave the issues of military courts and justice in the Philippines to the judgment of the Judge Advocate General of the Army, Brigadier General George B. Davis.[6] Root's foremost biographer, Philip Jessup, admits that the Secretary of War did little or nothing to check the atrocities against the Filipino insurgents and explains that "Root seems to have sympathized with the provocation under which the officers and enlisted men acted."[7] Unfortunately, the

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[6]Ibid., 1:215, 220, 222, 240-43. When Root was first appointed Secretary of War, the Judge Advocate General was Brigadier General Guido N. Lieber, who had held this post since 1895, and who was widely known for his work on international law. Upon his retirement in May 1901, Lieber was replaced by Brigadier General T. F. Barr, who served one day, and Brigadier General J. W. Clous, who served two days, before the assignment of the regular appointee, Brigadier General George B. Davis. General Davis, a former instructor of military law at the U. S. Military Academy at West Point and author of a widely read treatise on military law, would remain Judge Advocate General until February 1911, when he stepped down in favor of his personally selected replacement and chief subordinate, Brigadier General Enoch H. Crowder. The practice of short-term assignments prior to retirement was a common occurrence in the promotion stagnent army of the turn of the century and permitted over-age officers the prestige of retiring at a flag officer rank.

[7]Jessup, Elihu Root, 1:337, 343 (quotation); Another student

Judge Advocate General, while acknowledging that injustice existed, also declined to encroach on the long established judicial rights of the field commander.

Davis, a traditionalist in his approach to military law, was often critical of both the acts of American soldiers in the Philippines and of the decisions of the military courts there. When Americans were accused of using various irregular methods during interrogation of captured insurgents, General Davis ruled the use of torture to force confessions or assistance from suspects "to be in violation of the rules of international law as embodied in paragraph 16, General Orders, No. 100, Adjutant General's office, 1863."[8] However, when sympathetic court-martial boards let defendants off with no more than a symbolic slap on the wrist, the Judge Advocate General, while remarking that "the sentence imposed . . . was inadequate to the offense established by the testimony of the witnesses and the admission of the accused," realistically noted that "I am of the opinion that the court upon reconsideration would adhere to the sentence originally imposed, and it is therefore

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of Root's career, Richard W. Leopold, points out that:

> "Root was slow--too slow to please most reformers and humanitarians at home--to investigate cases pf cruelty. He was much quicker to defend the honor of the American soldier waging an unprecedented and exasperating war in the tropics, and for the most part his defense was justified. For it, he was loved by the service as few civilian secretaries have ever been loved" (Elihu Root and the Conservative Tradition [Boston: Little, Brown & Co., 1954], p. 35).

[8] Letter from the Secretary of War, p. 38.

recommended that the sentence be confirmed and carried into effect."[9] Consistently, General Davis took the attitude that as Judge Advocate General he was only an advisor who could neither interfere with the the decisions of the courts nor take further action once the convening authority had acted.

A long-standing justification of the need for judicial control by military men, rather than civilians, was that only trained officers could understand the basis and background of charges under the military system. Davis's predecessor, Brigadier General Lieber, wrote that "on questions of unwritten military law or usage . . . military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law."[10] Trials in the Philippines graphically demonstrated that the members of the boards not only understood the charges, but that they allowed themselves to be swayed by the existing conditions, rather than the legalities of the situation. Officers sitting on court-martial boards, prejudiced by their own frustrating experiences of fighting an enemy who did not abide by the rules of war, either

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[9]Ibid., pp. 28 (quotations), 78.

[10]Lieber, "Independence," p. 282. More than fifty years later the same excuse was being given by those associated with military justice. A former justice of the United States Court of Military Appeals, explaining why the administration of the system was in military hands, wrote that "there is a higher probability that the persons who hear the case will understand and be responsive to the problems involved." He also claimed that a military court was "better able to grapple with the problem of imposing a sentence." Robinson O. Everett, Military Justice in the Armed Forces of the United States (Harrisburg, Pa.: Military Service Publishing, 1956), p. 5.

failed to convict defendants or awarded only the lightest administrative punishments when the charges involved crimes allegedly perpetrated against Filipino insurgents and other uncooperative natives.

A classic example was the trial of Brigadier General Jacob H. Smith, commander of the Sixth Separate Brigade, Division of the Philippines, who was charged with ordering a subordinate to "take no prisoners" and to turn the interior of Samar Island into "a howling wilderness." General Smith also allegedly designated the age of males who were capable of bearing arms, and therefore who should be killed, as ten years of age or older. While finding Smith guilty, the court decided that since his order had not been obeyed and thus had not caused any deaths, he should be sentenced only to "be admonished by the reviewing authority."[11]

In another trial, Major Edwin F. Glenn, Fifth Infantry Regiment, was suspended from command for one month and ordered to forfeit fifty dollars when convicted of torturing the civilian presidente of the town of Igbarras by the punishment known as the "water cure."[12] Another officer, who admitted torturing three native

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[11]General Orders, No. 80, Headquarters of the Army, Adjutant General's office, Washington, D.C., 16 July 1902, reprinted in Letter from the Secretary of War, p. 2.

[12]General Orders, No. 87, para. 1, Headquarters of the Army, Adjutant General's office, Washington, D.C., 26 July 1902, reprinted in ibid., p. 17. The "water cure" involved directing a stream of water into the victim's mouth in such a way that he had to swallow the water or drown. After the victim had consumed a large amount of water, he was forced to vomit. The process was repeated until the

Catholic priests, received the same superficial sentence.[13] In more serious cases, a lieutenant of the Philippine Scouts, charged with ordering a pueblo presidente and two other civilians shot to death, and a Marine major on detached service with the army, who was accused of the murder of eleven men on the Island of Samar, were both found not guilty after what appeared to be extremely unenergetic prosecutions.[14]

William Howard Taft, head of a commission sent to investigate conditions in the Philippines, wrote the Secretary of War that the military commander, Major General Arthur MacArthur, was "strongly in favor of punishing military officers and men who have been guilty of cruelties to the natives, but he finds it difficult to control the court martials [sic] which sit in such cases because of the natural resentment against the natives' method of warfare."[15] Yet, even when the court imposed a more equitable sentence, higher authorities sometimes took actions which mitigated the punishment and seemed to imply tacit approval of the more cursory penalties. Widely publicized

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prisoner complied with his captor's demands. Refinements to this torture included the use of water under high pressure and striking the victim in the abdomen while it was distended by the water. This often resulted in intestinal damage and, occasionally, even was fatal.

[13]General Orders, No. 87, para. 2, Headquarters of the Army, Adjutant General's office, Washington, D.C., 26 July 1902, reprinted in ibid., p. 18.

[14]General Orders, No. 87, para. 3, Headquarters of the Army, Adjutant General's office, Washington, D.C., 26 July 1902, reprinted in ibid., pp. 19-20.

[15]Taft to Root, 18 August 1900, quoted in Jessup, Elihu Root, p. 340.

in both military and civilian circles was the case of First Lieutenant Preston Brown, Second Infantry Regiment. Lieutenant Brown, who had originally been charged with murdering a prisoner of war, was convicted in July 1901 on a reduced charge of manslaughter. He was sentenced to dismissal from the army and confinement at hard labor for five years. Six months later, President Roosevelt rescinded the dismissal, changing the sentence to a reduction of only thirty files on the promotion list of First Lieutenants of Infantry and forteiture of one-half pay for nine months.[16] Direct presidential involvement was the exception, however, rather than the rule. Normally, the military was left to its own devices.

The actions of military officials in the Philippines made it obvious that the system of military justice was neither disinterested nor impartial in its administration. It also appeared that military law did not provide administrative controls adequate to properly correct gross injustices or judicial deviations when they occurred. Unfortunately, although the legislative branch of the government expressed some interest in the problems of military judicial administration, its inquiry become involved with the separate issues of American imperilaism and expansion. Subsequent political squabbles and rhetoric overwhelmed any hope of substansive legislative correction of existing military judicial problems.

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[16]Court-Martial 26102, U.S. v. Preston Brown, 1st Lt., Second Infantry, July 1901; Letter from President Roosevelt, White House, 27 January 1902; both reprinted in Letter from the Secretary of War, pp. 48-49.

With less publicity, but no less intensity, military theorists also debated the role of the military legal program in modern national armies. The central topic in the discussions at the turn of the century was the issue of professionalism of the system of military justice and trials. General William T. Sherman, briefly a lawyer in civil life, had expressed the military point of view in 1879 when he told a Congressional committee: "[I]t will be a grave error if . . . we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence." He went on to say that "all the traditions of civil lawyers are antagonistic to this vital principle [the obligation to obey one man]."[17] Judge Advocate General Davis, in his earlier treatise on military law, not only accepted the Supreme Court's position that military and civil power "are entirely independent of each other,"[18] but went even further in concluding that "courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power. They are

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[17]Quoted in Hearings on H.R. 2498 Before a Spec. Subcomm. of the House Committee on Armed Forces, 81st Cong., 1st sess. 780 (1949), in Edward F. Sherman, "Justice in the Military," in Conscience and Command: Justice and Discipline in the Military, ed. James Finn (New York: Random House, 1971), pp. 23-24. General Sherman's brief law career was in Leavenworth, Kansas, during 1858-59. He was admitted to the bar "on the grounds of general intelligence" and practiced law with his two brothers-in-law, Hugh and Thomas Ewing, for about one year. Willima T. Sherman, Memoirs of General William T. Sherman (Bloomington: Indiana University Press, 1957; reprint ed., Westport, Conn.: Greenwood Press, 1972), pp. 140-42.

[18]Dynes v. Hoover, p. 838.

creatures of orders. . . ."[19] It was apparent that military leaders did not consider the military and civil systems of justice to be compatible.

Critics, on the other hand, claimed that a lifelong soldier was no more qualified to pass on fine legal distinctions than a lawyer was suited to validate "the construction of Upton's tactics."[20] They also questioned whether a military officer, even if trained in the legal profession, could fulfill the myriad duties required by the court-martial. The West Point military law textbook specified that the judge advocate of a court-martial occupied "a threefold position --prosecutor, clerk to the court, and legal advisor to the court."[21] Even when, in general courts-martial, a separate court clerk was appointed to perform part of these duties, critics still expressed doubt as to the judge advocate's ability to act with equal effectiveness as counsel and prosecutor on one hand while performing as advisor on points of law, thus effectively acting as judge, on the other hand. One commentator sarcastically noted that in the practice of law few have shown "equal brilliancy" from both the bench and the bar.[22]

Under the leadership of General Guido N. Lieber, a graduate of the Harvard Law School, a determined effort had been made to

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[19]Davis, Military Law, p. 15.

[20]Cranston, "Court-Martial System," pp. 248-49.

[21]Ives, Treatise, p. vi.

[22]Cranston, "Court-Martial System," p. 249.

secure qualified officers for the small legal branch of the army. This effort, however, was limited to encouraging military officers to study law, rather than incorporation of trained lawyers into the military system. Further reforms of the legal program were not encouraged, and suggestions that a civil official act as trial judge and rule on points of law while the military board continue to act as a jury were met with icy silence.[23] Yet, in adopting this attitude, the army was ignoring the advances made by other national systems, some of which American military men proudly claimed as precursors of the American program.

Both the German and British armies had incorporated professional legal officials into their systems by 1900; the German Army had a civil judge sitting as a member of the board of officers for courts-martial, while the British used a trained prosecutor, independent of the judge advocate, as a legal advisor to the court. In addition, military prosecutors in Germany were "equipped for their duties by long studies at the university and a certain amount of practice before the civil tribunals." Austria followed the German pattern, forming its military law experts into "a special legal corps, composed of seventy members." The Russian legal system had gone even further than any of the other European powers. Russian military tribunals were "standing bodies composed of nine members,"

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[23]David A. Lockmiller, Enoch H. Crowder: Soldier, Lawyer and Statesman, The University of Missouri Studies, vol. 27 (Columbia: University of Missouri Studies, 1955), p. 64; Cranston, "Court-Martial System," p. 251.

three of which were judicial officials appointed by the Czar, while the remainder were active duty officers of the army.[24]

American critics also could find a similar example in the United States, if they were willing to examine historical archives. During the Civil War the Confederacy abolished general courts-martial, except for the trial of officers above the grade of colonel. (Later the statute was amended to exclude only lieutenant generals and above.) In place of the familiar court-martial board, the Southern Army had permanent military courts composed of three judges with the rank of Colonel of Cavalry who were appointed to office for the duration of the war. Each court had a permanently assigned judge advocate with the rank of a Captain of Cavalry. These courts were also authorized to appoint, at their pleasure, a full-time provost marshal and a court clerk. One of these permanent courts was attached to each army corps in the field. Later in the war, additional courts were created for each military department, each state within a military department, and for any division of cavalry in the field. these standing judicial bodies, traveling around their area of responsibility conducting trials as needed, provided an element of continuity and consistency that was missing from the system of the Union Army.[25] The defeat of the Confederacy also meant the end of

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[24]Wilbur Larremore, "American Courts-Martial," North American Review 177 (1903):609-10, 612-13; Francis H. Jeune, "Courts Martial in England and America," North American Review 168 (1899):604; "French Military Justice," Nation 69 (1899):349 (quotations).

[25]Digest of the Military and Naval Laws of the Confederate

this far-reaching improvement in military judicial practice, while the victors continued their impermanent, unprofessional court system.

Fortunately for the military hierarchy which opposed legal professionalization, prominent support was available for its position. Foremost, and most influential, was the Right Honorable Sir Francis H. Jeune, Judge Advocate General of the British Army and a highly respected member of the legal profession. In an article in an American magazine, Jeune strongly disagreed with the need for the trial judge advocate to be trained in law since "the questions that come before Courts Martial very seldom present any such complexity of law. . . ." Accustomed to the small, professional regular officer corps of the British Army, Jeune claimed that military tribunals consisted "in every case" of officers who had "substantial training in the law of court martial" and the "best teaching of law," the teaching by witnessing or participating in previous courts-martial.[26]

Ranking American officers, cheered by Jeune's support, were jarred by a sour note, however, when the British officer's article mentioned that "in Britain serious offenses against the ordinary law are transferred to the civil courts, both in the United Kingdom and

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States (Columbia: n.p., 1864), p. 117, cited in "Military and Martial Law," North American Review 102 (1866):353; "An Act of the Congress of the "Confederate States of America,' entitled, 'An Act to organize Military Courts to attend the Army of the Confederate States in the Field and to define the Powers of said Courts,' 9 October 1862," and subsequent amending acts dated 1 May 1863, 16 February 1864, and 17 February 1864, as reprinted in Winthrop, Law and Precedents, pp. 1006-7.

[26]Jeune, "Courts Martial," pp. 603-4.

whenever practicable elsewhere in the Queen's Dominions." A further shock was the almost sotto voce admission that there was a "tendency to convict a prisoner on scanty evidence, if the offense had become rife."[27] Jeune's point, that a desire to make an example might outweigh a lack of evidence, would be repeatedly demonstrated in the trials of British Army deserters and cowards during World War I; however, a more striking illustration would occur earlier than that in the American Army during what became known as the "Brownsville Affair."[28]

During the summer of 1906 the army, in an extremely unpopular move with the citizens of the border town of Brownsville, Texas, replaced the white garrison troops of the Twenty-sixth Infantry with a battalion of the Twenty-fifth Infantry, one of the four black regiments in the army. On the night of 13 August a burst of gunfire from an unknown group of men wounded a police lieutenant and killed a bartender in a section of town near the military post. Resentful citizens immediately blamed the Negro soldiers and demanded that

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[27]Ibid., pp. 603 (second quotation), 605 (first quotation).

[28]An extremely readable study of British military justice which concentrates on death sentences during World War I is William Moore, The Thin Yellow Line (New York: St. Martin's Press, 1975); The best and most complete studies of the occurrences at Brownsville, and subsequent actions, are: John D. Weaver, The Brownsville Raid (New York: W. W. Norton, 1970) and Ann J. Lane, The Brownsville Affair: National Crisis and Black Reaction (Port Washington, N.Y.: National University Publications, Kennikat Press, 1971). The Weaver book suffers from a rather awkward and hard to use method of footnote references. The Lane book is especially useful for viewing the reaction of the black community towards both the President and the War Department.

they be punished, while Texas politicians went to the extreme of introducing bills in Congress which would prohibit Negroes from serving in the armed forces.[29] As a result of the subsequent actions by both military and civil authorities, military justice suffered one of its worst setbacks of the twentieth century.

Following a very brief investigation by officers of the battalion, the acting Secretary of War, Adjutant General Fred C. Ainsworth (Secretary of War Taft was on holiday in Canada), ordered the removal of the Negro soldiers to the isolated post at Fort Reno, Oklahoma, where they would be confined to post pending further investigation. Contrary to the legal requirement of the Articles of War requiring a speedy trial or release from arrest, twelve members of the battalion were transferred to the stockade at Fort Sam Houston, San Antonio, Texas, where they were left behind bars for over a month on orders from Washington, D.C. Originally, these twelve men had been arrested in Brownsville on the basis of civil bench warrants issued by District Judge Stanley Welch. When the judge later discovered that he had been misled concerning the validity of the evidence against these men, he abrogated the warrants. However, Washington authorities, instead of releasing the men since civil

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[29]Weaver, Brownsville, pp. 21-24, 72, 75-76; San Antonio Express, 15 August 1906, p. 1; U.S., Congress, House, A Bill to Discontinue the Enlistment and Appointment of Negroes in the Army of the United States, H.R. 20989, and A Bill to Repeal Sections 1104 and 1108, Revised Statutes, Edition of 1878, H.R. 20994, 59th Cong., 2d sess., 1906. Although these bills did not pass, similar bills to reduce or eliminate Negro service in the military forces were introduced in the next five consecutive Congresses.

charges were no longer pending against them, ordered the commander of the Department of Texas to "cause military charges to be formally preferred against said soldiers."[30] Apparently the army felt that an accusation by civil authorities, even if unfounded, was a fair indication of a criminal act. Neither the Departmental Inspector General, Lieutenant Colonel L. A. Lovering, nor the Commander of the Department of Texas, Major General W. S. McCaskey, were aware of any evidence associating these men with the affair in Brownsville.[31]

Superficial investigations of the affair by the Inspector General of the Army, Brigadier General Ernest A. Garlington, and several other officers, failed either to identify the guilty individuals or to disclose positive evidence that any members of the Twenty-fifth had been involved in the shootings.[32] The frustrated

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[30]Weaver, Brownsville, pp. 83, 86; Summary Discharge or Mustering Out of Regiments or Companies. Message from the President of the United States, Transmitting a Report from the Secretary of War, Together with Several Documents, Including a Letter of General Nettleton, and Memoranda as to Precedents for the Summary Discharge or Mustering Out of Regiments or Companies, S. Doc. 155, 59th Cong., 2d sess., 1907, published in S. Doc. 402, pt. 1, 60th Cong., 1st sess., 1908, p. 57, quoted in ibid., p. 90; Article 70, Articles of War of 1874, stated that "no soldier or officer put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled." Winthrop interpreted this article as limiting the usual time of confinement prior to trial, except under unusual circumstances such as extreme isolation or the exigencies of war. Law and Precedents, pp. 125-26. It was obvious that when Winthrop wrote this section, he assumed that under normal circumstances a commander would be able to decide whether to court-martial a soldier or return him to duty within a period of less than eight days after the assumed crime.

[31]Weaver, Brownsville, pp. 78, 88, 90-91.

[32]General Garlington only interviewed about thirty of the

Inspector General was unable to determine what actually occurred in Brownsville. The evidence given by civilians claiming to be witnesses was confused, contradictory, and often patently self-serving. At the same time, despite official threats, degrading treatment, and highly questionable restrictions of their freedom, the General was unable to force any of the Negro soldiers to admit participation in, or knowledge of, the crime. As he later admitted to a Congressional investigating committee, General Garlington relied on his southern-bred belief that Negroes generally were not truthful to determine that the taciturnity of the soldiers was not because of their innocence, but was attributable to a deliberate "conspiracy of silence" by which the entire battalion hoped to shield the guilty parties.[33]

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167 suspected men that he recommended for dismissal. Reportedly, the General was not interested in hearing any proof of their innocence. Major A. P. Blockson, who made the other major investigation for the army, stated that he talked to "twenty-five or thirty" of the men. Weaver, Brownsville, pp. 108, 157. Senator Joseph B. Foraker noted that the early investigations "all proceeded on the supposition that the soldiers were guilty." "A Review of the Testimony in the Brownsville Investigation," North American Review 187 (1908):554.

[33]U.S., Congress, Senate, Hearings Before the Committee on Military Affairs, S. Doc. 402, 60th Cong., 1st sess., 1908, pt. 6, pp. 2723 (quotation), 2747, quoted in Weaver, Brownsville, pp. 94, 96; A pro-administration article stated that "the fact that investigations were not conducted according to judicial usages has no bearing on the case at all." "Senator Foraker on Brownsville," Outlook 88 (1908):896. The editors seemed to feel that injustices or omissions during the investigation would have no influence on military authorities. Unfortunately, they did not realize that the military trial system was structured to the idea that an individual was not brought to trial unless the pre-trial investigation had almost definitely established that the individual had committed the

The paucity of evidence, however, precluded any possibility of obtaining a conviction if the army attempted to court-martial the Negro soldiers for the events at Brownsville, particularly after the obviously biased Cameron County Grand Jury "found no testimony upon which to base an indictment of anybody."[34] Instead, General Garlington submitted a report on 22 October in which he recommended that the President "dismiss without honor" all enlisted members of Companies B, C, and D who were present at Fort Brown on 13 August 1906 as a "forceful lesson" to the rest of the army and Congress that attacks on civilians by soldiers would not be tolerated.[35] Five weeks later President Theodore Roosevelt ordered the 167 men of the First Battalion, Twenty-fifth Infantry, "to be discharged without honor" under the authority of the Fourth Article of War, a move "unprecedented in the history of the Army."[36]

The San Antonio Express noted that "as evidence of his intention to be fair to the colored troops, the President has accompanied this action by an order which may amount to the court-martial of a white army officer of high grade, who was charged with

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crime. This made the need for a thorough, impartial investigation doubly important.

[34]Foraker, "Review," p. 553.

[35]"Report of Brig. Gen. Ernest A. Garlington, Inspector General, United States Army, on October 22, 1906 to the War Department on investigation made at Fort Sam Houston, Tex. and Fort Reno, Okla.," reprinted in John M. Carroll, ed., The Black Military Experience in the American West (New York: Liveright, 1971), pp. 471-76.

[36]San Antonio Express, 7 November 1906, p. 1.

having cast slurs upon the colored troops."[37] An editorial in Outlook expressed the conviction that the dismissal of the Negro soldiers served notice to all non-commissioned officers that they were responsible for keeping informed about what was happening among their men. A later anonymous article in the same journal claimed that the battalion had to be punished "to preserve the morale of the army, [and] to enable officers to maintain discipline."[38] Few observers noted that although many of these men had long and honorable careers in the service of their country, they were not given even the minimum opportunity for a hearing or redress before a court-martial, as required by Article 30 of the Articles of War of 1874.[39]

When it was pointed out that it was illegal for any one individual, even the President, to charge, try, and convict anyone under the Articles of War, both Roosevelt and his Secretary of War, Taft, denied that this discharge was in any way a punishment. In

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[37]Ibid. The white officer, Colonel William L. Pitcher, Twenty-seventh Infantry, had allegedly stated that he never liked Negro soldiers and "the further away from me they are kept the better it pleases me." Colonel Pitcher later denied making the insulting remark. Washington Post, 24 November 1906, p. 1. The San Antonio editorial failed to explain how a possible court-martial (which never occurred) would evidence "fairness" when compared to the dismissal of 167 black soldiers without proof of their guilt.

[38]"Drastic But Necessary Discipline," Outlook 84 (1906): 645-46; "A Soldier's View," Outlook 85 (1907):283.

[39]American Articles of War of 1874, reprinted in Winthrop, Law and Precedents, p. 988. Winthrop considered this article to be "of comparatively slight value to the code" and pointed out that it had been seldom used as a remedial statute. Ibid., pp. 601, 606.

the Annual Report of the Secretary of War, Taft characterized the "discharge without honor" as "merely the ending of a contract."[40] The pro-administration Outlook magazine would later claim that "the discharge of the negro [sic] soldiers without honor was not an attempt to administer justice . . . it was dismissal of untrusted servants."[41] Ironically, both the judicial history of American courts-martial and the penal options available under the Articles of War indicated that next to the death sentence one of the most severe penalties which could be meted out to a commissioned officer was dismissal from the service.[42]

Dual punishment standards became even more obvious during testimony before Congressional investigating committees in 1907 when it was revealed that some forty to fifty members of the Fourteenth Artillery Regiment had attacked and shot up the jail at Athens, Ohio, in 1904. During this precursor to the Brownsville affair, one civil official was killed and four police officers were wounded. When charges were brought against the artillerymen, Secretary Taft felt that the accused soldiers were rather like wards of the government and, by direction of the War Department,

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[40]San Antonio Express, 20 December 1906, p. 5; "Secretary Taft on the Brownsville Affair," Outlook 84 (1906):897-98 (quotations).

[41]"Senator Foraker on Brownsville," p. 896.

[42]Under "Punishments Legal and Appropriate for Officers," Winthrop listed "Dismissal or Cashiering" first. "Death" was first under the category "For Both Officers and Enlisted Men." Law and Precedents, pp. 405, 417.

representatives from both the army and the United States District Attorney's office were rushed to Athens to help defend and protect the rights of these men. As a result, one soldier was convicted of riot and sent to prison, and another soldier was given a fine. No one was tried for the murder or assault on the officers.[43] The apparent difference between the responses to the events at Athens and at Brownsville may be explained by the fact that the accused members of the Fourteenth Artillery were white, rather than black.

A final anomaly came when two of the five officers of the dismissed black battalion were ordered court-martialed for failing to maintain discipline among the men of the battalion. Irrespective of either the validity of the charge or the outcome of the trial, these white officers would at least have their day in court, while the black soldiers were denied both due process and equal protection of the law. One of the major attractions of military life for Afro-Americans in the nineteenth century had been that military justice, though harsh, was reasonably racially unbiased. With the dismissal of the Brownsville soldiers, justice in the armed forces was proven to suffer from the same double standard that Negroes faced in the civil community.[44]

The Brownsville affair, its results, and the subsequent

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[43] 59 Cong. Rec. 1035 (1907) (remarks of Senator Tillman). See also Senate Doc. 402, pt. 1, pp. 414-18.

[44] San Antonio Express, 15 December 1906, p. 1; Marvin E. Fletcher, "The Negro Soldier and the United States Army, 1891-1917" (Ph.D. dissertation, University of Wisconsin, 1968), pp. 121-29.

drawn-out Congressional investigations and hearings were widely publicized, but this publicity failed to identify the shortcomings in the system of military justice. Instead, attention focused on the issue of whether the army should have all-black regiments; and the investigations deteriorated into a trial of political wills between President Roosevelt and his chief adversary, Senator Joseph B. Foraker of Ohio. Although this period of American history saw the rise of journalistic investigation and exposé, the area of military law was apparently sacrosanct. From 1903 until 1910, with the exception of articles on the Brownsville affair, not one article on military law or courts-martial appeared in any major American periodical, and only a single listing is to be found under the category of "martial law."[45] Behind the scenes a different story developed as the army threw off the remains of the out-dated "Bureau Chief" system and began to look toward reform and modernization in all branches, including the Judge Advocate's Corps.

The most significant event effecting the military legal department in the first half of the twentieth century took place on 11 February 1911 with the appointment of a brilliant, ambitious officer, Enoch H. Crowder, as Judge Advocate General of the Army. Crowder, a self-taught lawyer who later received a law degree from the University of Missouri, had been fortunate enough to serve in a

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[45]Ann L. Guthrie, ed., Reader's Guide to Periodical Literature (Cummulated), 1904-1910, vol. 2 (Minneapolis: H. W. Wilson, 1910), s.v. "Court-Martial," "Martial Law," "Military Law."

series of assignments which put him in intimate contact with men who would be the leading political and military figures of the 1900-1920 period. One of the results was that he far out-stripped his West Point classmates in the promotion race. The new Judge Advocate General was not just another political appointee, however, but an officer widely read in the fields of criminology, penology, and punishment who had traveled in Europe observing at first hand the results of continental prison reform and military jurisprudence.[46]

General Crowder had served as Deputy Judge Advocate General during the early 1900s where he became aware that under the existing system "sentences were harsh, often including loss of citizenship rights, and in the prisons the watchword was 'punishment.'"[47] During the period since Brownsville between 5 and 7 percent of the average enlisted strength of the army faced general courts-martial annually, with a conviction rate exceeding 90 percent. Summary, garrison, and regimental courts-martial during 1907 to 1913 averaged approximately 35,000 per year. Military prisoners suffered under a harsh confinement system which made no attempt to rehabilitate them or to separate

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[46]Lockmiller, Crowder, pp. 131-32, 136. Lockmiller's book is the only comprehensive work on the life of a man who was internationally recognized for his work on election laws in Cuba and with the courts in the Philippines, and whose formulation and administration of World War I Selective Service laws was so outstanding that they were the basis for the system used in World War II. Crowder, who graduated thirty-first in the fifty-four man West Point class of 1881, was jumped in rank over some 800 senior officers when he was promoted to major in 1895 and was the ranking man in his class from that point on.

[47]Ibid., pp. 87, 134 (quotation).

them from common law misdemeanants and felons.[48]

From the beginning, General Crowder dedicated his term in office to reform and improvement of the legal program. In 1911, on advice from Crowder, President Taft issued an executive order which made punishment for desertion more uniform and allowed the reviewing authority to take into consideration mitigating circumstances in the cases of inexperienced soldiers who deserted early in their enlistment. The order also permitted consideration to be given for voluntary surrender from desertion. At the urging of General Crowder, Congress later passed a law on 22 August 1912 which exempted deserters in peacetime from losing their citizenship rights. The law additionally authorized the Secretary of War to allow re-enlistment of selected former deserters.[49]

Another problem faced by the new Judge Advocate General was the lack of legal training available for officers in the military. Crowder believed that specialized training was just as essential to judge advocates as to any other branch of the army. To solve this problem, Crowder conceived of a plan in 1914 for detailing young officers to specified law schools for education at government expense. He also initiated a program to insure that the opinions of

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[48]Reports of the Judge Advocate General, U.S. Army, to the Secretary of War, 1911-1913, passim, cited in Ibid., pp. 134-35. In 1913 the special courts-martial replaced the garrison and regimental courts and had jurisdiction over all persons subject to military law, other than officers, for non-capital offenses under the Articles of War.

[49]Ibid., pp. 135, 137.

the Judge Advocate General were published and circulated. Prior to 1912, these opinions had appeared at infrequent intervals. Many were not published at all. While opinions of the Judge Advocate General were not binding on the decisions of court-martial boards or reviewing authorities, they did provide general guidance and learned views on obscure or controversial points of military law. Under Crowder's direction, Captain Charles R. Howland published a digest in 1912 of the more important opinions given since 1862. Thereafter, advance reports of the the Judge Advocate's opinions were distributed on a monthly basis. Permanent digests also were issued periodically. This practice became standard for Crowder's successors, creating a valuable compendium of military legal judgments.[50]

More important was Crowder's work with military prison reform. On his recommendation, a General Order issued by the Chief of Staff separated the more serious from the lessor offenders in the military prisons. The new order also prohibited the use of the word "convicts" in referring to military prisoners. New programs were instituted allowing for the restoration to duty of deserving men, copying a practice used in the British military penal system since the late 1800s. Special disciplinary units for military training and instruction of good conduct prisoners under sentence for purely military offenses were set up at Fort Leavenworth, Fort Jay, and Alcatraz. These prisoners were put into military uniform, rather than standard prison garb. In addition, they were subjected to a

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[50]Ibid., pp. 146-48; Digest of Opinions: 1912, foreword.

strict military atmosphere which allowed them to regain their self-respect.[51]

These reforms were codified on 4 March 1915 when Congress passed a bill converting the United States Military Prison to the United States Disciplinary Barracks, giving legislative approval to the special disciplinary units, and authorizing the parole of good conduct prisoners who had served at least half their sentence of confinement. Congress had earlier authorized the suspension of dishonorable discharge sentences and the War Department instructed commanding generals to use this authority whenever there was a probability of saving a soldier for honorable service.[52] General Crowder was instrumental in getting many of these changes through Congress and the War Department; however, he was not as successful in his early attempts to revise the Articles of War.

Despite his initiation of numerous reforms, Crowder was a conservative in his military attitude. The Chief Judge Advocate

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[51]General Order 172, Headquarters of the Army, Adjutant General's office, 29 December 1911, cited in U.S., War Department, Report of the Judge Advocate General, U.S. Army, to the Secretary of War, 1912, p. 10; Arthur Griffiths, "Military Crime and Its Treatment," Fortnightly Review 76 (1901):868; Lockmiller, Crowder, pp. 134, 137. The Act of 3 March 1873, c. 249, first provided for the establishment of a Military Prison at Fort Leavenworth, Kansas, under the direction of the Secretary of War. In 1895 supervision of Military Prisons was transferred from the War Department to the Department of Justice. Congress placed the facilities under the control of the Judge Advocate General's office from 1913 to 1915, when they were transferred to the Adjutant General's Department. Winthrop, Law and Precedents, p. 36 n. 70; Lockmiller, Crowder, p. 134.

[52]Ibid., p. 137.

still believed in West Point's philosophy that the "great fundamental principle of military discipline and efficiency . . . is . . . expressed in the military maxim 'Obedience to orders is the highest military virtue; disobedience of orders the gravest military crime.'"[53] Thus, he planned no major changes in the orientation of the Articles as a system of discipline; however, they had not been revised since 1874 and Crowder was convinced that "the code was unscientific in arrangement and it contained provisions which were obsolete or ill adapted to twentieth century service conditions."[54] Legislation to modernize and update the Articles of War was one of the first tasks Crowder set for the staff of the Judge Advocate's office. By April 1912 the proposed revision was ready for Congress.

Although hearings were held in both Houses of Congress on the revision bills, neither bill was reported out for consideration; politicians were more interested in the elections of 1912 than in modernization of military law. In 1913 a couple of minor articles were changed in separate actions, but the major revision again failed to gain Congressional approval. The following two years all revision efforts died in committee or subcommittee.[55] Passage of the reorganized Articles of War had to wait until public and political interest in military justice was awakened by the pen of a crusading

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[53]Commencement address given at Columbia University, 1919, by Major General Enoch H. Crowder, quoted in ibid., p. 28.

[54]Ibid., p. 138.

[55]Ibid.

writer, Charles Johnson Post.

In the spring of 1914, Post wrote a series of articles in the Harper's Weekly magazine highly critical of inequities in the penalties awarded in courts-martial. He also criticized the excessive sentences given for relatively minor offenses.[56] Post blamed the severity of military justice for a rapidly rising rate of desertions, citing statistics showing that in comparison to enlistments desertions had increased from 7 to 17 percent over the last three years. The writer pointed out that during the past ten years the army had suffered 46,000 desertions, in spite of the fact that the army was able to be highly selective in accepting new recruits since there were five to six times as many applicants as vacancies. Post also gave detailed desertion statistics for specific units, including the elite Second Cavalry Regiment which lost over 16 percent of its members in 1913 alone.[57]

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[56]Post's seven articles in Harper's Weekly were: "The Honor of the Army," 21, 28 February, 7 March 1914; "Army-Made Criminals," 14, 21 March 1914; and "Towers of Steel," 27 June, 4 July 1914. A similar article in 1901 which illustrated punishment leniency for officers and extreme severity for enlisted men apparently caused little public reaction because the story was based on "history" rather than "current" information. See A. Maurice Low, "The Lash and the Branding Iron," Harper's Weekly 45 (1901):1076-77.

[57]Post, "Honor," 21 February 1914, pp. 14, 18-19; 28 February 1914, p. 11. As an example of the army's ability to pick and chose recruits, the article cited the 1912 statistics which revealed that almost 150,000 enlistment applications were received, but only 26,000 were accepted. Post did not differentiate between desertions and absences without leave in his articles. This was hardly surprising because the difference in the two categories was a question of the mental intent of the individual as to whether he planned to voluntarily return to duty. This question could only be answered by the decision

Having gained the reader's attention, Post proceeded to document the inequities in the justice system which were driving these men out of service, citing numerous cases from the court-martial files in Washington, D.C. His main theme was that "a court-martial can, and does, condone crimes and outrages in officers that saves them from justice: it can, and does, heap oppressions and even illegal sentences upon the enlisted men."[58] As an example, he noted that a private guilty of "appropriating for his own use" $27 in Philippine currency ($14 United States) was given a dishonorable discharge, forfeiture of all pay and allowances, and sentenced to one year at hard labor; while in another case, a veteran of two enlistments with excellent conduct ratings was awarded a dishonorable discharge, total forfeiture, and three years hard labor for stealing a total of $160. In comparison, when Captain Augustus H. Bishop, First Infantry, was found guilty of embezzling $135 from the company fund of the unit he commanded, he was only dismissed from service.[59]

Post was particularly incensed by the contrast between two cases of absence from duty. In one instance, a lieutenant was

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of a court after the individual had been returned to military custody. Post obtained his statistics from official army sources. The extreme jump in the desertion rate from 9 percent in 1912 to 17 percent in 1913 may be partly accounted for by the Congressional relaxation of some of the penalties for this offense in 1912. See p. 49 above.

[58]Ibid., 21 February 1914, p. 14.

[59]Ibid., 21 February 1914, p. 15 (quotation), 18.

"absent without leave" for five days and then reported drunk and unfit for duty. The lieutenant received a reprimand and was restricted to post. In the other instance, a private of the Third Battalion of Engineers missed both a retreat and a reveille formation. He was also charged with breach of arrest. The private was sentenced to a dishonorable discharge, total forfeiture, and two years at hard labor. The Harper's Weekly article pointed out that the latter case also proved that court-martial boards did not obey regulations themselves since the current order outlining permissible punishments specified the maximum penalty for "absent from reveille" as forfeiture of one dollar, for "absent from retreat" as forfeiture of one dollar, and for "breach of arrest" as imprisonment for one month and forfeiture of ten dollars.[60]

To show how "a single act may be—and is—split into its component parts and each part become a separtely punishable offense,"[61] the reporter cited the case of a soldier from the Fifteenth Cavalry who was confined at Fort Jay, New York. While on a detail, the soldier attempted to escape by swimming, but finding the current too strong, he returned to the detail. Having been seen returning, the prisoner was charged with desertion in accordance

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[60]Ibid., 28 February 1914, p. 11 (quotations); 7 March 1914, p. 21. See also, "Executive Order, Prescribing Limits of Punishment by Sentence of Court-Martial, In Cases of Enlisted Men, Under the Authority of the Act of September 27, 1890," General Orders, No. 16, Adjutant General's office, 25 March 1895, reprinted in Winthrop, Law and Precedents, pp. 1002-3.

[61]Post, "Honor," 21 February 1914, p. 14.

with the Forty-seventh Article of War for leaving the island. He was also charged with "conduct to the prejudice of good order and military discipline," a violation of the Sixty-second Article of War, for escaping from the guard. Obviously, both charges pertained to the same act, and were interdependent, but the subsequent court-martial sentenced the young attempted escapee to two years imprisonment at hard labor for each charge.[62]

By the time Post went back to the court-martial files for more data for his later articles, access to the records had been declared restricted and he was refused further use of them by the Judge Advocate General, Brigadier General Crowder. Major General Leonard Wood, the Chief of Staff of the Army, and Secretary of War Henry Stimson also refused Post when he appealed Crowder's decision to them.[63] These officials had acted too late, however. Post's articles had caused a stir among the civilian population, especially since war clouds were gathering over Europe; and Americans were beginning to suspect that they might again find themselves subject

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[62]Post, "Criminals," 21 March 1914, p. 23.

[63]Ibid., 14 March 1914, p. 21. The army later established a policy, still in effect, prohibiting access to court-martial records and data for all cases less than fifty years old. This policy was ostensively for the protection of the right of privacy of the individuals involved, however, it has also served to bar scholarly research and study of the actual practice of the system of military justice. See cover latters, United States v. Sergeant William C. Nesbit, et al., General Courts Martial Case 109045, Records of the Judge Advocate General, General Courts Martial, 1812-1938, Box 5384, Record Group 153, Federal Records Center, Suitland, Maryland.

to this system of "injustice."

Post's charges also seemed to be confirmed by the work of another author, Sydney Brooks, who cited the same statistics on desertions and pointed out that only 12 percent of the enlisted men re-enlisted at the end of their first three years in service. As reasons for the high desertion and low re-enlistment rates, Brooks explained that "discipline is stern, and the punishments meted out by courts-martial are often almost archaic in their severity." He also claimed that the army was regarded as "a 'reform school' upon a grand scale."[64]

In response to the Post and Brooks exposes, and to other pressures, the War Department once more submitted the much rejected revision to the Articles of War to the legislative branch. This time, after much debate and political wrangling, Congress finally adopted the revision as a part of the National Defense Act of 1916. Although supporters of the change hailed it as far-reaching and substantial, it would later become the subject of much controversy, with opponents charging that the revision made no significant advances, leaving the military man still subject to an archaic and out-dated code of law.[65]

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[64]Sydney Brooks, "The Army of the United States," Nineteenth Century and After 75 (May 1914):1201 (first quotation), 1202 (second quotation).

[65]Sec. 1342, 39 Stat. 650 (1916); 57 Cong. Rec. Appendix 280 (1919) (extension of remarks of Representative Stephens); 58 Cong. Rec. 3471 (1919) (reprint of manuscript entitled "Military Justice," by Lieutenant Colonel S. T. Ansell, delivered on 26 June

One of the accomplishments of the 1916 revision, and a goal of military commanders since the days of the Spanish-American War, was the provision that provided for court-martial, even in peacetime, of certain specific civilian crimes committed by "any person subject to military law."[66] This peacetime extension of military authority further insured that the military would not have to share control of its personnel with the civilian judiciary, even for non-military crimes. The revision also gave the army court-martial jurisdiction over "all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States."[67] This authority over non-military personnel previously had applied only during wartime. Now, the army could "discipline" its overseas civilians at any time.

In addition, the general article was modified to provide for military trial of "all crimes or offenses not capital."[68] This was a drastic departure from the original Articles of War where "it was clear from the context of the provision it [Congress] enacted that it expected the trials [for civil crimes] would be in civil court."[69]

1919 at Bedford Springs, Pa., before the Pennsylvania Bar Association).

[66]Art. 93, sec. 1342, 39 Stat. 650 (1916).

[67]Art. 2(d), sec. 1342, 39 Stat. 650 (1916).

[68]Art. 96, sec. 1342, 39 Stat. 650 (1916).

[69]Justice Douglas opinion, O'Callahan v. Parker, p. 295.

Even the foremost authority on American military law in the nineteenth century, Winthrop's Military Law and Precedents, interpreted the general article to embrace only the commission of crimes which had some "reasonably direct" impact on military discipline.[70]

During Congressional hearings on the 1916 revision, the Judge Advocate General had been forced to admit that since the right of the defendant to counsel of his own selection was only through an army regulation, this "right" was subject to the imminent danger of command termination without Congressional consultation. Disturbed Congressmen added this provision to the pending revision and made statutory the right of the defendant to a counsel of his own selection, if reasonably available, in both general and special courts-martial.[71]

Other than the above changes, and the modernization of the wording of some articles, the revision of 1916 was little different from John Adams' original draft in relation to the intent of the system of military justice. Military law continued to emphasize the iron hand of discipline more than it did the scales of justice. It was with this premise, and the 1916 Articles of War, that the United

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[70]Winthrop, Law and Precedents, p. 769. Winthrop noted that some courts-martial were set aside during review because the defendant was charged only with a general criminal offense, rather than a specific military offense. Ibid., p. 770 nn. 82, 88.

[71]Ulmer, Right to Counsel, pp. 32-33; Right to counsel was contained in Artilce 75, section 926, Army Regulations of 1895, and was made statutory as Article 17, sec. 1342, 39 Stat. 650 (1916). See Winthrop, Law and Precedents, p. 1036 and 64 Cong. Rec. 11505 (1916) (amendment to section 1342 of the Revised Statutes of the United States).

States faced the stiffest challenge yet presented to the military legal system—the massive induction of civilians into the army during World War I.[72]

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[72]The new code was not effective until 1 March 1917 due to the need to revise the Manual for Courts-Martial and allow personnel to become familiar with its new provisions. Lockmiller, Crowder, p. 140.

CHAPTER III

AMERICA GOES TO WAR: VICTORY BEFORE JUSTICE

In 1916, under the increasing threat of American involvement in the European conflict and the more immediate possibility of war with Mexico, Congress passed a National Defense Act which expanded the peacetime Regular Army to a maximum of 175,000 men and made the National Guard the principal trained reserve. The Department of the Judge Advocate General was one of the organizations to gain from this expansion, more than doubling its personnel, from fifteen to thirty-two, in less than a year. Considering that an average of one out of every three soldiers in the army faced some kind of court-martial annually, the proportion of one judge advocate per 5,400 men was not excessive.[1]

The provisions of the 1916 act soon became academic, however, as the United States found herself drawn into the war in Europe. The demands of this war would require manpower far beyond anything envisioned in 1916; an expansion of the army so vast that it could not be formed on the skeleton of the regular forces, but would be an entirely new national army. From the beginning, even while planning

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[1]Ganoe, United States Army, pp. 457-58; Weigley, History of the Army, p. 348; Lockmiller, Crowder, pp. 135, 150 n. 28.

the assembly of this huge force, military leaders assigned the system of military justice second place.[2]

Part of the reason for subordination of the legal system was that the most experienced legal officer in the army, Judge Advocate General Crowder, was given the task of developing the selective service program. Crowder was an expert in the problems of conscription during the Civil War. To help formulate this comprehensive program, General Crowder not surprisingly chose his principal assistants in the office of the Judge Advocate General. Unfortunately, when the general was selected to administer the conscription program as Provost Marshal General of the Army, he took the majority of these men with him to the new office. This mass transfer left the legal department bereft of many of its best minds just when the system of military justice was facing the greatest challenge of its history.[3]

To further complicate matters, General Crowder refused to relinquish the prerogatives of his permanent post, leaving his temporary replacements with little authority. Although Crowder, in his earlier career, had been associated with those members of the General Staff who helped denude the Bureau Chiefs of much of

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[2]Marvin A. Kreidberg and Merton G. Henry, History of Military Mobilization in the United States Army, 1775-1945 (Washington, D.C.: Government Printing Office, 1955), p. 239.

[3]Lockmiller, Crowder, p. 150; General Orders, Number 65, War Department, 22 May 1917, cited in U.S., War Department, Second Report of the Provost Marshal General to the Secretary of War on the Operation of the Selective Service System to December 20, 1918, p. 253.

their power, after his appointment as Judge Advocate General some of his rulings seemed to favor retention of power in the hands of the various branches. In his possessive attitude toward his dual responsibilities during the war, the Missouri lawyer appeared to be a relic of the bureau chief system.[4]

Another factor that hindered the administration of justice was that the acting Judge Advocate General often found his opinions over-ridden or opposed from the Provost Marshal's office. Crowder was on particularly intimate terms with Secretary of War Newton D. Baker. As a result, Baker often consulted with Crowder directly on matters which were more properly the concern of the legal department. This informal guidance from the Provost Marshal's office undermined both the prestige and authority of the acting Judge Advocate General. The resultant unofficial chain of command left the acting Judge Advocate General as little more than a figure-head in the office.[5]

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[4]Lockmiller, Crowder, pp. 91, 144-46. For an example of Crowder's support of the bureau chief concept in opposition to the authority of the General Staff, see his opinion on the construction of Section 5 of the National Defense Act of 3 June 1916, cited in U.S., War Department, A Digest of Opinions of the Judge Advocate General of the Army from July 1, 1912, to April 1, 1917, p. 91. Crowder was also the only Bureau Chief remaining whose original appointment antedated the changes in the appointment system brought about by the Congressional Acts of 24 August 1912 and 27 April 1914. Thus, the provisions of the original system still applied to General Crowder until his retirement or failure to be reappointed. Lockmiller, Crowder, p. 204.

[5]Letter, Lieutenant Colonel Ansell to the Secretary of War, 11 March 1919, reprinted in the United States Army and Navy Journal, and Gazette of the Regular and Volunteer Forces 56 (1919):1098-99 (hereafter cited as ANJ; 58 Cong. Rec. 6501 (1919) (remarks of Senator Chamberlain). Later in the war, even the new Chief of Staff,

Not the least of the legal system's problems was the rapid expansion of the Judge Advocate's Department to meet the needs of the National Army. In order to bring the organization up to an eventual strength of almost four hundred men, large numbers of civil lawyers were inducted to fill the ranks. These men were first of all lawyers, while only casually military officers. However, even this increase in strength could not keep up with the expanding demands for courts-martial members; non-lawyers regularly acted in the trials of lesser offenders. Unacquainted with the disciplinary basis for the military jurisprudence program, the temporary judge advocates were shocked by what they observed.[6]

During the hectic early days of mobilization and organization, there was little time for either discussion or analysis of the finer points of law. In addition, the imagined threat of radical insurrection from groups such as the International Workers of the World; continuing concern over the actions and attitudes of the

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Peyton C. March, found that the Provost Marshal General had an "inside track" with the Secretary of War. When March attempted to have Crowder report to him concerning the selective service system, Crowder refused. Shortly thereafter, the Chief of Staff was informed from the Secretary of War's office that the Provost Marshal General was responsible only to the Secretary for matters pertaining to selective service policy. Lockmiller, Crowder, p. 234.

[6]Ibid., p. 150; New York Times, 28 March 1919, p. 12. The Times article contains typical remarks of the former judge advocates concerning the injustices they observed. In March 1919, these discharged lawyers formed the Ex-Judge Advocates Committee to support Lieutenant Colonel Ansell in his attempt to reform the system of military justice. This committee also held hearings in Washington and Chicago on the abuses which had occurred during the war.

leaders of our southern neighbor, Mexico; and an almost hysterical, frenzied domestic search for German spies and provocateurs left the general populace with little sympathy for anyone who ran afoul of American laws, whether they were military or civil. Thus, there was little attention given to the proliferation of courts-martial as the hordes of independent-minded citizen privates clashed with the equally unmilitary ninety-day citizen officers.[7] The volunteers, however, were no more guilty of misuse of the legal system than were the regular officers.

Illustrative of the way disciplinary bias could enter the otherwise equitable deliberations of courts-martial boards was the case of the "Waco disturbance," involving members of the regular army's Twenty-fourth Infantry Regiment. The unit's first battalion had been sent to Waco, Texas, to guard the construction of Camp MacArthur, one of the new training cantonments. Shortly after the battalion's arrival, a disturbance broke out at a local dance hall between some of the soldiers and the local police. Following the pistol-whipping of one of the soldiers by a police officer, several of the infantrymen returned to camp, seized their rifles, and

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[7]The hysterical wartime hatred and violence is discussed in Arthur S. Link, American Epoch: A History of the United States Since the 1890's, 3 vols., 3d ed. (New York: Alfred A. Knopf, Borzo Book, 1967), 1:208-12. See also, Frank Freidel, America in the Twentieth Century (New York: Alfred A. Knopf, 1960), p. 203. Courts-martial of all types increased from a pre-war average of less than 45,000 per year to almost 250,000 in 1918 alone. U.S., War Department, "Report of the Judge Advocate General," War Department Annual Reports, 1918, 1:248.

marched on the town with the intention of taking revenge on the minions of the law. Informed of the situation, the battalion commander took a guard detail and intercepted the vengeful-minded soldiers. Finding themselves confronted with what they believed were Waco officers, the marchers fired a brief volley which harmed no one. Almost instantly, they realized that they were firing on members of their own battalion and they fled in panic back to the confines of their camp, where another guard detail awaited them.[8]

Following an investigation, twelve soldiers were alleged to have marched on the town. Subsequently, six of these men were charged with "violation of the 93rd Article of War," in that they did with "common intent . . . with intent to commit a felony, viz: murder, feloniously assault Captain James A. Higgins and detachment 24th Infantry, by shooting at them with service rifles."[9]

As a member of the court-martial board, the Southern Department assigned Captain Higgins, the commander of the detail that was attacked. In addition, Higgins had headed the pre-trial

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[8]"Findings of a Board of Officers convened to investigate and report upon the circumstances connected with the disturbance in the city of Waco, Texas, on the night of July 29, 1917," United States v. Private James H. Johnson, et al., Court-Martial Case 105553, Records of the Judge Advocate General, General Courts Martial, 1812-1938, Box 5384, Record Group 153, Federal Records Center, Suitland, Maryland. (General documents will hereafter be cited by record title, case number, and RG 153; trial records will be cited by the abbreviated case name and page number.)

[9]U.S. v. Johnson, p. 3. Although there is a cryptic reference on page 19 of the trial record to one of the remaining six men which indicates that they were tried for their part in the affair, there is no other indication of what punishment these men received.

investigating board and was scheduled to be a witness for the prosecution. Captain Joseph E. Barzynski, another of the investigating officers, was also named to the court-martial board. Both officers asked to be excused from board duty because of their previous association with the incident. The President of the board granted both excusals. On the other hand, the officer appointed trial judge advocate, Captain Eugene W. Fales, who had been the third member of the investigating team, did not request that he be replaced. Fales also had been directly connected with the incident as the officer in charge of the detail that captured four of the defendants on the night of the shooting. Later in the trial, furthering the multiplicity of his roles, the trial judge advocate took the stand as a prosecution witness.[10]

Five of the six accused soldiers pled "guilty" as charged; however, the sixth man, Private Luther Briggs, Company D, claimed that he had been visiting a young woman at the time of the trouble and was not a participant in either the march or assault. The woman corroborated Briggs' statement, but the court chose to lend more credence to the testimony of four of the other defendants, who had already admitted their own guilt. All four of these men swore that Briggs had been one of the men who fired on the guard

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[10]Paragraph 17, Special Orders, Number 217, Headquarters Southern Department, 8 August 1917, U.S. v. Johnson, pp. 2-3, 22-23. Apparently the army saw no anomaly in assigning an individual as judge and jury who was also the victim, the chief investigator, and the commander of the men being tried. Only Captain Higgins' request for excusal kept this from happening in this trial.

detail. The judge advocate also testified against Briggs, noting that although the soldier had no rifle in his possession when captured, he was "wringing wet with perspiration" and agitated, a condition similar to that of the three admitted participants who were captured at the same time.[11] Strangely, Briggs was the only one of the six men who was accused of using someone else's rifle during the assault. The other five men were caught returning to camp with their own rifles, which had been fired. Briggs' rifle was still in the weapons rack, unfired.[12]

At the conclusion of the testimony, the board found all six men guilty as charged. All of the accused were sentenced to be dishonorably discharged and to forfeit all pay and allowances. The five men who had earlier pled "guilty" were sentenced to five years imprisonment at hard labor; however, Private Briggs was more severely dealt with, receiving a sentence of ten years in prison.[13] Apparently, the court regarded his refusal to admit guilt as worthy of extra retribution, setting an example to others who would

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[11] Ibid., pp. 22 (quotation), 24-27, 29-30. The young woman who testified on Briggs' behalf had known the defendant for less than twenty-four hours and apparently had nothing to gain by lying. On the other hand, the four confessed co-defendants who testified against Briggs could have hoped to gain more lenient sentences by their cooperation with the prosecution.

[12] Ibid., p. 23.

[13] Ibid., pp. 34-38. Under military law, unless the specification was "so descriptive as to disclose all the circumstances of mitigation or aggravation," which was highly unlikely, the court continued to take evidence as pass judgment after a plea of "guilty," just as it would after a plea of "not guilty." Paragraph 154(c), Manual for Courts-Martial, 1917, p. 72.

inconvenience the system of justice.

Another classic court-martial case involved the so-called "Texas Mutineers," a dozen regular non-commissioned officers of Battery A, Eighteenth Field Artillery, who were court-martialed for mutiny in the fall of 1917. The commander of these men was a young officer, recently graduated from the Officer's Training School and apparently over-impressed with the dignity of his new rank. The next level of command was held by a regular officer, but one who had been recently jumped several ranks to higher command in the rapid promotion days of the early mobilization period of the National Army. One afternoon the new young officer ordered these experienced non-commissioned officers "under arrest" for a minor infraction of the regulations of the camp. The next morning, when the lieutenant ordered the men to fall out for battery drill, they refused to go because they had been ordered in arrest and believed that this meant that they were in confinement until they were either adjudged or released from arrest.[14]

As a result, the lieutenant charged these non-commissioned officers with mutiny in time of war, an extremely serious charge

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[14] 58 Cong. Rec. 3942 (1919) (reprint of letter, S. T. Ansell to Senator Chamberlain, 16 August 1919); Lockmiller, Crowder, p. 207; Paragraph 53 of the courts-martial manual stated that non-commissioned officers "when placed in arrest, . . . will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement, they will not be sent out to work." Manual for Courts-Martial, 1917, p. 27. The case became a classic by virtue of the intense amount of attention focused on it during later congressional investigations.

with a possible maximum penalty of death. The new brigade commander, eager to support his junior officers, convened a court-martial. The accused men were tried, found guilty, and sentenced to dishonorable discharges, total forfeiture of all pay and allowances, and prison terms at hard labor for various periods of from ten to twenty-five years. The record of the trial was hurriedly reviewed, confirmed, and forwarded to the Judge Advocate General's office, as required by regulations.[15]

Upon its arrival in Washington, the trial record was again reviewed. Both the acting Judge Advocate General and all twelve departmental judge advocates found the "trial in its entirety to be illegal, [and] the substantial rights of the men were at no point protected."[16] A later commentator noted that in this case "military discipline clearly overshadowed the sense of law and justice."[17]

Notwithstanding the results of the review and the recommendation of the acting Judge Advocate General that the case be reopened or the results set aside, the conviction of these soldiers was allowed to stand. General Crowder, with the support of the Secretary of War, ruled that "approval [of the sentence] of the major general in command [the reviewing authority] was final and placed the judgment of the court, whether legal or illegal, beyond all power

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[15] 58 Cong. Rec. 3942 (1919) (reprint of letter, S. T. Ansell to Senator Chamberlain, 16 August 1919).

[16] Ibid.

[17] Lockmiller, Crowder, p. 207.

of review." (Italics mine.)[18] The issue over the right to review would be only one shot in a war of opinions which would lead to bitter emnity between General Crowder and his chief assistant in the legal department. Subsequently, the disagreement between these two men would be heard in the halls of Congress and receive nation-wide attention in the post-war period.

Even while the case of the "Texas Mutineers" was developing as a divisive issue within the military justice department, an event was taking place which would further publicize the procedural and systematic faults of the program--the first court-martial of the "Houston Rioters." This would be the biggest trial in the history of the United States Army and the first of three courts-martial before which the army tried members of the Twenty-fourth Infantry who were accused of mutiny and murder in Houston, Texas.[19]

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[18] 58 Cong. Rec. 3942 (1919) (reprint of letter, S. T. Ansell to Senator Chamberlain, 16 August 1919). Lockmiller erroneously implies that the Secretary of War immediately gave the Judge Advocate General the authority to "direct the setting aside of findings for legal error in this and similar cases." Lockmiller also errs in crediting this case with causing the issuance of General Order Number 7, which suspended death sentences in the United States Army pending additional reviews. Crowder, pp. 207-8. On the contrary, remedial action was published as a direct result of the first execution of the "Houston Rioters."

[19] The only authoritative book on the Houston riots and subsequent events is Robert V. Haynes' well written and documented volume, A Night of Violence: The Houston Riot of 1917 (Baton Rogue: Louisiana State University Press, 1976). Haynes is also the author of two excellent articles on the problems of black soldiers in Texas: "The Houston Mutiny and Riot of 1917," Southwestern Historical Quarterly 76 (1973):418-39 and "Unrest at Home: Racial Conflict between White Civilians and Black Soldiers in 1917," Journal of the American Studies Association of Texas 6 (1975):43-54. Two other

Although the murderous assault on Texas civilians and the secretive executions following the first trial elicited the most public attention and comment, the trials themselves most graphically demonstrated many of the major problems that existed in the overall system of military jurisprudence.

The incident at Houston was not the first time that Negro soldiers had found themselves in bloody confrontation with Texans. Indeed, it seemed that everytime a black unit was assigned to Texas, trouble ensued and black soldiers were court-martialed. In addition to the previously examined Brownsville affair, widely publicized incidents at San Antonio in 1911 and at both San Antonio and Del Rio

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accounts of the riot or trial are: Thomas R. Adams, "The Houston Riot of 1917" (M.A. thesis, Texas A&M University, 1972) and Phocion S. Park, Jr., "The Twenty-fourth Infantry Regiment and the Houston Riot of 1917" (M.A. thesis, University of Houston, 1971). Three older articles, which are highly biased and suffer from a lack of available research materials at the time, are: Martha Gruening, "Houston: An NAACP Investigation," Crisis 15 (1917):14-19 (Westport, Conn.: Greewood Publishing, Microform Division, n.d.); Edgar A. Schuler, "The Houston Race Riot, 1917," Journal of Negro History 29 (1944):300-338; and C. D. Waide, "When Psychology Failed: An Unbiased Fact-Story of the Houston Race Riot of 1917," Houston Gargoyle, 15, 22, 29 May, 5, 12 June 1928. The three trials were: Court-Martial Case 109045, United States v. Sergeant William C. Nesbit, et al., 1-30 November 1917; Court-Martial Case 109018, United States v. Corporal John Washington, et al., 17-22 December 1917; and Court-Martial Case 114575, United States v. Corporal Robert Tillman, et al., 18 February-26 March 1918. "Memo, JAG to Sect. of War," 3 July 1918, Case 109045, RG 153. Apparently the reason for having more than one trial was due to the pressure of public charges that the army was going to "cover up" the riot. As a result, the army apparently initiated the first trial before the prosecution had even determined exactly how many men were actually involved in the riot. The first trial involved men who marched on Houston from the camp, the second trial concerned the soldiers on guard duty at Camp Logan, and the final trial appeared to be a "clean up" trial of those not previously charged, or who were newly identified during the previous trials.

in 1916 served to keep the embers of bitter animosity smouldering on both sides of the issue.[20]

Resentful Negro soldiers, faced with a degree of racial discrimination in the early twentieth century unequaled during even the worst periods of the previous century, saw American entry into the conflict in Europe as an opportunity to repeat the glorious record of the black units in the Spanish-American War. They felt that Negro valor while fighting for freedom on the battlefields of France would justify their claims to unrestricted citizenship at home. Thus it came as a blow to black regulars when they learned that the General Staff had decided to retain the regular army units to defend the borders of the United States and her insular possessions, while a new national army of National Guardsmen and draftees would fight in France. Additionally, the regular regiments were to be levied for the best of their officers and enlisted men to form the cadres upon which the National Army would be built, leaving the permanent establishment as a "second class" army, both in mission and quality. These decisions severely affected Negro morale while

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[20]San Antonio Express, 21 March 1911, p. 1; 10 April 1916, p. 1; 11 April 1916, p. 1; 25 July 1916, p. 1. Gunnar Myrdal points out that incidents sometimes occurred because of the unwillingness of Negro soldiers, especially northerners, to comply with southern segregational patterns. With the assistance of Richard Sterner and Arnold Rose, An American Dilemma: The Negro Problem and Modern Democracy, Harper Torchbooks ed., 2 vols. (New York: Harper and Row, 1969), 1:421-22; Well aware of the history of Texas problems, "the dominent attitude among the men of these battalions [of the Twenty-fourth Infantry] was suspicion" as they discussed the move to Texas. Park, "Houston Riot," p. 61, quoting an 11 October 1969 personal interview with Samuel Stratton of Chicago, former member of the first battalion, Twenty-fourth Infantry in 1917.

stripping black organizations of the very heart of the system of military discipline, their experienced non-commissioned officers.[21]

These were the circumstances under which the War Department ordered various regiments of the regular army to duty in the summer of 1917 as guards for the construction of the huge cantonments being built to house the new National Army. Among these units was the Twenty-fourth Infantry, one of the four black regiments of the Regular Army, whose third battalion was sent from Columbus, New Mexico, to Houston, Texas, where Camp Logan was being built.[22]

Unfortunately, while the citizens of Houston had actively campaigned to be selected as one of the training cantonment sites,

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[21]The performance of black soldiers in the Spanish-American War and the Filipino Insurrection inspired Negro citizens with a sense of pride. Black soldiers were regarded as successes in a white man's world. Marvin E. Fletcher, The Black Soldier and Officer in the United States Army 1891-1917 (Columbia: University of Missouri Press, 1974), p. 158; Florette Henri, Bitter Victory: A History of Black Soldiers in World War I (Garden City, N.Y.: Doubleday & Co., Zenith Books, 1970), pp. 15-16; Willard B. Gatewood, Jr., Smoked Yankees and the Struggle for Empire: Letters from Negro Soldiers 1898-1902 (Urbana: University of Illinois Press, 1971), p. ix; Kreidberg and Henry, Military Mobilization, p. 239.

[22]Special Orders, Number 38, Headquarters New Mexico Subdistrict, Southern Department, 23 July 1917, pursuant to telegraphic instructions of the War Department through the Commanding General, Southern Department. The Regimental Headquarters, Headquarters Company, Supply Company, and three companies of the second battalion were ordered to guard Camp Cody, Deming, New Mexico. The first battalion was transferred to Waco, Texas. (Supra, p. 65.) William G. Muller, The Twenty-Fourth Infantry Past and Present: A Brief History of the Regiment Compiled from Official Records under the Direction of the Regimental Commander (n.p., ca. 1923; reprint ed., Ft. Collins, Colo.: Old Army Press, 1972), unpaginated. Not surprisingly, this regimental history makes no mention of the events at Waco and Houston which brought disgrace to this otherwise distinguished organization.

anticipating its attendent benfits to the local economy, they were not prepared to change their southern-oriented attitude toward Negroes, even when the Negroes were wearing the uniform of the United States Army. On the other hand, many of the men of the third battalion, after having served in foreign territories or remote western assignments for most of the last five years, were accustomed to being regarded as part of a conquering force or, at worst, as respected co-equals. These men were shocked to suddenly find themselves treated as second-class citizens. These conditions made it highly unlikely that the Negro regulars would passively accept the "Jim Crowism" of Houston--a clash became inevitable.[23]

The crisis occurred less than four weeks after the third battalion detrained in the Texas city. Faced with blatant discrimination and insulting disregard for the uniform they wore so proudly; harrassed by white citizens, public functionaries, and lawmen; lacking the stabilizing influence of experienced non-commissioned officers; and apparently unsupported and unprotected by their white officers, the men of the Twenty-fourth reached the breaking point by late August.

On the afternoon of the twenty-third of August, rumors swept through the camp of the black regulars that Corporal James Baltimore,

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[23]Houston Post, 29 July 1917, p. 8; 30 July 1917, p. 4; "Telegram, Colonel F. L. Wynn, Twenty-fourth Infantry to President W. S. Scarborough of Wilberforce University," cited in Crisis 14 (July 1917):137; Myrdal, American Dilemma, 2:535-37, 1012; "Statement of Agreement," U.S. v. Nesbit, pp. 8-13; U.S., War Department, Regimental History of the United States Regular Army: Chronological Outline 1866-1918, p. 16.

a military policeman and one of the most popular men in the third battalion, had been beaten and killed by a white police officer while on duty in Houston. Threats of revenge against the Houston police were not stilled when Corporal Baltimore was proven to be alive, although injured slightly as a result of a pistol-whipping by a white mounted patrolman. Nervous battalion officers provided the final spark to ignite the wrath of the black soldiers when they ordered the men to turn in their weapons and ammunition just as a rumor that a white mob was preparing to attack the camp gained widespread circulation among the soldiers.

Within moments gunfire broke out. Almost one-fourth of the battalion left camp; and some of these men attacked the city of Houston in a murderous assault, intent on revenging themselves on the symbol of white oppression, the local police. Although the racially inspired mutiny lasted less than three hours, it left thirty-one civilians and soldiers dead or wounded on the streets. Shocked and frightened, Texans called for revenge and insisted that all Negro troops be immediately removed from the state. Secretary of War Newton D. Baker, promising that he would "punish to the limit of the law" those responsible for the outrage, ordered the withdrawal of all black regulars from Texas; however, Baker refused to remove black National Guardsmen and volunteers from the state.[24]

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[24]Haynes, Night of Violence, pp. 122-70; New York Times, 28 August 1917, p. 18; Texas, House Journal, 35th Leg., 2d sess. (1917), p. 105; Texas, Senate Journal, 35th Leg., 2d sess. (1917), p. 60; Houston Post, 26 August 1917, p. 1 (quotation).

Within forty-eight hours of the riot, the disarmed third battalion, under heavy guard, was aboard two trains speeding them back to Camp Furlong at Columbus, New Mexico, where the men would be held while the army investigated their actions on the night of the twenty-third. Two days after their arrival in Columbus, 156 soldiers suspected of direct participation in the mutiny and murders were removed to confinement at Fort Bliss, El Paso, Texas. Eventually 118 men from the four Negro companies stood trial during the fall of 1917 and the following spring; 110 of these men were found guilty of one or more of the charges brought against them.[25]

At first glance, the courts-martial of the Houston rioters would be assumed to be strongly biased against the men of the Twenty-fourth because they were Negroes being tried during a period of extreme racial unrest and discrimination; because these soldiers were black and the entire military judicial system was white; because

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[25]Houston Post, 2 November 1917, p. 4; San Antonio Express, 24 November 1917, p. 16; El Paso Morning Times, 29 August 1917, p. 1; 30 August 1917, p. 1; "Report by the Military Justice Division, Clemency Section," 20 December 1919, showing summary of men tried and disposition, Case 109045, RG 153. The men of the first trial were charged with violating, in time of war, four Articles of War. The articles and charges were: Sixty-fourth Article--willfully disobeying orders to remain in camp and to turn in arms and ammunition; Sixty-sixth Article--mutiny, in that they "did forcibly subvert and override military authority and break out of camp with the intent of marching on the city of Houston, Texas to the injury of persons and property"; Ninety-second Article--willful and deliberate murder "with malice aforethought" of fourteen persons "by shooting them with U.S. Rifles loaded with ball and powder"; and Ninety-third Article--assault on eight civilians "by shooting at and upon them with U.S. Rifles." Similar charges were brought against the men charged in the other two trials. Charge Sheet, U.S. v. Nesbit, pp. 3-5.

the crime was against white citizens in a southern city; and because the trial was held in a state which traditionally had displayed animosity toward black men in army uniform. However, a closer examination of the facts of the trial would reveal this assumption to be false. From a racial standpoint, given the conditions existing in Texas in 1917, the defendants could not have received a more impartial trial under any other circumstances. The injustices of the proceedings were not as a result of the color of the men's skins, but because of the olive-drab uniforms they wore. Secretary of War Baker set the tone of the military attitude when he explained that while he opposed discrimination by reason of race, his primary attention was on winning the war and that there was "no intention on the part of the War Department to undertake at this time to settle the so-called race question."[26]

At the same time, the army was determined that there would

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[26]"Memorandum, Newton D. Baker to Emment J. Scott," 30 November 1917, explaining Baker's policy toward Negroes, quoted in William Matthews and Dixon Wector, Our Soldiers Speak 1775-1918 (Boston: Little, Brown & Co., 1943), pp. 54-55. The public organ of the National Association for the Advancement of Colored People editorialized after the first trial that they did not believe the color of the men had anything to do with the severity of the sentences. "The End of the Houston Riot," Crisis 15 (December 1917):63. The leading authority on the riot and court-martial, Robert V. Haynes, pointed out to the author that under the circumstances a military trial was much more likely to be impartial and judicious than any other legal body in Texas or elsewhere in the South. Granted that this statement is correct concerning racial prejudice, it does not alter the contention that World War I courts-martial, irregardless of whether the defendants were black or white, did not grant the accused the legal protections they were entitled to as citizens of the United States. Interview with Professor Robert V. Haynes, University of Houston, 4 June 1976.

not be a repetition of the inconclusive, drawn-out Brownsville affair. Among other reasons, haste was necessary because the entire conscription and training program for Negro draftees and officer trainees was temporarily suspended pending action on the Houston problem. At the same time, selection of the officers detailed to sit on the court and to plead the government's case reflected both the importance of the case and the continuing pressure exerted by southern politicians for immediate punishment of the Negro soldiers. The army wisely refused either to allow the accused men to be tried by Texas civil courts or to hold the courts-martial in the super-charged atmosphere of Houston; however, military authorities compromised with both witness convenience and Texas political demands by selecting Fort Sam Houston at San Antonio as the courts-martial site.[27]

The composition of the court was an early indicator of the intentions of Washington officials. Of the thirteen officers selected to the board of the first trial, only three had ever been in direct command of Negro troops, only two of them had experience with infantry units, and all were extremely senior officers whose average time in the military service (excluding Colonel C. J. Manly,

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[27]Austin American, 11 September 1917, p. 3; "The Houston Mutiny," Outlook 117 (5 September 1917):10; "Where to Encamp the Negro Troops," Literary Digest 55 (29 September 1917):14-15; San Antonio Express, 10 October 1917, p. 1; 14 October 1917, p. 1. Refusal to deliver the accused soldiers to civil authorities was in accordance with Article 74 of the Articles of War which excepted such delivery "in time of war." Manual for Courts-Martial, 1917, p. 320.

a medical officer) exceeded thirty-seven years.[28] Despite the availability of three Negro regular officers of the line and a number of Negro National Guard officers who were on active duty, only white officers were detailed to duty with any of the courts-martial boards.[29]

Peculiarly, the same board, with only two changes, would be used for both the first and second trials.[30] While this occurrence

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[28]Paragraph 47, Special Orders, Number 290, Headquarters Southern Department, Fort Sam Houston, Texas, 20 October 1917, U.S. v. Nesbit, p. 1; U.S., War Department, Official Army Register, Dec. 1, 1918, s.v. below. The members of the court-martial board for the first trial were: Brigadier General George K. Hunter, Assistant Inspector General, Washington, D.C.; Brigadier General Joseph A. Gaston, Ninetieth Division; Brigadier General R. A. Richards, Thirty-fourth Division; Colonel E. A. Millar, Third Field Artillery; Colonel A. C. McComb, Fourteenth Cavalry; Colonel DeR. C. Cabell, Tenth Cavalry; Colonel R. H. Tompkins, Seventh Cavalry; Colonel James H. Frier, Thirty-fifth Infantry; Colonel G. E. Staackle, Twelveth Cavalry; Colonel C. J. Manly, Medical Corps, Southern Department; Lieutenant Colonel J. J. Hornbrook, Seventeenth Cavalry; Lieutenant Colonel O. B. Meyer, Fourteenth Cavalry; and Lieutenant Colonel Charles J. Symmonds, Sixth Cavalry.

[29]The three regular officers were: Colonel Charles Young, First Lieutenant Benjamin O. Davis, and First Lieutenant John E. Green. Black officers were also on duty as members of the recalled Eighth Illinois and Fifteenth New York Infantry Regiments, and in single companies from the District of Columbia, Maryland, Ohio, Tennessee, and Massachusetts National Guard organizations. Jack D. Foner, Blacks and the Military in American History: A New Perspective, foreword and conclusion by James P. Shelton (New York: Praeger, 1974), p. 107.

[30]Paragraph 7, Special Orders, Number 344, Headquarters Southern Department, Fort Sam Houston, Texas, 15 December 1917, U.S. v. Washington, p. 1. Brigadier General Richards and Colonel Manly were relieved from court-martial duty. Only one officer, Colonel Farrad Sayre, Sixteenth Cavalry, was appointed in their place, leaving the board with only twelve officers to try the second group of Houston defendants.

was not prohibited by regulation, the objectivity of the court in the second case could be questioned. The possibility existed that evidence and testimony presented during the first trial could influence the judgment of the court, thus violating the premise that the accused has the right to confront his accusers (and by implication, the evidence given by his accusers). In all three courts-martial, although the American system of law supposedly rested on the principle of trial before one's peers, the disparity between the youthful, uneducated, low-ranking, black defendants and their jurymen/judges was obvious.

Even more excessive, but less visible, was the difference in legal training and qualification of the prosecution as opposed to the defense. As chief prosecutor, the Judge Advocate General of the Army personally selected an outstanding lawyer and the senior ranking judge advocate in the entire department, Colonel John A. Hull.[31] As his principal assistant, Colonel Hull chose a highly regarded Cincinnati lawyer and superior court judge who had been recalled to active duty from reserve status, Major Dudley V. Sutphin. Later, another top-level military lawyer, Major Thomas Finley of the Provost Marshal General's office in Washington joined the

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[31] "Telegram, General Crowder to Colonel Hull, Judge Advocate, Central Department," 5 September 1917, Case 109045, RG 153; Army Register, 1918, p. 15. Colonel Hull had been associated with General Crowder since his days in the Philippines and was the ranking Colonel in the department, with date of rank from 15 February 1911. Only General Crowder outranked Hull in either seniority or experience. Hull later served as Judge Advocate General of the Army after Crowder's retirement in the 1920s.

prosecution staff.[32] In a move that was highly unusual, but not unprecedented, the Harris County (Houston) District Attorney, John A. Crooker, also was invited to assist in the prosecution of the case.[33]

Against this array of noted legal talent, the defense for all 118 accused would be conducted by a lone officer, Major Harry S. Grier, the newly assigned division inspector for the Seventy-eighth Division. Major Grier was not a lawyer, but his recent duty as captain and adjutant of the defendant's regiment made him familiar with the Negro soldiers involved. In that assignment, Grier also had an opportunity to participate in several courts-martial. In addition, this assignment as defense attorney was not the former adjutant's first experience with a major incident between black soldiers and white civilians. As a second lieutenant, Grier was

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[32]"Telegram, Judge Advocate General to General Ruckman, Commander, Southern Department," 8 September 1917, Case 109045, RG 153; San Antonio Express, 2 November 1917, p. 4. Sutphin was Judge Advocate General, Officer's Reserve Corps. After his recall to active duty, he was Assistant Judge Advocate, Central Department, as Hull's chief assistant.

[33]Oral recollection of John H. Crooker, 17 September 1971, cited in Adams, "Houston Riot," p. 85; San Antonio Express, 2 November 1917, p. 4; Davis noted that the use of a civilian attorney as a member of the prosecution, while legal, was "of the rarest occurrence" in military courts in the past. Military Law, p. 33. An historic precedent for Crooker's appointment was the designation of Martin Van Buren (afterwards President of the United States) as an assistant judge advocate in the trials of Brigadier General William Hull in 1813 and Major General James Wilkinson in 1815. Winthrop, Law and Precedents, p. 184. Crooker's appointment was probably an effort to mollify the irate citizens of Houston and convince Texans that the army did not intend to "white-wash" the case against the Twenty-fourth infantrymen.

the battalion adjutant and acting commander of C Company at Fort Brown on the night of the Brownsville affair, but was not one of the officers charged with dereliction of duty in the aftermath of the Brownsville dismissals.[34]

Major Grier's long association with the Negro infantrymen apparently made him neither sympathetic with, or understanding of, their problems. A legal reporter who accompanied Grier during many of his interviews with the defendants, individually and as a group, reported that the defense counsel used intemperate language and racial slurs while insisting that the accused were habitually lying to him. While reportedly a common tactic among civilian defense attorneys, Grier's actions were in violation of regulations governing the language of superiors toward those under their authority, and could have been grounds for charges of "conduct unbecoming an officer" against him. Grier's attitude appeared to be more that of an antagonist than an ally.[35]

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[34]U.S. v. Nesbit, p. 2; Weaver, Brownsville, pp. 122, 148, 243. Coincidently, the Judge Advocate General, Crowder, also had been the acting Judge Advocate General during the Brownsville affair because General Davis was out of the country at the time. Lockmiller, Crowder, p. 122.

[35]Interview with Tom Burger, San Antonio, Texas, 16 September 1976. Burger was one of the four court reporters for the third trial and was earlier employed to take testimony during interviews with the defendants by Major Grier and Major Sutphin. Burger, whose court reporting experience spanned over forty years and innumerable court cases, also was not complimentary of Major Sutphin's conduct during the trial, feeling that the judge advocate was more interested in the publicity and "making a name for himself" than in proper conduct of the trial. Guidance for the conduct of superiors and their language was contained in U.S., War Department, Regulations for the

A possible explanation for Grier's unprofessional acts was the lack of response and uncommunicativeness of the prisoners. He was unable to gain the black soldiers confidence. The major was white, an officer, an appointee of the commanding general rather than a choice of the prisoners, and he had served as a participant in disciplining several of the men during his service in their regiment. To the defendants, Grier was more representative of authority and oppression than of assistance, and the men steadfastly refused to confide in him.[36] This left the defense counsel dependent on information gleaned from the men by the prosecution's investigators, an unsatisfactory source.

Another mitigating circumstance for the major's impatience with the defendant's recalcitrance was the lack of time he was given to prepare his case after his appointment as counsel on 14 October.

Army of the United States, 1913, art. I, p. 9. Improper conduct by an officer was chargeable under the Ninety-fifth Article of War. See Manual for Courts-Martial, 1917, p. 324.

[36]An example of the lack of trust the defendants felt in Major Grier was the actions of Private Levy V. McNeil, Company M. Throughout the investigation and trial, Private McNeil had a perfect alabi for the night of the riot in the form of a signed deposition in which three white citizens of Houston certified that the soldier had spent the entire night in their house. However, it was not until just prior to the third trial that the young soldier admitted his alibi to the defense attorney. Previously, he had steadfastly refused to tell where he had been during the riot, apparently fearing that the disclosure to Major Grier would cause him to be punished for being "out of camp." As regimental adjutant of the Twenty-fourth Infantry, Grier was responsible for issuing the sentences of courts-martial held in the organization. This may have lead some of the men to associate subsequent punishments with the then captain. For example, see "Charge Sheet #244," entered as "Exhibit Number 6," Case 109018, RG 153.

Military law emphasized to a high degree the defendant's right to a speedy trial. The Articles of War specified that the accused must be served with a copy of the charges against him within eight days after his arrest and be "brought to trial within ten days thereafter, unless the necessities of the service prevent such a trial; and then he shall be brought to trial within thirty days after the expiration of said ten days." However, provisions were also made to allow additional delays and continuances "for reasonable cause . . . as often as may appear just."[37]

The number of defendants, the seriousness of the charges, the extremity of possible punishment, and the lack of assistance and resources available to the defense counsel all appear to have been reasonable grounds for an extended delay in the proceedings. However, Grier was under considerable pressure from the departmental commander to get the trial underway as soon as possible, and he acquiesced to the suggested trial date of 1 November 1917. This gave the defense counsel only eleven days to gather his evidence, interview the first defendants, find and question possible defense witnesses, and plan his courtroom strategy--a notable effort, even by a qualified, experienced lawyer. The prosecution, with the assistance of

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[37]Grier was selected as defense counsel by General Ruckman, Commander of the Southern Department, on 14 October and first met with the defendants on their arrival in San Antonio on 21 October. "General John Ruckman to Adjutant General of the Army," 14 October 1917, Army Commands, Southern Department, Headquarters, RG 153, NA, cited in Haynes, Night of Violence, p. 251; Articles 20 and 70, Articles of War, reprinted in Manual for Courts-Martial, 1917, pp. 312 (second quotation), 320 (first quotation).

numerous other investigators, a citizen's committee in Houston, and the Harris County District Attorney's office, had almost two months to accomplish the same task.[38]

One of the requirements of military law is that a thorough pre-trial investigation be made to determine the validity and adequacy of the charges made before summoning a court-martial board.[39] This comprehensive investigation traditionally has been cited as the primary reason for the high percentage of convictions in military trials. Under the military concept, it is assumed that an individual normally will not be brought to trial unless substantial evidence of his guilt has been found; thus, the fact that a court is convened tends to influence the court members as to the guilt of the accused. Basic to this supposition is an impartial investigation. If the Houston riot investigations were typical, pre-trial procedures were neither impartial nor just.

During the investigations, some members of the Twenty-fourth

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[38]Haynes, Night of Violence, pp. 251-53. Both the press and Texas politicians were vehement in their demands for early punishment of the Houston defendants. These demands put considerable pressure on General Ruckman. When Grier arrived in San Antonio, the General "made it clear that he wanted the trial to commence as soon as possible, preferably the first of November." Ibid., p. 251. Before Grier's arrival, the prosecution had the advantage of several other investigative bodies. Besides the prosecution's own inquiry at both Houston and Fort Bliss, there were also collateral investigations and inquiries by boards of officers from battalion, regimental, and departmental level. Separate investigations and reports were made by the Inspector General of the Southern Department and the Inspector General of the Army.

[39]Article 70, paragraph 970, Regulations, 1913, p. 172; paragraph 76, Manual for Courts-Martial, 1917, pp. 40-41.

spent as long as five months in confinement before being brought to trial. During this extended confinement they were repeatedly questioned, and investigators reportedly lied to the men in an attempt to trick them into inadvertent confessions. Prosecutors denied this allegation, but admitted that the accused were not always informed of their rights or warned that their answers to questions could be used against them.[40]

On several occasions, soldiers working covertly for the prosecution were sent into the confinement areas in an effort to gain information which could be used during questioning or in court.[41] Defense witnesses also reported that individuals acting for the trial judge advocate came to Houston and attempted to force them to change or retract their testimony.[42] Several defendants

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[40]The original confinement date at Fort Bliss was 29 August 1917 and the third trial did not begin until 18 February 1918; Undated fifteen page typescript statement of those men held at Fort Leavenworth, Kansas, Military Prison in 1919, p. 8, Case 109045, RG 153; Testimony of First Lieutenant A. J. Levy, U.S. v. Tillman, pp. 2900-21; Case of United States vs. Corporal Robert Tillman, et al., 24th U.S. Infantry: Copy of Proceedings of Trial by General Court-Martial at Fort Sam Houston, Texas: February-March, 1918 (San Antonio, Tex.: Alamo Printing, 1918), pp. 1354-55. (The latter reference is to the trial reporter's copy of the original printed trial transcript of the third trial, now in the personal possession of Henry Parrott, Houston, Texas. Hereafter cited as U.S. v. Tillman: Copy.) It should be noted that well before the Miranda Case [Miranda v. Arizona, 384 U.S. 436 (1966)] military law specified that an investigating officer had an "obligation . . . to warn the person investigated that he need not answer any question that might tend to incriminate him." Manual for Courts-Martial, 1917, p. 112.

[41]Testimony of Corporal Daniel Rumph, U.S. v. Tillman: Copy, p. 179; Testimony of Private Frank Draper, ibid., p. 560.

[42]Ibid., p. 1293; U.S. v. Tillman, pp. 2779-89. Private

charged that they were threatened, cursed, and promised favors by investigating officers--a violation of Army Regulations which could subject the officers concerned to punitive charges. Private Grover Burns testified that a member of the investigating board said: "I have got the goods on you, and you might as well tell me. If you don't, I am going to see that you get a rope around your neck." A petition from the convicted men later claimed that questioning of this type apparently caused the prisoners to become frightened and confused before the rhetoric of the officers, resulting in some of the men telling the investigators what they thought the board members wanted to hear, rather than the truth.[43]

When the court questioned the validity of these charges, Captain Tom Fox denied having threatened the men and said that the use of phrases like "putting a noose around their necks" was only to impress the men with the gravity of the situation and the sincerity of the investigation. In answer to the President of the court-martial board as to whether the investigators "bulldozed" the witnesses, Fox replied: "I don't believe that what was done by the

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Draper, a prosecution investigator, admitted committing some of these acts while on a trip to Houston for Major Sutphin.

[43]Testimony of Private Grover Burns, U.S. v. Nesbit, pp. 1867-68 (quotation); Undated typescript statement of those men held at Fort Leavenworth, Kansas, Military Prison in 1919, p. 8, Case 109045, RG 153. If the defendant's charges were true, the investigating officers' acts violated military regulations (section 3, article 1, Military Discipline, Regulations, 1913, p. 9), making them subject to court-martial charges. However, no charges were ever filed as a result of these accusations.

[investigating] Board could be properly called 'bulldozing.'" He justified these interrogation tactics as necessary because the witnesses refused to cooperate and "it was extremely difficult to get any information at all."[44] Major Sutphin acknowledged in court during the third trial that he had sent agents to Houston on "confidential matters for the government," but he refused to discuss what the agents were sent to do or whether they threatened anyone.[45] The court-martial board did not question Sutphin further on this matter in open court.

The issue of "threat" also was rejected as a factor in the explanation of the men's leaving the third battalion camp on the night of 23 August. One of the claims of military men favoring the concept of trial by military officers rather than civil officials was that these men would more clearly understand the significance of

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[44]Testimony of Captain Tom Fox, U.S. v. Nesbit, pp. 2900-21; San Antonio Express, 24 November 1917, p. 16. Fox was a member of the Board of Inquiry that interrogated the prisoners held in confinement at Fort Bliss and he later became an assistant trial judge advocate in the Houston trials. Grier called Fox and other members of the prosecution team to the witness stand in an attempt to prove that information acquired during these interrogations should not be admitted because it was obtained by "words or acts--such as promises, assurances, threats, harsh treatment, or the like," and therefore was illegally obtained. Grier's efforts were unsuccessful, in part possibly because the advisor to the court on the "legality" of procedures was the accused violator, the trial judge advocate. For the inadmissibility of evidence under these conditions, or by "entrapment" or "deception," see Winthrop, Law and Precedents, pp. 327-29. See also, Manual for Courts-Martial, 1917, pp. 110-12.

[45]Comments of Major D. V. Sutphin, assistant judge advocate, first and second trials, judge advocate, third trial. U.S. v. Tillman: Copy, p. 1293. Left unanswered was the question of why, if the actions of Sutphin's agents were legal and proper, the major refused to reveal them to the court.

various crimes from a military standpoint; however, military courts were also less understanding when it came to certain aspects of an event. As trained soldiers, the members of the court failed to consider that an individual's absence from camp could have been as a result of fear. When several defendants testified that they fled camp when the firing began, a board member asked: "Didn't you expect to hear any shooting when you enlisted?" Another witness who cited fear of an attack by white Houstonians as the reason for his absence from one of the roll-calls was asked by the President of the board "if he expected to run the next time he heard someone say a mob was coming?"[46] Colonel Hull, in his summation, asserted that "the exigencies of the service have not produced fear as a military defense." The judge advocate then went on to remark that: "Fear to a soldier, . . . is a crime itself."[47]

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[46]San Antonio Express, 22 November 1917, p. 7. The standard procedures for courts-martial allow members of the board to "ask questions of a witness when it is apparent that the examination of the witness already made has failed to bring out matters material to the issues." Manual for Courts-Martial, 1917, p. 124. Careful review of the trial transcripts indicates that the comments made by the board as cited here, and other comments in all three trials, probably were made sarcastically and did not meet the referenced criteria. The apparently immaterial and irrelavent comments frequently made by the board indicated a possible lack of judicial impartiality on the part of at least some members of the board. Because the trial transcripts were not annotated to reveal which board member asked a particular question, the extent of an individual board member's bias, if any, could not be determined.

[47]Summation of the trial judge advocate, Colonel Hull, in the first trial, quoted in the San Antonio Express, 27 November 1917, pp. 1, 4; U.S. v. Nesbit, pp. 2119-26. The issue of fear as an explanation was a critical one because the only proof of association of many of the defendants with the murderous march on Houston was

In refusing to accept the contention that some men may have left the camp out of fear of a mob, the white officers were ignoring the fact that just a few months earlier, in East St. Louis, Illinois, white mobs ransacked entire black neighborhoods, indiscriminately killing or seriously injuring several hundred black citizens.[48] Other cities around the United States, both north and south, had

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their reported absence from roll-calls or the skirmish line. Some men claimed that they were absent from these checks due to fear, rather than because of participation in mutiny or the march on Houston. Although the first court-martial rejected fear as a valid explanation of absence, the departmental review of the third trial appeared to take an opposite view. This review of the Tillman case held that:

> "It cannot be reasonably doubted that some of the men of the 3d Battalion were impelled by fear to flee the camp-site when the firing first broke out and to seek refuge in various places beyond its confines. Nor is it improbable that some were apprehensive and filled with fear lest their comrades, who had gone forth with the column, would return and carry out their threats to "shoot up the camp" and all those who refused to join the mutineers in their descent upon the city. Therefore, mere absence from the checks which were taken, or from the camp-site, or from any given proper station fails to establish the elements of wilful disobedience of orders, of mutiny, of murder, or of assault to commit murder." (Italics mine.) (Quoted in "the Military Justice Division Review of the evidence against Abner Davis," 16 July 1919 [draft copy], Case 109045, RG 153.)

This review for the Secretary of War was prepared by Colonel King for the signiture of the acting Judge Advocate General, E. A. Kreger, and recommended reduction of the sentence for Davis to seven years for mutiny only. There is no evidence that a final copy of the review, with this recommendation, was actually sent to the Secretary of War.

[48] The exact count of Negro dead and injured in the East St. Louis race riot was never determined. Members of the third battalion were well aware of the events in East St. Louis and were actively engaged in a program to raise money for the relief of Negroes who had suffered in the Illinois riot. "Letters to the Editor," Crisis 14 (October 1917):307-8. For a well-documented, scholarly study of the Illinois confrontation, see Elliot M. Rudwick, Race Riot at East St. Louis, July 2, 1917 (Carbondale: Southern Illinois University Press, 1964).

influencing the crime.[51] In addition, since two of the charges against the men of the Twenty-fourth involved the issue of whether lawful command was exercised, the defense counsel appeared to be conceding the guilt of his clients before the trial was well underway.[52]

The trial judge advocate, in charge of all courtroom security arrangements in addition to prosecuting the case, made the implied status of the men's guilt even more obvious. Newsmen noted that at the beginning of the trial the defendants were escorted to and from the courtroom by "armed guards" of the Nineteenth Infantry. By the time the civilian witnesses finished testifying on the twelfth of November, it was reported that the guard detachment would now have "fixed bayonets at all times." With the damning testimony of the immunity witnesses on 14 November, reporters saw evidence of how much the case was going against the accused by the fact that the guard had been strengthened and "many now carry pump guns."[53] Even the dullest observers needed no other measurement of the judge advocate's increasing confidence in obtaining convictions with maximum penalties.

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[51] Opening statement, U.S. v. Nesbit, pp. 8-13.

[52] The issue of command was an element of the proof which had to be shown to sustain the charges in both the Sixty-fourth and Sixty-sixth Articles of War. Manual for Courts-Martial, 1917, pp. 209-10, 213-14.

[53] San Antonio Express, 2 November 1917, p. 4 (first quotation); 12 November 1917, p. 9 (second quotation); 15 November 1917, p. 4 (third quotation).

witnessed similar, but more limited attacks on blacks that summer.[49] The men of the Twenty-fourth Infantry were well aware that mob violence over the past thirty years had resulted in the deaths of over 2,500 Negores at the hands of their fellow citizens.[50] Denial of fear of white mobs as an explanation for the charge of running away from camp was denial of an unpleasant truth of Negro life in the twentieth century. The contention that men were no longer subject to this fear when they put on a military uniform was totally unrealistic.

From the beginning, the court also rejected any hope that the charge of mutiny could be rebutted on the basis of failure of leadership and control on the part of the battalion officers. Immediately after the opening formalities, a statement, mutually agreed to by both the defense counsel and the prosecution, was read into the record. This statement outlined the racial incidents in Houston which formed the background to the riot and further detailed the shortages of both officers and experienced non-commission officers in the battalion while at Houston. In agreeing to this statement, the defense counsel virtually gave up all possibility of successfully establishing a defense based on these factors, because the statement specifically ruled out these circumstances as

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[49]Riots also occurred in New York City; Chester, Pennsylvania; Philadelphia, Pennsylvania; Washington, D.C.; and Youngstown, Ohio.

[50]Thirty Years of Lynching in the United States, 1889-1918 (New York: NAACP, 1919; reprint ed., New York: Arno Press, 1969), pp. 29, 33.

The manner in which prosecution witnesses identified individual defendants is also open to criticism. At the beginning of the trial the prosecution specified that when a defendant was named during testimony, he should rise from his seat so that the court could see him and the witness could identify him. Upon objection by the defense counsel, this procedure was changed. Starting on the second day of the trial, the witness was required to point out the particular defendant he was testifying about before the named defendant would stand up. The result was that the prosecution witnesses, from that point on, had extreme difficulty in identifying the correct defendant. In many cases, the judge advocate's witnesses either identified the wrong man or were unable to find any defendant present who resembled the person they were testifying about. This proved so embarrassing to the army's case that on the eleventh of November the trial judge advocate decided once again to change courtroom procedure. Colonel Hull decided that witnesses would no longer have to point out individual defendants, ruling that if they had given their name at the time of arrest or capture, it "was prima facie evidence as to his [the defendant's] identity."[54] This ruling ignored the established fact that some soldiers, when asked to identify themselves on the night of the riot, had given a name other than their own.[55]

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[54]San Antonio Express, 2 November 1917, p. 4; 3 November 1917, p. 3; 12 November 1917, p. 3; Houston Post, 11 November 1917, p. 2; 12 November 1917, p. 1 (quotation); 14 November 1917, p. 5.

[55]Testimony of Captain Haig Shekerjain, cited in the

Even more questionable was the method by which the prosecution presented alleged pre-trial testimony to the court. The Articles of War clearly prohibited compulsory self-incrimination and guaranteed the defendant the right to not testify in court, if that was his choice.[56] Throughout the trials, prosecutors frequently made reference to pre-trial statements which allegedly conflicted with the testimony given in court; however, at no time were supporting documents introduced to confirm these conflicts. By discussing the supposed pre-trial statement of a defendant, the prosecutor was, in effect, introducing the defendant's testimony into court even if he had elected not to testify. Surprisingly, the defense counsel did not make serious objections to this manner of examination, nor did he insist that actual transcripts of the pre-trial testimony be admitted in evidence so that the court could see exactly what the defendants had said earlier.[57] Despite denials by the accused, the

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[56] Manual for Courts-Martial, 1917, pp. 115-16, 312-14 (Article 24).

[57] For examples of introduction of pre-trial statements without submission of supporting documents in evidence, see the testimony of Sergeant Roscoe C. Lewis and Private Charles J. Hatton, U.S. v. Tillman: Copy, pp. 985, 1004-5. Later in the trial, the prosecution claimed that the use of testimony given before pre-trial boards was just "to attack the credibility of those witnesses" and not intended to be a part of the evidence against these men. Ibid., p. 1356. Whatever the "intent," the prosecution was able to place unsupported information before the court which was detrimental to the defendant's cases. Military court procedures require that if it is claimed that witnesses have changed their testimony, before the court can accept this claim there must be "proof of contrary statements out of court." Manual for Courts-Martial, 1917, pp. 126-27. Such "proof" was never furnished. A possible reason for the prosecution's reluctance to introduce transcripts of the actual interrogations is the possibility

prosecution's allegations that some witnesses had changed their stories were allowed to remain as part of the trial record. Perhaps indicative of the validity of such allegations was the failure of the judge advocate to charge a single defendant or witness with perjury during the three trials.[58]

On the other hand, immunity witnesses freely admitted that they had changed their testimony since originally being interviewed, in some cases several times. The testimony of these witnesses, who had agreed to testify for the government, was the very heart of the prosecution's case. In most instances, evidence had been found during initial investigations which directly linked these men to the mutiny. Subsequently, these men agreed to identify other participants in the crime in exchange for immunity from prosecution or reduction of their sentences. In this way numerous defendants were positively pointed out as participants.[59]

Contrary to this positive identification, however, some of the soldiers whom the immunity witnesses named as present in one

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that these documents would prove defense contentions that the information was obtained illegally or without the proper advisement of the witnesses of their rights. See pp. 87-89 supra.

[58]The trial judge advocate of the third trial, Major Sutphin, once again broached the subject in his summation to the court. He referred to the defendant's statements to the Regimental Board of Inquiry and to the judge advocate and assistant judge advocates during the course of the trial preparation. Sutphin claimed that these statements "were brushed aside and contradicted with a uniform effrontery and disregard for the truth which was as amazing as it was deplorable. Never in my experience have I heard so much perjured testimony. . . ." U.S. v. Tillman: Copy, pp. 1445-46.

[59]Haynes, Night of Violence, p. 263.

location later conclusively were proven to have been elsewhere at the time. For example, five individuals named by Private Cleda Love as accompanying him back to camp from the march were either in jail in Houston or reliably proven never to have left the camp. This left open to question the validity of the entire testimony of the immunity witnesses. Was their testimony an honest unburdening of guilt-ridden consciences or a selfish attempt to escape certain punishment by any means, even if it meant implicating innocent men?[60] In his chapter on evidence, Davis's treatise on military law noted that the credibility to be attached to the testimony of accomplices and co-defendants should not be given weight unless

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[60]The five immunity witnesses in the first trial made a total of 117 identifications (many were duplications). Adams, "Houston Riot," p. 91. The star performer of the group was twenty year old Private Cleda Love. Love was a fast-talking recruit who had made few friends and many enemies during his four month career in the army prior to the riot. Despite his short sojourn in the battalion, the witness positively identified as amazing total of forty-one participants in the march on Houston. Both Love and the judge advocate remained nonplussed even after the young soldier's identification was conclusively proven to be erroneous in at least five cases. Even more questionable was his testimony in the third trial, which often contradicted the evidence he gave in the first trial. Testimony of Private Love, U.S. v. Nesbit, pp. 1266-1304; U.S. v. Tillman: Copy, pp. 707-9; U.S. v. Tillman, pp. 1550-67; Undated typescript statement of those men held at Fort Leavenworth, Kansas, Military Prison in 1919, Case 109045, RG 153; Haynes, Night of Violence, pp. 266-67, 292. Former Private Hesakiah C. Turner, in commenting on the immunity witnesses, told a Board of Review in 1924 that "the terror of the hanging had them so scared that they would gladly give any amount of evidence on anybody." Statement, General Prisoner 13232, "Report of Board of Review, 1924," 15 April 1924, Case 109045, RG 153. Private Grover Burns also claimed during the trial that "these men [immunity witnesses] were doing that [testifying] to save their lives, they would recognize anybody in that column even if they hadn't been there." U.S. v. Nesbit, pp. 1834-68.

corroborated by other and better testimony "or strongly supported by facts otherwise established in evidence."[61] The extent to which the board believed the testimony of the immunity witnesses will never be known, but reviews written later and summaries of the evidence indicated that reviewing officials considered this evidence as pivotal to the findings of guilty.

A further anomaly in the immunity testimony was the question concerning conditions under which immunity was offered. Prosecution witnesses claimed that they freely had admitted their guilt earlier and were not promised immunity until after their arrival in San Antonio. They denied charges that they were lying to save themselves. The trial judge advocate also asserted that these witnesses had voluntarily confessed their guilt without previous promises of favorable consideration.[62] The inconsistency in these statements was that the prosecution only transported from El Paso to San Antonio those individuals who had indicated a willingness to testify in court. Unless already promised immunity from maximum punishment, it seems highly unlikely that even the most repentant individual would agree to admit to a crime for which the penalty was death. Whatever the reasons for their testimony, the results of the trial made it obvious that the board was strongly influenced by the testimony of the "immunes," despite apparent inconsistencies.

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[61] Davis, Military Law, p. 257.

[62] San Antonio Express, 15 November 1917, p. 4.

Nor was the court-martial board totally consistent in its own actions. An example was the board's attitude toward the ability of witnesses to recall details of events. On the first day of the trial, the commanding officer of the third battalion, Major Kneeland S. Snow, testified that he had briefed the first sergeants of the four companies to tell their men to remain in camp and to turn in their weapons and ammunition. This testimony was critical to the issue of whether the men disobeyed a lawful order. When the major was unable to name three of the four men to whom he claimed to have issued the order, the court accepted his forgetfulness without comment; although it should have seemed strange that an organization commander would not be on at least recognition acquaintance with the four senior non-commissioned officers of his battalion.[63]

Later in the trial, several defendants testified on their own behalf. Under a rather strenuous cross-examination these defendants were not always able to remember some specific events or people. For example, when discussing their position in the skirmish line which was awaiting attack in the rainy blackness that night, some of the accused were not sure who the soldiers were on either side of them, or even which company these men were from. Several times members of the board unnecessarily commented on these lapses of memory and the president of the board specifically remarked on "the inability of the defendants to remember some things while

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[63]San Antonio Express, 2 November 1917, p. 4; Testimony of Major Kneeland S. Snow, U.S. v. Nesbit, pp. 44-68.

others they know very well."[64]

The confused testimony of the accused was hardly surprising. So overwhelming was the cross-examination effort of the judge advocate, Colonel Hull, that several of the defendants refused to exercise their rights under the Articles of War to testify in their own behalf. They had undergone the military lawyer's practiced verbal dissection during questioning at Fort Bliss and had no wish to repeat that confusing, frightening experience again.[65]

Ironically, the memory of prosecution witnesses apparently was improved by conversations with the judge advocates. During the third trial, one witness was asked how he was able to remember details of events now that he did not even know at the first trial. The soldier replied that it was "because I had been going over to Major Sutphin's office, and had my mind on it."[66]

The results of the first trial were no more indicative of consistency than the trial proceedings. Published summaries of the trial transcript indicated that conviction was based primarily on three circumstances: absence from the roll call taken between nine

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[64]San Antonio Express, 21 November 1917, p. 4 (quotation); 22 November 1917, p. 7. For the propriety of court comments, see Manual for Courts-Martial, 1917, p. 124. The practice of members of the board making inappropriate and apparently sarcastic comments continued in the other two trials. For example, when a defendant could not remember what time it was when he learned of the beating of Corporal Baltimore, the court asked if there was something wrong with the witnesses mind. U.S. v. Tillman: Copy, p. 815.

[65]Haynes, Night of Violence, p. 267.

[66]Testimony of Private First Class James C. Johnson, U.S. v. Tillman: Copy, p. 195.

and ten o'clock, arrest or capture outside the limits of the battalion camp, and presence in the Houston column, as indicated by the testimony of immunity witnesses.[67] Yet, some men who met these criteria were not convicted. Private Terry Smith, M Company, was acquitted, despite being absent at ten o'clock and being later arrested in downtown Houston. Private Grover Burns, who missed the roll call and was identified as being in the assault column by three witnesses, was also acquitted. Two other men who denied leaving camp, although they missed the roll calls, were also found "not guilty."[68]

Four men were convicted of disobeying orders by leaving camp, but were found innocent of participating in the march on Houston and the subsequent murders. Three of the men were sentenced to two years in prison while the fourth, for some unknown reason, was sentenced to two and one-half years at hard labor.[69] Similar

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[67]Review of Trials of the Houston Riot Cases, prepared by Colonel James J. Mayes, acting Judge Advocate General, 3 August 1918, Case 109018, RG 153; Judge Advocate's Review of Record of Trial, prepared by Colonel B. A. Read, assistant to the Judge Advocate General, 5 April 1919, Case 109045, RG 153.

[68]Adams, "Houston Riot," p. 100; U.S. v. Nesbit, pp. 2129-69. Because courts-martial boards were not required to explain the reasons for their findings, no evidence exists as to the considerations which caused the court to issue these acquittals. The only certainty is that there were men convicted who had less weight of evidence against them than those who were acquitted.

[69]Adams, "Houston Riot," p. 99. An extensive review of trial transcripts indicates no logical reason for the court's additional severity against Private Oliver Fletcher. Fletcher was later restored to duty after serving seven months of his sentence. It was ironic that while one of the "two year" men only served six months of his sentence, the other two remained in prison longer than Fletcher, serving ten and eighteen months respectively. Reviews of individual

inconsistancies appeared in the sentences of the other two trials.

Following a court-martial, army regulations provided for a final check to avoid the certification of erroneous conclusions as a result of judicial error. The reviewing authority was required to examine the trial record for these defects and to reconvene the court if substantial errors were found which affected the findings. The transcript of the first trial was examined for the department commander by Colonel George Dunn, Southern Department Judge Advocate General. Colonel Dunn's "intensive" review of the 2,165 pages of testimony for identification of errors took just one day.[70] The obvious superficiality of this examination did little to provide the convicted soldiers with a last opportunity for justice.

To the legalistic-minded, the greatest injustice of all in the first trial was the execution of the thirteen men who were sentenced to hang. These men were given no opportunity for review or mitigation of their sentences by the President of the United States. That such an occurrence was legal under the existing Articles of War was unquestioned, since a state of war had been declared over nine months earlier. However, those who formulated the applicable article had not envisioned the existing circumstances in which the United States could be at war without either actual

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records: Private Oliver Fletcher, Private First Class Alvin Pugh, Private Walter B. Tucker, and Private Henry T. Walls, Case 109045, RG 153.

[70]Article 37, Articles of War, reprinted in Manual for Courts-Martial, 1917, p. 314; Regulations, 1913, pp. 175-76; Houston Post, 4 December 1917, p. 4; Adams, "Houston Riot," p. 101.

combat within her borders or a direct threat to her continental limits.[71] The inordinate haste and secrecy of the execution appeared to be deliberately done in order to avoid any challenge to the execution on the basis of the obvious obsolescence of this article.

Whatever the reasons, the public outcry was immediate and sustained. In response to the reaction over the first trial, Secretary of War Baker modified the Articles of War through issuance of General Order Number 7, requiring that within the continental United States the death penalty in all courts-martial be suspended until the trial records were reviewed by the office of the Judge Advocate General of the Army and confirmed by the President.[72]

Under this requirement, President Wilson remitted the death sentences of ten members of the Twenty-fourth Infantry who were sentenced to die by the two later courts-martial. The death sentences of six other black soldiers, however, were confirmed and they were executed on the same gallows used for the first thirteen men.[73] With

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[71]The discussion of the history of Article 48(d), and the interpretation of what the intent of Congress was in passage of that portion of the Act of 2 July 1864, is in Davis, Military Law, pp. 543-45. See also, Winthrop, Law and Precedents, p. 460.

[72]Copies of the many letters, petitions, and telegrams to President Wilson and Secretary Baker are contained in the files of Case 109045 and Case 114575, RG 153; Crisis 15 (April 1918):283; General Orders, Number 7, War Department, Washington, D.C., 17 January 1918, reprinted in War Department Committee on Education and Special Training, A Source-Book of Military Law and War-Time Legislation, with a preface by John H. Wigmore (St. Paul, Minn.: West Publishing, 1919), pp. 604-6.

[73]General Court-Martial Order 197, Headquarters, Washington, D.C., Adjutant General's office, 7 September 1918, Case 109045,

these executions, the Houston Mutiny Courts-Martial were complete. The final results were nineteen men executed, sixty-three sentenced to life imprisonment, and twenty-eight other soldiers given lesser terms in prison. Only seven of the men charged with the attack on Houston successfully defended their innocence.[74]

However, others involved in the Houston incident and/or trials fared better. Although Major Grier's record as a defense attorney left much to be desired, the army evidently was not disappointed at his inadequate and sometimes questionable defense of the Negro soldiers. Following the completion of the third trial, Major Grier was promoted to lieutenant colonel in the National Army. Also in line for promotions within a short time after the trials were the commander of the third battalion, Major Snow, and the M Company commander, Captain Lindsey McD. Silvester. Both officers had been severely criticized by the Inspector General of the Army,

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RG 153. Another factor in Wilson's remission order may have been the idea expressed in a memorandum from the Judge Advocate General to the Secretary of War. The memorandum noted that "the American people are prone to consider a measure of atonement by death as being sufficient and to tire of continued executions, intermittent and after long delay." "Commutation of death sentences in Houston Riot Cases," ibid. Contrary to the statement on page six of Haynes's otherwise accurate book, the gallows used for the first trial was disassembled, stored, and reused for both the subsequent executions of the "Houston Rioters." This gallows remained in storage in a quartermaster warehouse at Fort Sam Houston for several years after World War I. Interview with Harold Kayton, 18 August 1976.

[74]Report by the Military Justice Division, Clemency Section, 20 December 1919, Case 109045, RG 153. Seven other men who admitted participating in some part of the attack on Houston were never charged, having been granted immunity in return for their testimony against other participants.

Brigadier General John L. Chamberlain, for their inadequate performance as unit officers at Houston. Major Snow had been especially singled out as exhibiting "inefficiency and criminal negligence of character, which . . . demonstrates his unfitness to command." General Chamberlain also faulted Snow's predecessor as battalion commander, Lieutenant Colonel William Newman, for creating the conditions that led to the events at Houston. Despite this criticism, Newman was also promoted.[75]

Colonel George O. Cress, Inspector General for the Southern Department, went even further than Chamberlain and recommended that Major Snow be court-martialed under the Ninety-sixth Article of War for his actions at Houston.[76] Colonel Cress's recommendation was never acted upon. Once again the double standard was apparent as the army left no stone unturned to convict enlisted men of a crime while failing to try, and even promoting, officers who had also failed to

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[75]Rank in the National Army was in accordance with a separate promotion list from that of the Regular Army, similar to the system of "volunteer" rank during the Civil War and the Spanish-American War. During World War I, many regular officers were promoted to a National Army rank two or three grades above their regular rank. Army Register, 1920, s.v. "Harry S. Grier," "Lindsey McD. Silvester," "William A. Newman," "Kneeland S. Snow"; Report of "General Chamberlain to Adjutant General of the Army," 13 September 1917, quoted in Haynes, Night of Violence, pp. 242-44.

[76]Colonel Cress to Commanding General, Southern Department, 13 September 1917, cited in ibid. In addition to failing to maintain discipline within his command, Major Snow apparently was a coward. Civilian witnesses testified that after Snow fled the camp to seek help, leaving his junior officers to remain and cope with the mutiny, the major huddled in fear on the floor of a car while begging to be taken into downtown Houston. Testimony of R. P. McDaniel, Cress Report, Appendix B, pp. 128-31, cited in ibid., p. 225.

meet military standards.

The trial became history as the public reaction to the events at Houston and in the Fort Sam Houston Chapel soon faded to a small die-hard effort of a few citizens to get the black prison inmates released, an effort which would take over twenty-three years before the last of the "Houston men" were freed.[77] But the problems demonstrated in the Houston courts-martial had not faded away; they were being repeated daily in the hundreds of trials being held in the United States and overseas. These trials would eventually involve over a quarter-million American citizens.[78] Even before the

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[77]The last of the mutineers in prison, Private Richard Brown, was released on 9 September 1941. Memorandum, Richard Brown, Case 109045, RG 153. However, this was not the end of the "Houston affair." On 20 September 1957, the Adjutant General remitted the unexecuted portion of the sentence to confinement of William Frazier. Frazier, a cook in I Company who had escaped while on parole from his life sentence, turned himself in to the army in 1957 and asked for clemency. Paradoxically, the file on Frazier contains a handwritten memorandum from someone in the office of the Judge Advocate General (signiture illegible), dated 3 June 1920, that states that the author "doubts the guilt of this man based on papers submitted." Frazier File, ibid. Three months later, William L. Dugan, another parole violator, also appealed for, and received, remission of his life sentence. Letter, Judge Advocate General of the Army to William L. Dugan, 13 January 1958, Case 114575, RG 153. Thus, the records on the Houston Mutiny and Court-Martial were finally closed.

[78]Human rights problems in World War I were not unique to the military. As John Braeman points out ("World War One and the Crisis of American Liberty," American Quarterly 16 [1964]:110), constitutional guarantees were overrun in all segments of American society and, with few exceptions, the judiciary failed "to resist the popular clamor and uphold constitutional liberties." Braeman suggests that the outbursts of public hysteria were "repercussions of this psychic crisis" which Richard Hofstader claimed resulted from the "rapid social changes which transformed post-Civil War America." Richard Hofstader, "Manifest Destiny and the Philippines," in Daniel Aaron, ed., America in Crisis: Fourteen Crucial Episodes in American History (New York:

end of the war, the reaction of these men and their families to the abuses within the system of military justice began to make itself heard--and their concern would grow, not fade.

Holt, Rinehart & Winston, 1952), pp. 173-200, quoted in ibid.

CHAPTER IV

JUSTICE VERSUS PROFESSIONAL ABSOLUTISM: THE ANSELL/CROWDER CONTROVERSY

During 1918, American manpower contributions to the international bloodletting on the fields of France grew from a trickle to a flood. As increasing thousands of young Americans boarded the overseas transports, they were replaced in the training camps by the continuing production of the selective service system. Only a minority of these converted civilians would come into direct contact with the system of military justice. Even fewer of these men would become involved with the formality of a court-martial.

Statistically, the percentage of disciplinary involvement was decreasing in the wartime national army, compared to the pre-war regular army. However, the mushrooming size of the temporary forces meant that even while the percentages fell, the actual number of soldiers subjected to judicial actions soared.[1] Throughout what

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[1]Newton D. Baker, "The Court Martial in Its True Perspective," Independent and Weekly Review 98 (19 April 1919):122; During the period 6 April 1917 to 30 June 1918 there were 12,357 general courts-martial, 14,715 special courts-martial, and 228,839 summary courts-martial. The pre-war averages (1910 to 1916) were approximately 4,500, 2,200, and 37,000 respectively. Over 6½ percent of the enlisted men of the pre-war regualr army met general courts-martial each year and 70 percent of the men annually went before inferior courts. U.S., War Department, War Department Annual Reports, 1918, 3 vols. (Washington, D.C.: Government Printing Office, 1919), 1:239, 247, 249; "Manuscript entitled 'Military Justice' by Lieut. Col.

would be the final year of the war, the increasing number of courts-martial convened, the severity of the sentences imposed, and the growing number of American families directly affected by the system of military justice resulted in floods of letters to members of Congress.[2] Newsmen, sensing the swelling tide of protest, began to question and probe for the causal reasons for military judicial problems.

Facing similar situations in the past, the military had been able to divert civilian attention elsewhere until the army could cleanse itself of the citizen soldiers following the end of hostilities. The celebration of victory and the rush of demobilization had regularly served to mask any exposed deficiencies. With the end of World War I, the army once again might have been able to ignore the voices of "disgruntled individuals" and "undisciplined felons," except for the actions of one of its own leading officers, the acting Judge Advocate General of the Army, Brigadier General Samuel T. Ansell.

General Ansell, senior ranking officer in the Judge Advocate General's office upon the temporary departure of General Crowder, felt that the system of military justice needed a "legal check"

S. T. Ansell, delivered on June 26, 1919, at Bedford Springs, Pa., before the Pennsylvania Bar Association," section VIII, reprinted in the 58 Cong. Rec. 3474 (1919).

[2]57 Cong. Rec. Appendix 279 (1919) (extension of remarks of Hon. Dan V. Stephens of Nebraska in the House of Representatives, Monday, 3 March 1919); 58 Cong. Rec. 6497 (1919) (remarks of Senator Chamberlain).

to the "instances of palpable and unquestioned injustice through courts-martial."[3] On 10 November 1917, in response to the conviction of the "Texas Mutineers," Ansell prepared a lengthy memorandum to the Secretary of War in which he reasoned that the authority vested in the Judge Advocate General of the Army by section 1199 of the Revised Statutes (to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions") carried with it the power to change or modify the decisions of such bodies.[4] In his efforts to gain appellate authority, and thus legal jurisdiction over courts-martial boards, General Ansell interpreted this statute as providing the basis "for the legal supervision of the procedure and judgments of courts-martial, for the establishment of legal appreciations in the administration of military justice, and for giving legal guidance to the power of military command over such judicial functions."[5] This interpretation brought about the first clash between Generals Ansell and Crowder.

As Provost Marshal General, Crowder was occupied fully with the difficult task of supervising the selective service system. However, when he learned of Ansell's memorandum, Crowder took time

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[3]Letter, S. T. Ansell to Senator Chamberlain, 16 August 1919, reprinted in 58 Cong. Rec. 3940 (1919).

[4]58 Cong. Rec. 6495-96 (1919) (remarks of Senator Chamberlain); Section 1199, Revised Statutes of the United States, 1878, reprinted in War Department Committee, Source-Book, p. 36 (quotation).

[5]Letter, S. T. Ansell to Senator Chamberlain, 16 August 1919, reprinted in 58 Cong. Rec. 3940 (1919).

to write Secretary of War Baker a detailed brief in opposition to Ansell's position. Crowder's basic contention was that directive, rather than "recommendatory," authority between the office of the Judge Advocate General and reviewing officers in the field would constitute interference with the chain of command. The Provost Marshal General also disagreed with Ansell's interpretation of section 1199, citing as the basis for his disagreement the opinions of several past Attorney Generals and some previous federal court rulings. Crowder held that the power to "revise" court-martial records granted in section 1199 was for the purposes of examination for jurisdictional defects, rather than to direct the remedy of all defects of procedure and law. As precedent for his opinion, he cited the ruling of the United States District Court in Mason's Case in 1882 which states that "the Judge Advocate General, under the authority vested in him by Sec. 1199, R.S., to receive, revise, &c., the proceedings of courts-martial has of course no power to reverse a finding and sentence." (Italics not mine.)[6]

Secretary of War Baker, more concerned with winning the war than with social reform, either within or without the army, supported his chief legal officer. In addition, the Secretary was "determined to support discipline as a fundamental principle"[7] in

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[6]Lockmiller, Crowder, p. 207; George G. Bogert, "Courts-Martial: Criticisms and Proposed Reforms," Cornell Law Quarterly 5 (November 1919):44-45; Winthrop, Law and Precedents, pp. 53-54 n. 56 (quotation).

[7]Frederick Palmer, Newton D. Baker, America at War, 2 vols.

the prompt preparation of the new national army. In a memorandum to General Crowder, Baker said: "The administration of justice is a compromise between speed and certainty."[8] The "speed" aspect of Baker's position was emphasized by the hurried hangings at Fort Sam Houston only a few days after Baker wrote this memorandum.[9] Despite Baker's agreement with Crowder's position, Ansell was not discouraged at this temporary set-back; he continued to insist on the need for legal regulation of the military courts.

Even while the "Houston Rioters" were being denied an opportunity for clemency, General Ansell was filing a second brief with the Secretary of War in answer to the Provost Marshal General's opinion. Explaining that "justice is a matter of law and not of executive favor," Ansell castigated those who disagreed with him as "looking backward and taking counsel of a reactionary past whose guidance will prove harmful, if not fatal." He specifically charged that: "The views of the Assistant Chief of Staff and the Inspector General [who had joined Crowder in opposing Ansell's stand on revision] savor of professional absolutism." Ansell further claimed that "opposing legal views are anachronistic" and that these views were "given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of court-martial," a

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(New York: Dodd, Mead & Co., 1931), 2:279.

[8]Quoted in ibid.

[9]Supra, pp. 1-2, 102-3.

reference to Crowder's use of citations from Winthrop's Military Law and Precedents in his opposing brief.[10]

At the heart of the entire controversy was the interpretation of the meaning of the word "revise." Denying Crowder's contention that the word had "no substantial meaning, but has reference only to clerical corrections," Ansell believed that "the word 'revise' is an organic word, which solely creates and defines the duties of an entire bureau." He further stated that: "'Revise,' in its every sense--ordinary, legal, and technical military sense--means to correct, to alter, and amend." Basic to "the ordinary meaning of the word 'revise,'" according to Ansell, was not the authority "to review for the purpose of corrections, but to perform the act of correction."[11]

General Ansell's counter-argument was only the first in a continuing series of briefs and memoranda submitted to the Secretary of War and the Chief of Staff on the topic of military justice and adjudication. Ansell also attempted to strengthen his authority and influence by having his "acting" position confirmed by headquarters orders relieving General Crowder of the duty of Judge Advocate

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[10]New York Times, 16 February 1919, p. 17; Head notes from a "Brief Filed by Permission of the Secretary of War in Support of My Recent Opinion Concerning the Revisory Power of the Judge Advocate General of the Army Over Judgments of Military Courts," section I (first quotation), section II (second quotation), section II, 1 (third quotation), section II, 2 (fourth and fifth quotations), reprinted in 57 Cong. Rec. 4504 (1919) (remarks of Representative Johnson).

[11]Ibid., section III (first and second quotations), section IV (third quotation), section IV(a) (fourth quotation).

General. This unsuccessful effort to make Ansell's office "legal" rather than "customary" further alienated General Crowder and increased the polarization between the Judge Advocate General and his chief legal assistant.[12]

In the process of attempting to alter the relationship between the judicial and the command functions of the army, Ansell gained several powerful allies in Congress. Foremost among these supporters were Senator George E. Chamberlain of Oregon, Chairman of the Senate Military Affairs Committee, and Representative Royal C. Johnson of South Dakota, a decorated veteran of service in France and a former officer who had risen from the ranks.[13] These congressmen provided the access to public attention that Ansell lacked. More importantly, embarrassing questions, when asked by members of Congress, could not be avoided by the usual simple military expedient of allowing them to become bogged down in a maze of administrative bureaucracy. Additionally, information that could

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[12] 57 Cong. Rec. 5404 (1919) (remarks of Representative Johnson); Letter, S. T. Ansell to Senator Chamberlain, 16 August 1919, reprinted in 58 Cong. Rec. 3940 (1919); Letter, E. H. Crowder to the Secretary of War, 8 March 1919, reprinted in 58 Cong. Rec. 6501 (1919).

[13] Crowder's biographer implies that the support of Chamberlain, Johnson, and others for Ansell's position was at least partially politically motivated. Lockmiller, Crowder, p. 205. Baker's chief biographer lends support to this view and characterizes Chamberlain as "an unplacable critic of Baker's administration from the outset." Chamberlain "ardently" hoped to be appointed to the post of Secretary of War and was bitterly disappointed when President Wilson appointed Baker instead. Palmer, Baker, 1:6, 2:53. Of course, there were also some honest differences of opinion which divided people on the complex subject of military law and justice.

not be released to the news media by a dissident officer, due to wartime censorship restrictions, could be printed in the Congressional Record by a concerned congressman intent on the need for reform.[14]

In an effort to still public criticism, the army took a number of steps apparently designed to eliminate the worst abuses in the system of justice. In January 1918, the War Department proposed that the controversial section 1199 be amended by Congress to allow the President to "disapprove, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part of any sentence as has not been vacated or set aside." The proposed amendment also would permit the President to "return any record through the reviewing authority to the court for reconsideration or correction."[15]

Critics of the proposal claimed that this change only worsened the situation because it would now be possible for "the Chief of Staff, acting for the President, (a) to set aside an acquittal and have the accused, though acquitted, tried again;

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[14]The question of "to what extent an active duty officer can or should publicly disagree with the decisions and actions of his superiors" has yet to be definately answered. The public outbursts and courts-martial of the Viet Nam era did nothing to clarify the issue. The issue was again publicized in 1977 when President Carter recalled several senior army officers who publicly expressed opinions contrary to administration policy.

[15]S. 3692, H.R. 9164, 65th Cong., 2d sess. (1918); Letter, Secretary of War to the Chairman, Senate Military Affairs Committee, quoted in 58 Cong. Rec. 6496 (1919) (remarks of Senator Chamberlain). Under the existing statutes, the President could only exercise his power of clemency in court-martial cases in which he was not the designated reviewing official.

(b) to substitute a conviction of a more serious offense for a less serious one; (c) to increase the punishment; and (d) to return the proceedings to the court, with directions to reconsider for the purpose of doing all these things." The major objection to the revision was that it effectively still left the revisory process in the hands of the command structure, who would advise the President on the basis of discipline, not justice. Dedicated to the concept of a separate, independent appellate system similar to that of the civil judiciary, Senator Chamberlain condemned the War Department proposal as merely a subterfuge, while still retaining "control of military justice within the power of a military autocracy."[16] Other members of Congress apparently agreed with the Senator's views because both the Senate and House refused to approve the proposed revision.[17] However, this did not finish the army's attempts to mask the problems in its legal system.

The promulgation of General Orders, Number 7 in January 1918, which required, in substance, that all sentences involving death, dismissal, or dishonorable discharge be sent to the Judge Advocate General's office in Washington for review prior to execution, meant

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[16] 58 Cong. Rec. 6496 (1919) (remarks of Senator Chamberlain). The proposed revision to section 1199, while overtly extending broad revisory powers to the President, was actually a grant of authority to the Chief of Staff. It would be unrealistic to expect the President to personally review the thousands of records monthly, thus he would be dependent on the advice of the military staff system in the exercise of the authority granted in the revised section 1199.

[17] 58 Cong. Rec. 6499 (1919) (remarks of Senator Chamberlain).

that capital sentences would have at least the opportunity for presidential clemency before being carried out. This negated any possiblity of a repetition in the United States of the widely criticized execution of the "Houston Rioters" without executive review. The second paragraph of this order directed the establishment of a branch of the Judge Advocate General's office in France. On the surface, this office, together with the assignment to it of a senior member of the Judge Advocates Department, Brigadier General Edward A. Kreger, provided the same review and clemency opportunity for the men serving in France.[18]

On 24 March 1918, a cablegram was received from Major General John J. Pershing, Commander of the American Expeditionary Forces in Europe, objecting to this "possible obstruction to the administration of military justice."[19] Pershing also informed the Chief of Staff that, contrary to orders, "Brig. Gen. Walter A. Bethel [Pershing's staff judge advocate] has not established [a] branch office and will not do so pending further instructions."[20] Apparently what Pershing really objected to was General Staff interference with his command

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[18]General Orders, No. 7, War Department, Washington, D.C., 17 January 1918, reprinted in War Department Committee, Source-Book, pp. 604-6; Lockmiller, Crowder, p. 205. The branch office of the Judge Advocate General was eventually established at Chaumont, France.

[19]Letter, E. H. Crowder to Brig. Gen. Walter A. Bethel, 5 April 1918, reprinted in 58 Cong. Rec. 6497 (1919).

[20]War Department Cablegram No. 779, Commander, AEF to Chief of Staff, U.S. Army, quoted in 58 Cong. Rec. 6497 (1919).

authority in France.

In reply to Pershing's near insubordination, General Crowder wrote General Bethel a letter which gave a better indication of the real intent behind the establishment of the branch office. Following assurances that the purpose of this action was not to interfere with, but to help General Pershing, Crowder wrote:

> Prior to the issue of General Order No. 7 it had become apparent that, due to the large increase in commissioned personnel, which included many officers with little or no experience in court-martial practice, a large number of proceedings were coming in which exhibited fatal defects. A Congressional investigation was threatened and there was talk of the establishment of courts of appeal.
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> The remedy for the situation was immediate executive action which would make it clearly apparent that an accused did get some kind of revision of his court-martial proceedings other than the revision at field headquarters, where these prejudicial errors were occurring.[21]

Obviously the important purposes behind the French branch office were to preclude congressional investigation, silence talk of establishment of a tribunal of appeal, and make it appear that some improvement had been made in the revisory process. Crowder further pointed out that "at other headquarters the scheme has worked beautifully. It has silenced all criticism. . . ."[22]

The Judge Advocate General was wrong; criticism had not been silenced, but instead was only temporarily stilled. One source of internal agitation was removed for a short time when General Ansell

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[21]Letter, E. H. Crowder to Brig. Gen. Walter A. Bethel, 5 April 1918, reprinted and emphasis added in 58 Cong. Rec. 6497 (1919).

[22]Ibid.

was suddenly sent to study the systems of military justice being used by other nations in Europe, leaving Colonel James J. Mayes as acting Judge Advcoate General. However, when Ansell returned in July he submitted a report which pointed out many elements in which other systems of military law were far superior to the American program. Although Ansell resumed nominal control of the department upon his return, his report comparing the various judicial programs was "disregarded, ignored, and never reached the Secretary of War."[23]

Throughout the summer and early fall of 1918, the public had little time to pay attention to the interdepartmental squabbles of an agency that few understood and even fewer cared about. Newspaper headlines were occupied with the increasing involvement of American troops on the battlefields of France. Foremost in the minds of most Americans was the need to unify in support of the men in the front lines; but with the armistice in November, critics of all phases of the war effort began to make themselves heard, including those disenchanted with the system of military law.

On 30 December 1918, Senator Chamberlain addressed the Senate on the subject of the numerous injustices in military trials that were being reported to congressmen by their constituents. The Senator charged that:

> The administration of military justice during this war has developed many cases of life or long term sentences by courts-martial which either would not have been imposed at all, or

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[23] 57 Cong. Rec. 4504 (1919) (remarks of Representative Johnson); Lockmiller, Crowder, p. 202.

> would have been more lenient, if the rights of the enlisted man had been properly protected in the course of the trial before the court-martial.[24]

As examples of judical abuses, Chamberlain cited six specific cases in which minor offenses were punished by drastic sentences involving dishonorable discharges and long terms at hard labor. The details given by the senator were not normally available to the public, including data from the restricted files of the Judge Advocate General's office.

The timing of Chamberlain's speech, the details provided, and the senator's subsequent introduction of a bill to reform courts-martial procedure appeared to be a more than coincidental attempt to influence the issue of Crowder's impending reappointment to the post of Judge Advocate General of the Army.[25] However, the clamor had gone beyond the stage of personal conflict between two individuals. With more than a third of a million men affected by courts-martial since the beginning of the war, many people were interested in what

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[24] 57 Cong. Rec. 876-79 (1918) (remarks of Senator Chamberlain).

[25] Crowder's second four-year term of office as Judge Advocate General was due to expire on 14 February 1919. Because Crowder's original appointment antedated the changes made in the Bureau Chief system in 1912 and 1914, failure to gain reappointment prior to that date would result in his automatically becoming a civilian and losing all seniority in the army. Crowder's biographer thought that the sudden interest in criticising military justice was partly an attempt to influence President Wilson against the Judge Advocate General's reappointment. Wilson apparently did not even consider replacing Crowder with anyone else, however, a combination of circumstances associated with the President's trip to France resulted in the letter of nomination not arriving in Washington until 13 February. Thus, Crowder's appointment was confirmed by Congress with only a few hours to spare. Lockmiller, Crowder, p. 204. See also, ANJ 56:861.

was wrong with the army's legal system.

Less than a week after Chamberlain's address to the Senate, George T. Page, president of the prestigious American Bar Association, joined the critics of the military program. Speaking before the association's executive committee, Page described military law and the system of military justice as "unworthy of the names law or justice."[26] He further commented that punishments imposed by military courts "are grossly harsh" and "differ so widely that we find the same offense punished in one court-martial by twenty-five years in the penitentiary and in another by six months punishment in disciplinary barracks."[27] President Page called for the subject to be included in the program at the next annual session of the bar association.

Congressional critics were not willing to wait for the bar association to act, however. In January 1919, Senator Chamberlain introduced a bill to modify courts-martial procedures and to increase the authority of the Judge Advocate General to conduct judicial review. The bill also prohibited execution of sentences of death or dishonorable discharges until such time as Congress completed a study of possible revision of the Articles of War. The same bill was introduced in the House of Representatives by

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[26]New York World, 19 January 1919, quoted in Lockmiller, Crowder, p. 199.

[27]New York Times, 4 January 1919, p. 11.

Congressman Isaac Siegal of New York.[28] Hearings on these bills were held by the respective Military Affairs Committees. The first witness called before the Senate committee in February 1919 was Brigadier General Ansell. This hearing gave the outspoken judge advocate the public platform he sought as he responded to committee questions with opinions and data which his position in the army had previously prohibited him from making public.[29] This was not the first time, however, that the acting Judge Advocate General had publicly proclaimed his opposition to the views of his superiors.

In a story reminiscent of the muckraking exposés of an earlier decade, the 19 January edition of the New York World carried a full page story under the banner headline, "THE THING THAT IS CALLED MILITARY JUSTICE!"[30] Under the by-line of Rowland Thomas, the article was extremely critical of wartime justice and enumerated various instances of brutal and shocking treatment of soldiers which allegedly violated their rights as American citizens. An indication of how Thomas was able to gain access to much of his information was revealed by his comment on the disagreement between Crowder and his chief assistant.

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[28] S. 64, H.R. 367, 65th Cong., 3d sess. (1919). Known as the Chamberlain Bill, the act to reform courts-martial procedure was introduced on 13 January 1919. 57 Cong. Rec. 1311 (1919).

[29] "Establishment of Military Justice: Hearings before a Subcommittee of the Committee on Military Affairs," testimony of Brigadier General Samuel T. Ansell, reported in the New York Times, 14 February 1919, pp. 1, 10.

[30] New York World, 19 January 1919, p. 2.

> It was clearly evident from offical "recommendations" attached to various cases, that in the Judge Advocate General's Department there is a school which believes in the theory that courts-martial are instrumentalities of military command, that this is the view of the Judge Advocate General himself, General Crowder, but is not the view held by the officer who, throughout the war, has been Acting Judge Advocate General of the United States Army, nor by most of the officers of the Department.[31]

It is very likely that Ansell or one of his supporters in the department supplied the New York World reporter with the information that Ansell himself revealed in Chicago six days later.

Contrary to the military custom that all public pronouncements be cleared through military channels, General Ansell placed his criticisms before the public in two addresses before the Chicago Bar Association and the Chicago Real Estate Board. He told members of the lawyer's group that the existing military justice system was "in many respects patently defective and in need of immediate revision at the hands of Congress."[32] With these speeches, the dam of official silence was broken. The hearings before the Senate Military Affairs Committee on the Chamberlain Bill would only serve to further expose the depths of the schism existing within the Judge Advocate General's Department.

General Ansell opened his testimony before the Senate committee on 13 February by calling the army justice system "an atrociously bad system."[33] Not only did he reveal the controversy

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[31]Ibid.

[32]Chicago Daily News, 25 January 1919, p. 1; Chicago Tribune, 26 January 1919, p. 2 (quotation).

[33]New York Times, 14 February 1919, p. 1.

concerning the issue of judicial review, but he also cited specific examples of extreme penalties from the files of the Judge Advocate General's office. Senators were dismayed to discover that a soldier of less than six weeks service was given a sentence of forty years at hard labor for merely telling a lieutenant to "go to hell" when ordered to surrender a pack of cigarettes.[34]

Even more startling was the revelation of the extent of influence exercised by the convening officer. In one case cited, the defendant had been acquitted by the court-martial board of the charge of burglary, but the commanding general disagreed. He ordered the court to reconvene and reconsider the "very incriminating" evidence. Upon reconsideration as ordered, the court found the soldier guilty and sentenced him to a dishonorable discharge and five years at hard labor. The "guilty" verdict was based on exactly the same evidence as the previous "acquittal"--the only difference being the additional "guidance" provided by the commander. When the case was reviewed in the judge advocate's office, the reviewing officer said: "After careful consideration of the evidence, this office is firmly convinced of the absolute innocence of the accused." The Judge Advocate General, noting that he had no power to correct this situation, endorsed this review and sent it to the responsible

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[34]"Unjust Punishments Inflicted by Our Courts-Martial," Literary Digest 60 (1 March 1919):57-59; Testimony before the Senate Military Affairs Committee, reprinted in the Washington Post, 14 February 1919, p. 1; 57 Cong. Rec. 3328-30 (1919) (remarks of various senators).

camp commander only for his information. The second verdict remained in effect.[35]

The disagreement between Ansell and the Judge Advocate General on the issue of the power of review was a highlight of the testimony before the committee. When committee members questioned whether General Orders, Number 7 provided a basis for legal review, Ansell denounced the order as "an administrative palliative which was described by the Judge Advocate General [Crowder] as necessary to head off a 'threatened Congressional investigation,' to 'silence criticism,' [and] 'to prevent talk about the establishment of courts of appeal.'"[36]

The committee also heard accusations that enlisted defendants seldom had adequate counsel. The acting Judge Advocate General pointed out that the government was usually "represented by able counsel, and the offender has all the odds against him."[37] Ansell further criticized as unjust the idea of trying several men on the same charge before the same board, remarking that "it would be impossible for the court to have an open mind" when trying the subsequent offenders.[38]

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[35]Court-Martial Case 110595, cited in 58 Cong. Rec. 3942-43 (1919); New York Times, 14 February 1919, p. 1.

[36]New York Times, 20 February 1919, p. 3.

[37]New York Times, 14 February 1919, p. 10.

[38]57 Cong. Rec. 4504-5 (1919) (remarks of Representative Johnson); New York Times, 16 February 1919, p. 17.

These exposures came at a time when the War Department was already under public pressure over the policy concerning conscientious objectors. In early 1919, Secretary of War Baker yielded to pressure from several groups, including the National Civil Liberties Union. He ordered the release, with honorable discharges and back pay, of 113 conscientious objectors from the disciplinary barracks at Fort Leavenworth, Kansas. Prisoners in the disciplinary barracks who were serving sentences for other military offenses were incensed at this supposed favoritism and mutinied. This prison riot resulted in the direction of even more criticism at Secretary Baker. On 17 February, Baker, in response to both the mutiny and the charges aired before the Senate committee, issued an order requiring review of the cases of all men currently imprisoned for wartime offenses. To avoid further prison uprisings, Baker directed that the order be read to all military prisoners, and he virtually promised clemency in their sentences if the prisoners would behave in an "orderly manner."[39]

In a statement later distributed to the press, Baker claimed that it had been the intention of the department from the beginning of the war to adjust any inequities caused by trials "carried out under the pressure of war." The Secretary of War explained that:

> Now, at the close of this great war, not only are all those who suffered sentences assured that those sentences are susceptible of correction--so that the lessons which the courts

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[39]"When 2,300 Soldier-Prisoners Struck at Fort Leavenworth," Literary Digest 60 (1 March 1919):50-57; ANJ 56:899; New York Times, 18 February 1919, p. 6 (quotation).

> martial felt to be necessary in order to reach essential discipline are not allowed to remain an incorrigible disability upon those whose misfortunes or minor shortcomings brought them into court--but we have the proud record of not having had to enforce military discipline by a single example of capital punishment for any purely military offense.[40]

It was unlikely, though, that the men of the Twenty-fourth Infantry who were executed on the Salado Creek gallows would have understood the legal nuances of Baker's definition of a "military offense." Nor did the Secreatry of War explain how "reducing all sentences substantially to a peacetime basis, and correcting incidental inequities" after the war would compensate those men who had already served their "unfair" sentences or suffered "harsh" punishments.[41]

General Ansell was not the only one to question the Secretary's distinction between sentences on a "peacetime basis" as opposed to a "wartime basis." Many people wondered why a criminal act was more

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[40]Baker, "True Perspective," p. 92.

[41]Ibid., p. 122. The question of what constitutes a "military offense" versus a "civil crime" is a continuing point of controversy. The question lends itself to almost any interpretation which suits an individual's argumentative needs. By the early twentieth century, military law had been expanded to the point that there were few civil crimes which were not also violations of military law, and visa versa. A classic early case of a common crime which was simultaneously a military offense was the case of Sergeant John Mason of Battery B, Second Artillery. Sergeant Mason, detailed as a guard for President Garfield's assassin, Charles Guiteau, attempted to kill Guiteau by firing a musket through the cell window. A court-martial convicted Mason of violating Article 62 of the Articles of War and sentenced him to eight years at hard labor. On appeal, the Supreme Court upheld the conviction because Mason had been convicted of "an atrocious breach of military discipline, not the civilian offense of assault with intent to kill." Ex parte Mason, 105 U.S. 696 (1882), cited in Joseph W. Bishop, Jr., Justice Under Fire: A Study of Military Law (New York: Charterhouse, 1974), p. 83.

reprehensible merely because the nation was involved in a state of war. Ansell felt that if it was necessary to make a distinction based on the condition of conflict, then that distinction should be based on the location of the offense in relation to the scene of combat, rather than on "time of war." He conceded that some acts were a "greater crime" if committed "in the face of the enemy" than if committed under more normal conditions three thousand miles from the combat area.[42]

Baker's announced program of post-war clemency was also questioned. Not only was there no indication that this program was, in fact, a preplanned part of the overall scheme of the military system, but the validity of the program was suspect. Ansell observed that "clemency, even when generously granted, is a poor remedy in the case of a soldier who should not have been convicted at all."[43] In any case, the post-war review for men still imprisoned was not enough to satisfy aroused congressmen.

On 18 February 1919, Senator Kenneth D. McKellar of Tennessee proposed a joint resolution requiring that all courts-martial

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[42]Samuel T. Ansell, "Injustice in Military Trials," Forum 62 (1919):455. The President had the authority to set maximum sentences for peacetime offenses (Act of 27 September 1890), but in wartime no similar authority or limitation existed. The "Chamberlain Bill" proposed granting the President the authority "to fix maximum limits in time of war as well as in time of peace" as a remedy "to prevent excessive sentences." S. 64, Arts. 12, 52, and various articles defining military offenses, cited in Bogert, "Reforms," p. 43.

[43]Samuel T. Ansell, "Military Justice," Cornell Law Quarterly 5 (November 1919):16.

proceedings since the beginning of the war be reopened and reviewed by special boards. Two days later, Representative Frederick C. Hicks of New York requested that the House Military Affairs Committee investigate both the sentences imposed during the war and the Judge Advocate General's office itself.[44] The most serious threat to military control of its justice system was expressed by Representative Royal C. Johnson of South Dakota following the initial committee hearings. Johnson told the House of Representatives:

> Why should not a man placed on trial before a court-martial, for murder, for instance, be entitled to just as much protection as he would be entitled to if placed on trial for the same offense before a civil court? The law alleged to be violated is the same, the punishment is the same, and the terrible consequences of the miscarriage of justice are the same. The civil law leaves no stone unturned in building up protection for an accused thus placed in jeopardy. But the military law and the practice under it leave his life to the hazard of what untrained, unskilled, and unadvised Army officers may be disposed to do.[45]

Representative Johnson proceeded to detail sixty-seven individual courts-martial cases which illustrated the inequities and abuses of the system. Members of the House were startled to find that sentences for the crime of "sleeping on post" ranged from six months confinement to ten years at hard labor and dishonorable discharge. Even more varied were the sentences given for the charge of "desertion," where the extremes included such diverse punishments as: ten years at hard labor for an absence of six months, fifteen

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[44] New York Times, 19 February 1919, p. 9; 21 February 1919, p. 7.

[45] 57 Cong. Rec. 4503 (1919) (remarks of Representative Johnson).

years at hard labor for an absence of eleven days, twenty years at hard labor for an absence of one day, and life imprisonment for an absence of three and two-thirds months.[46]

Representative Johnson supplied equally accusative details about the inequitable actions of commanding officers in applying their authority to reduce the sentences awarded by courts-martial. Most extreme were the cases of two soldiers who deserted from Camp Funston, Kansas, on the same day and were apprehended on the same day. Courts-martial sentenced both soldiers to ten years in prison at hard labor. The reviewing officer reduced the sentence of one soldier, who had two previous convictions, to one year in prison. The sentence of the other soldier, who had only one previous conviction, was approved as originally ordered.[47]

In opposition to Johnson's views and the examples he gave, Representative Florence P. Kahn of California had the House Clerk read an editorial from the Chicago Tribune of 15 February 1919, which defended the use of the military justice system to enforce discipline. The editor of the Tribune supported the absolutism of the commander, commenting that "he must be the judiciary, the legislature, and the executive." The editorial continued:

> If he [the commander] were not, he would not have an army. He would have a collection of armed individuals. Gen. Ansell's testimony before the Senate is based on a fundamental

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[46]Ibid., pp. 4506-7.

[47]General Courts-Martial Orders Numbers 26 and 27, United States Disciplinary Barracks, Kansas, cited in ibid., p. 4507.

> misconception. He thinks the first object of an army is justice. It is not. The first object of an army is victory.

The Tribune editorial, denying the wisdom of any program of review or supervision of military courts by other than the command function, claimed that "an army, to be successful in the field, must from the moment it begins to train at home have absolute control of its discipline."[48]

The sentiment of the majority of the House of Representatives was obviously not sympathetic to the views of the Chicago newspaper's editor. This was clearly revealed when Representative David A. Dyer of Missouri rose to attack the Tribune's position. Congressman Dyer suggested that if the abuses were as prevelant as documented by Johnson, then, contrary to the Tribune's view, "[Congress] ought to reorganize the Military Establishment from top to bottom."[49] The Missouri legislator's five minute speech was interrupted six times by applause from the House.

At this point Secretary of War Baker apparently finally realized the seriousness of the threat to the military structure. To indicate that the military establishment was able to correct its problems without legislative help, Baker announced that the first fifty-five cases reviewed under his 17 February order had resulted

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[48] Editorial entitled "Army Discipline," Chicago Tribune, 15 February 1919, reprinted in 57 Cong. Rec. 4507 (third quotation), 4508 (first and second quotations) (1919).

[49] 57 Cong. Rec. 4508 (1919) (remarks of Representative Dyer).

in total remission of sixteen sentences, with the remainder reduced to an average of two years imprisonment, as opposed to the original average of twenty years.[50] In addition, to still the "recent outburst of criticism and complaint, voiced in public by a few individuals," Baker wrote Crowder a letter asking him to prepare a statement to "reassure" the public and the members of Congress that justice had been done under military law. While Baker professed complete faith "that the public apprehensions which have been created are groundless," the Secretary was concerned that the public had been given only highly colored press accounts of "certain supposed instances of harsh and illegal treatment" of American soldiers exposed to the system of military justice. In his letter, the Secretary of War also indicated that he was puzzled by the sudden surge of criticism, writing that:

> During the times of peace, prior to the war, I do not recall that our system of military law ever became the subject of public attack on the ground of its structural defects. Nor during the entire period of 1917 and 1918, while the camps and cantonments were full of men and the strain of preparation was at its highest tension, do I remember noticing any complaints either in the public press or in Congress or in the general mail arriving at this office.[51]

As soon as Baker's letter was made public, journalist Charles Johnson Post denied its accuracy and reminded the Secretary of War of his six months series of articles in 1914 on this very

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[50]New York Times, 2 March 1919, p. 12.

[51]Letter, Secretary of War Newton D. Baker to Maj. Gen. E. H. Crowder, 1 March 1919, reprinted in ANJ 56:983.

subject.[52] Baker was also conveniently forgetting the clamor in 1917 and 1918, particularly in the Negro press, over the courts-martial and execution of the members of the Twenty-fourth Infantry Regiment.[53] However, it was not Baker's faulty memory that fanned the flames of legislative wrath. Instead, it was two other actions that were taken by the War Department while the Judge Advocate General was formulating his reply to Baker's request for a "reassuring statement."

On 3 March 1919, the War Department rescinded its earlier order requiring that all cases of men sentenced in France be returned for revision. The same instructions also deactivated the branch office of the Judge Advocate General in France. This order made it appear that the War Department had decided what action to take in regard to overseas courts-martial without waiting for the results of the congressional investigations.[54]

On the same day, the War Department announced that General Crowder soon would depart on a mission to Cuba to help formulate new

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[52]New York Times, 12 March 1919, p. 10.

[53]Supra, p. 103.

[54]57 Cong. Rec. Appendix 281 (1919) (extension of remarks of Hon. Dan V. Stephens); New York Times, 8 March 1919, p. 7; ANJ 56:1131. Ansell had succeeded in obtaining a revision to General Orders, Number 7, in the form of General Orders, Number 84, 11 September 1918. This revision gave the branch office the authority to "modify or set aside any sentence found to be illegal, defective or void." Lockmiller, Crowder, p. 208. The revision also required that the recommendations of the acting Judge Advcoate General be followed. Apparently, it was the recission of this modification which upset Ansell's congressional supporters.

election laws for that island republic. The rumor circulated through Congress that Crowder's position would be filled in his absence by Brigadier General Bethel, judge advocate on the staff of General Pershing. Another rumor, the following day, alleged that General Ansell would be demoted to his permanent rank of lieutenant colonel, more as a punishment for his outspokenness than as a return to national peacetime status. This rumored demotion was protested to the Secretary of War by several congressmen. Baker immediately denied, on 5 March, that there was any truth to this rumor; however, two days later the War Department publicly announced that Ansell was one of twelve general officers demoted to their permanent ranks.[55]

The press release announcing Ansell's demotion also stated that the former general would remain as chairman of the clemency board set up to review the cases of men currently in confinement. Brigadier General Edward A. Kreger, an officer junior to Ansell both in experience in the Judge Advocate General's Department and in date of rank, was designated to be the acting Judge Advocate General while Crowder was in Cuba. As Congressman Johnson pointed out to his fellow members of the House of Representatives, only Ansell's sudden demotion kept him from being the senior officer present for duty, and thus automatically the Judge Advocate General, when Crowder was

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[55]New York Times, 4 March 1919, p. 10; 5 March 1919, p. 11; 7 March 1919, p. 17; ANJ 56:950, 961, 989; Letter, Representative N. J. Gould of New York to Secretary of War Baker, 11 March 1919, reprinted in ANJ 56:984; Letter, Representative Royal C. Johnson to Secretary of War Baker, 7 March 1919, quoted in ANJ 56:985.

out of the country. Left unexplained was why Ansell was demoted when other officers in the judge advocates department who also held temporary brigadier general rank did not revert to their peacetime ranks.[56]

Despite assurances of the Secretary of War to the contrary, many congressmen were convinced that Ansell's demotion was actually punishment. This demotion further publicized the expanding controversy over military justice and the practice of military law. As the topic received more publicity, partisan politics played a larger role, helping to increase the polarization of the two sides. Meanwhile, growing personal bitterness became a characteristic of the public statements issued by the individuals involved. However, more was at stake than just the career of one officer or the reputation of another. For the next year, the program of military law finally would receive the widespread public scrutiny and political attention that it had avoided successfully for almost a century and a half. Yet, the heart of the controversy still revolved around one individual who steadfastly refused to alter his view of

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[56]New York Times, 7 March 1919, p. 17; 8 March 1919, p. 7. The other officers in the judge advocates department holding rank as temporary brigadier general were Walter A. Bethel, Hugh S. Johnson, and Edward A. Kreger. All were junior in rank to Ansell. Army Register, 1920, s.v. above. Secretary Baker explained that the demotion of the twelve general officers was just "part of the ordinary routine of demobilizing the Army." He denied that Ansell's reduction was related to his criticisms of military justice, but failed to explain why Kreger, who was seven months junior to Ansell in temporary rank, was not demoted first. Washington Post, 7 March 1919, p. 2.

what military law should be--the former acting Judge Advocate General of the United States Army, Samuel T. Ansell.

CHAPTER V

GENERALS AND THE QUESTION OF JUSTICE: A DIFFERENCE OF OPINIONS

On 8 March 1919, Major General Crowder replied to Secretary of War Baker's earlier request for a "reassuring statement." The Judge Advocate General's thirty-six-hundred word letter went into great detail to defend the existing "organization for and the practice of the administration of military justice during the war." Crowder began his letter by expressing surprise at reports of "supposed controversy between myself and an officer of my department, Gen. Ansell." He indicated that he actually agreed with Ansell on the need for revisory powers, with the only element of contention being a question of where this revisory power should reside. While Ansell insisted on a separate, independent appellate system within the judge advocates department, Crowder wanted to extend such authority only to the President. The Judge Advocate General noted in his letter that he had asked Congress for revisory authority for the President more than a year earlier, but that the request "died in the Senate Committee." According to Crowder, the addition of the requested revisory mechanism would "make the system such that I am willing to stand or fall by it."[1]

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[1]Letter, E. H. Crowder to the Secretary of War, 8 March 1919,

Besides blaming Congress for not making the requested changes in the legal code, Crowder defended his "complete revision" of the Articles of War in 1916 against Ansell's charges that the code was "archaic" and that the 1916 alterations were, at best, superficial. Part of the reason for this divergence of views was that the Judge Advocate General believed that "the purposes of the two systems [civil legal codes and military legal codes] are diametrically opposed."[2] Crowder saw the goal of military law as victory in the field, not justice, necessitating certain restrictions to individual liberties.

In his discussion of the need to sacrifice individual freedoms, the chief legal officer of the army appeared to be an idealist, and possibly even a little naive. Differentiating between human motivations in peacetime as opposed to wartime, the military lawyer explained why the soldier should not be afraid to don the uniform and give up his former freedom of action.

> It is . . . for the purposes of peace that we demand an intricate legal system, even at the cost of technicalities, delays, and abstruse rules of law; we demand the admirable system of checks and balances that is illustrated by the divorce of our executive from our judicial system. We intrust ourselves to these devices rather then to the fairness and justice in the hearts of men. The very nature of war is such that men forget the sordid views that made these checks and balances necessary. They give the Nation, willingly and eagerly, their fortunes and their lives, and in such a time of patriotic exaltation we willingly give over, and the peril is such that we must give over, this

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reprinted in 58 Cong. Rec. 6499 (first and second quotations), 6500 (third and fourth quotations) (1919). See also, ANJ 56:983-84.

[2]Ibid., p. 6500.

> adherence to artificial safeguard of complex rules and trust our individual rights more and more to the principles of humanity, honor, and justice in the breasts of our fellow citizens who are offering their lives and fortunes, as we are offering ours, to the perpetrations of our institutions and for the common good. On this theory the soldier is remitted to the simple and direct procedure for the enforcement of discipline in the Army. His court has its inception in the old courts of chivalry and honor and the essential principle remains.[3]

Crowder then turned from philosophical meditations to specific accusations.

Contrary to his statements in the opening of the letter to the Secretary of War, the final seven paragraphs of the missive contained a personal attack upon Ansell, whom Crowder characterized as "formerly . . . one of the most promising and trusted officers in my office." Crowder gave a detailed description of "Ansell's attempt to secure an order giving him my functions as Judge Advocate General," virtually accusing the former brigadier general of trying to illegally usurp the appointive office of Judge Advocate General of the Army.[4] General Crowder admitted receiving a formal memorandum in which Ansell asked for official confirmation of his "acting" position. Ansell's memorandum explained:

> I am at times considerably embarrassed, and besides the transaction of public business is, I think, somewhat impeded and confused by the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of Provost Marshal General; . . . I ought to be designated by the Secretary of War as Acting Judge Advocate

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[3] Ibid.

[4] Ibid., p. 6501.

General during your practical detachment from the office.[5] Although he "did not wish to be relieved," Crowder gave Ansell permission to take the matter up with the Secretary of War "directly." Instead, Ansell went to the acting Chief of Staff, Major General John Biddle, with a prepared draft order relieving Crowder of his office and assigning Ansell in his place. Ansell reportedly told Biddle that Crowder concurred with the order. The acting Chief of Staff thereupon had the ordered prepared for publication.[6]

When General Crowder accidently learned of the existence of the draft order, he informed the Secretary of War of the circumstances leading to its formulation. Baker "directed that the order be not published." Surprisingly, no action was taken against Ansell for his abortive attempt to gain increased authority and, according to Crowder's 8 March letter, this act was not a factor in Ansell's later relief from "his duties of supervising the administration of military justice." Without going into detail, Crowder also accused Ansell of "preparation of a brief urging a revolution in the military system and his circulation of a document of such grave consequence among every officer in my office without giving me the slightest information of his efforts."[7] If the information in Crowder's

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[5]Memorandum, Ansell to Crowder, 3 November 1917, quoted in Lockmiller, Crowder, p. 203.

[6]Letter, E. H. Crowder to the Secretary of War, 8 March 1919, reprinted in 58 Cong. Rec. 6501 (1919).

[7]Ibid.

letter were true, Ansell had violated several customs of the service and at least two articles of war--violations which could have resulted in court-martial charges against the perpetrator. No such charges were ever filed.

Both Baker and Crowder, in their respective communications with each other, complained that military officials had not been given an opportunity to present their side of the controversy to the public. Both men were ignoring the fact that either of them could have appeared before the Senate Military Affairs Committee which was investigating military justice, if they had so desired. Testimony before this committee would have provided the public forum they claimed to need. In any case, the lack of publicity for the military staff's position was resolved on 10 March when both letters were released in full to the press by the War Department.[8]

The following day, Lieutenant Colonel Ansell wrote a lengthy formal letter to the Secretary of War giving his views of the justice controversy and his version of the affairs mentioned by General Crowder. Because, as a subordinate officer, he was not authorized to release the letter himself, Ansell requested that his letter be given the same public release as those of Baker and Crowder. Five days later, Senator Chamberlain, who had been given a copy of Ansell's letter by Assistant Secretary of War Benedict Crowell, also

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[8] 58 Cong. Rec. 6501 (1919) (remarks of Senator Chamberlain). Baker's and Crowder's letters were reprinted on page one of the New York Times on 10 March 1919.

asked Baker to release the letter to the public.[9] The Secretary of War was busy touring military cantonments and camps around the country, but he took time on 19 March to reply to the senator by telegram. Reminding Chamberlain that "more than a year ago I asked . . . [for] legislation to correct the evils in present court-martial system," Baker told the senator that "there would seem to be, therefore, no controversy on the merits of the subject." As far as the Secretary of War was concerned, Ansell's letter could wait for a leisurely perusal after Baker's return from his inspection trip.[10]

Senator Chamberlain immediately addressed a long letter to the Secretary of War criticizing the delay in releasing Ansell's letter, disagreeing with the worth of Baker's year-old legislative request, and objecting to the idea that "no controversy" existed over the problems of military justice. Citing numerous past statements by both Baker and Crowder, the senator accused both men of inconsistency and of "not acting in good faith."[11] Baker, in

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[9]Letter, S. T. Ansell to The Honorable the Secretary of War, 11 March 1919, reprinted in ANJ 56:1098-99; Telegram, George E. Chamberlain to Newton D. Baker, 16 March 1919, cited in 58 Cong. Rec. 6501 (1919) (remarks of Senator Chamberlain). Chamberlain, apparently with foreknowledge of Ansell's letter, asked the War Department for a copy of the communication. Baker was absent from Washington and had not seen the letter. Assistant Secretary of War Crowell provided the senator with a courtesy copy, but advised him that he "was not at liberty to publish it." Ibid.

[10]Telegram, Newton D. Baker to Geo. E. Chamberlain, 19 March 1919, quoted in ibid.

[11]Letter, Geo. E. Chamberlain to Newton D. Baker, 19 March

turn, strongly indicated his estimation of the congressman's views when he later told a newspaper reporter: "From Senator Chamberlain I do not recall that I have ever received a suggestion that was helpful or seemed intended to be helpful."[12]

When the Secretary of War finally did get around to considering Ansell's letter more than two weeks later, he immediately refused to accept the army officer's arguments because the letter's transmission was "not through ordinary channels."[13] The letter was returned to Ansell with the comment that it was "not helpful." On 2 April, Ansell resubmitted the letter to the Chief of Staff--the "proper channel." Three days later, the Adjutant General informed Ansell that the Secretary of War found himself "in hearty concurrence" with many of Ansell's suggestions for changes in the system of military justice. Through the Adjutant General, Baker directed Ansell to submit a draft of a bill designed to implement his suggested modifications. In an editorial the following day, the New York Times said that Baker's "concurrence" was an admission by the Secretary that he might have been wrong when he told Crowder on 1 March that "justice had been done under military law during the war." The editorial expressed the conviction that: "In court-martial

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1919, reprinted in ibid., pp. 6501-3.

[12]New York Times, 4 April 1919, p. 3.

[13]Memorandum, Baker to Lieutenant Colonel S. T. Ansell, 27 March 1919, reprinted in the New York Times, 7 April 1919, p. 3.

trials there has been too much soldier and too little lawyer. . . ."[14] Unfortunately for the military hierarchy's peace of mind, Ansell's struggle against military bureaucracy and red tape had attracted the attention of more than just the Times.

While Chamberlain and Baker were exchanging bitter criticisms, the president of the American Bar Association announced that his organization, at the Secretary of War's invitation, would immediately start an investigation of the system of military law. Almost simultaneously, a group of civilian lawyers who were former judge advocates during the war, formed an association to support reform of the court-martial system. These ex-judge advocates announced that they would hold hearings and conduct a separate, independent investigation of wartime trials. They issued a statement which said, in part:

> The present system of military justice is a system of practiced injustice. We are lawyers who were commissioned as officers in the Judge Advocate General's Department. We were amazed and shocked by the court-martial system. We found that it secures no adequate protection of men charged with military crimes; it permits the conviction of innocent men, as well as the imposition of unduly harsh sentences upon men who have been guilty of trivial offenses.[15]

These ex-judge advocates claimed that the problems were more extensive than just the wartime injustices. Their contention was that the basis of the system itself was defective and that the war

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[14]New York Times, 3 April 1919, p. 3 (first quotation); 8 april 1919, p. 1 (second quotation); 9 April 1919, p. 10 (third and fourth quotations).

[15]New York Times, 16 March 1919, sec. 3, p. 5; 28 March 1919, p. 12 (quotation); ANJ 56:1026.

only exposed excesses that had existed all the time. Later statistics would justify these lawyer's claims when the data revealed that the percentage of army personnel facing courts-martial annually before the war was even higher than the shocking figures from the war years.[16] Nevertheless, it was the revelations of the latter which aroused the public.

To counter the increasingly unfavorable public image resulting from the initial hearings before the bar association and ex-judge advocates committees, the Secretary of War prepared a "true perspective" of military justice to be released to the press. This article was published on 19 April, while Baker was making a trip to inspect American forces in France. The press release left the impression that only a few, "not unexpected," cases of injustice had occurred during the war. Baker's article continued the theme established by Crowder that the main identifiable fault of the system, a lack of revisory power, had not been corrected as a result of congressional failure to pass requested legislation, rather than through any lack of action on the part of military authorities.[17]

While Baker's statement was being disseminated to the general public, the Judge Advocate General's office distributed over seventy thousand copies of a pamphlet entitled "Military Justice During the

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[16]Ibid.; "Manuscript entitled 'Military Justice' by Lieut. Col. S. T. Ansell, delivered on June 26, 1919, at Bedford Springs, Pa., before the Pennsylvania Bar Association," section 8, reprinted in 58 Cong. Rec. 3474 (1919).

[17]Baker, "True Perspective," pp. 92, 122-23.

War" to prominent jurists throughout the country. This pamphlet contained an extensive defense of General Crowder's position on the justice controversy, together with an attack on his critics. The author of this document was Colonel John H. Wigmore, a reserve officer and Dean of the Law School at Northwestern University. Wigmore, a protege of Crowder's, served in the Provost Marshal's office during the war and had no direct contact with the administration of military justice. Senator Chamberlain complained to Attorney General A. Mitchell Palmer and Postmaster General Albert S. Burleson about Wigmore's pamphlet, charging that it was a "gross abuse of official position and the franking priviledge." The Oregon legislator pointed out that not only was the letter formulated by government employees and printed on government paper, but also the mailing was made in "postage free" envelopes of the War Department. No action ever resulted from Chamberlain's charges. The War Department subsequently selected Wigmore to "assist" the American Bar Association (ABA) Committee in its investigations.[18]

In the meantime, newspaper headlines kept the issue before the general public as both the bar association and ex-judge advocates committees took testimony on the administration of justice from various individuals. The latter reported that by 12 April the War Department's clemency board had reviewed 1,683 cases and recommended clemency in 1,521 of these cases; the reduction of sentences in the

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[18] 58 Cong. Rec. 6501 (1919) (remarks of Senator Chamberlain); ANJ 56:1131; New York Times, 22 April 1919, p. 10.

cases recommended for clemency amounting to a total of 9,339 years imprisonment. The ex-judge advocates concluded that these statistics confirmed that the "present system of military justice has practiced injustice in over 90% of the cases." They also noted that the creation of the clemency board was one of the last official acts of ex-General Ansell before he was replaced as acting Judge Advocate General. The chairman of the ex-judge advocates committee, George C. Beach, told reporters that the figures released by the clemency board proved that "the sentences imposed by it [military courts] are over 400 per cent [sic] higher than they should have been."[19]

More telling than the statistics was the testimony of a long line of distinguished officers before the American Bar Association Committee. Although ostensibly supporting the existing system, their language revealed the narrowness of their viewpoint and its orientation toward discipline. Major General Charles T. Menoher, Commander of the Forty-second (Rainbow) Division, testified that the present system needed no radical alterations. He blamed the "few" problems that had arisen on the lack of understanding of the system by officers serving for "the short wartime emergency." Menoher dismissed the significance of variances in punishment with the statement that: "I do not recall that in this controversy it has ever

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[19]New York Times, 13 April 1919, sec. 2, p. 1. Eventually, the clemency board reviewed 7,207 cases between 25 February and 15 October 1919. Clemency was recommended in 5,837 (81 percent) cases, with total remission of the unexecuted portion of the sentence recommended in 2,075 (29 percent) of the cases. The average original confinement was reduced by over 72 percent. ANJ 57:388.

been claimed that any innocent man was found guilty."[20]

The following day, Major General Leonard Wood, ranking major general of the army at the onset of the war, also blamed the inexperience of wartime officers and their lack of the "habit of command" for the injustices that had occurred. He commented that "probably 75% of the cases brought to trial during the war never should have reached a court-martial stage." Wood indicated that he favored a permanent court of legal officials who would travel from area to area to sit on courts-martial, similar to the program used by the Confederacy in the Civil War. General Wood also felt the existing practice of using the trial judge advocate as both prosecutor and advisor on law to the court needed modification, but he indicated that he did not favor any type of separate appellate system. During questioning by the ABA committee, the ex-Chief of Staff conceded that the sentences awarded by many courts-martial were "too severe."[21]

The Inspector General of the Army, Major General John L. Chamberlain, testified that the public should have expected injustices to show up in wartime, but that these injustices were "more apparent than real." In his opinion, "the ordinary safeguards must be observed, and when this is done the accused are sure of a fair trial." On the issue of whether a legal expert was needed as an advisor to or member of the court, Chamberlain thought an expert

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[20]New York Times, 16 April 1919, p. 6.

[21]New Yrok Times, 17 April 1919, p. 10.

was "unnecessary if the commander was careful in his selection of the trial judge advocate and the President of the court."[22]

Another officer who found little to fault with the system was Major General Hugh L. Scott, another former Chief of Staff of the Army. His only criticism concerned the need for a more thorough pre-trial investigation. Scott claimed that pre-trial investigations were emphasized under his administration at Camp Dix, New Jersy, with outstanding results. To prove how effective the military justice program was at Camp Dix, Scott cited statistics from the camp records which showed that of 278 general courts-martial, convictions were obtained in 264, while 192 special courts-martial resulted in the conviction of 176 men. General Scott apparently equated conviction with justice.[23]

The testimony of Colonel Charles D. Herron, former commander of the 313th Field Artillery Regiment, ultimately expressed the most paternalistic view of the purpose of military law. Like other witnesses, Herron also felt the present military system was adequate, but said that its success was dependent upon the intelligence of the administering officers. According to Herron, courts-martial were "much like whippings for children--necessary but also reflect the intelligence and ingenuity of the parents."[24]

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[22]Ibid.

[23]Ibid.

[24]New York Times, 16 April 1919, p. 6.

An opposing view was presented by E. M. Duncan, former major in the Corps of Engineers at Fort Leavenworth, Camp Humphries, and Camp Lee during the war. Duncan told the ABA committee that he "sat on probably a thousand" courts-martial during the wartime emergency. He attacked the attitude of officers on these courts-martial boards as "not human" when they were dealing with disciplinary problems. Duncan noted that this attitude was due in part to the feeling that the "Old Man" insisted on the award of severe penalties. The former officer of engineers claimed that at least 40 percent of the penalties adjudged in courts-martial on which he sat as a member were unjust.[25]

The attitude expressed by Major General Edwin F. Glenn to the ABA committee was fairly common among ranking officers. Glenn, commander of the Eighty-third Division and a graduate of the University of Minnesota Law School, claimed that the "system of military jurisprudence is designed to produce an efficient, dependable fighting army, not to do exact justice to individual soldiers." Glenn, and other officers of field experience, freely admitted "cases of court-martial sentences so excessive in the penalty awarded as to be ridiculous," but said that because this was not the final action in the cases, it proved the system was fair.[26] Even the New York Times considered Glenn's statement extreme, publishing

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[25]New York Times, 17 April 1919, p. 10.

[26]New York Times, 18 April 1919, p. 10.

an editorial the following day critcal of Glenn's attitude.[27]

Lieutenant Colonel Ansell criticized both the testimony and the overall bar association hearings, accusing the committee of not trying to get at all the facts. Ansell told the City Club of Baltimore that the ABA committee seemed to have called all the major generals who were available, and he suggested that they next intended to call on all the living ex-Secretaries of War. In a sarcastic aside, Ansell remarked that a considerable part of the American legal code was plagiarized from the works of Gustavus Adolphus and that it was too bad the committee could not call on the Swedish King to also commend his code.[28]

Reviewing the testimony of the long line of ranking officers for his audience, Ansell answered General Glenn's contention that "fairness" was provided by eventual final review of courts-martial sentences. Ansell commented that "the time to prevent injustice is at the very beginning of the court-martial proceedings," not in the final action.[29] The former acting Judge Advocate General also refuted testimony before the American Bar Association committee which had countered his claim that the courts were biased toward officers, as opposed to enlisted men. Ansell released data showing that for every one hundred officers tried, thirty-five were

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[27]New York Times, 19 April 1919, p. 16.

[28]New York Times, 20 April 1919, p. 16.

[29]Ansell, "Injustice," p. 451.

acquitted, while the ratio for enlisted men was only six acquittals per one hundred trials. This indicated that either the pre-trial investigation was not as thorough for officers as for enlisted men, or, as Ansell claimed, courts-martial boards were more lenient toward fellow officers than toward lower ranking personnel.[30]

Ansell told the assembled club members that the military code of law "regards the court-martial simply as the right hand of the commanding officer, to aid him in the maintenance of discipline," rather than as a court doing justice. He further announced that statistics gathered by a group of disinterested officers in recent weeks indicated that of 2,212 military trials examined, 63 percent were "not reasonably well tried" and the trial records of 21 percent did not legally sustain the sentence imposed. The study also supported the dissident military officer's previous charges that enlisted defendants usually were assigned inadequate legal counsel. Statistics revealed that almost three-fourths of all enlisted men court-martialed were defended by lieutenants, "as a rule, the most junior Second Lieutenants."[31] In a subsequent appearance before the bar association committee, Ansell released specific figures which revealed that in the enlisted courts-martial cases cited, the defense counsels were: captain or above, 13 percent; chaplains, 2.8 percent; civilians, 1.25 percent; and lieutenants, 74.77 percent. He told

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[30]New York Times, 20 April 1919, p. 16.

[31]New York Times, 23 April 1919, p. 16.

the committe members that "there is not a greater travesty in the world than this practice of assigning junior officers to defend." It was Ansell's opinion that "the prisoner might better have no counsel."[32]

Brigadier General Kreger, a former professor of law at West Point and Ansell's replacement in the Judge Advocate General's office, replied to the charge that counsel was inadequate when he testified before the special bar association committee in late April. Kreger's view was that the inexperienced defense by lieutenants did not seriously infringe on the rights of the defendants because the trial judge advocates were also inexperienced, leaving the abilities of the two sides "about balanced."[33] The new acting Judge Advocate General apparently felt that incompetence plus incompetence equalled justice. Kreger's estimate of the qualifications of the trial judge advocates was also at variance with the opinions of such noted legal figures as Cornell law professor George G. Bogert and Northwestern Law School Dean John H. Wigmore, both of whom praised the qualifications of the wartime trial judge advocates. Bogert remembered that "in every division and camp there were many capable lawyers who . . . were invariably used as judge advocates." The Cornell lawyer could not "recall a single general court case tried by a non-lawyer"

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[32]Ibid.

[33]New York Times, 26 April 1919, p. 8.

while he was assigned to the Seventy-eighth Division.[34] This statement did not address the problem of whether defendants before lesser courts also enjoyed the protection of knowledgeable officers of the law. This omission was significant because general courts-martial comprised less than 10 percent of the trials held during the war.

In reference to the qualifications of trial members, Ansell denied the claim of Generals Menoher and Wood that inexperienced temporary officers were to blame for most of the inequities that had occurred. In a speech on 19 April, he pointed out that comparison of wartime sentences showed that "courts dominated by the professional officers have been the harshest courts of all." Ansell added that even if the harsh sentences had been caused by inexperienced officers, any large American army formed to meet the emergency of a major war would, of necessity, contain a great number of tyro officers; therefore, "a system of justice worthy of the name should afford protection to the enlisted man against such an inevitable situation." Ansell told his Baltimore audience that the standard argument of militarists that discipline could not be maintained with justice was "without logic or common sense."[35]

Two days later, it was Lieutenant Colonel Ansell's turn to appear before the ABA committee. The former Judge Advocate General immediately incurred the ire of committee members by charging that

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[34]Bogert, "Reforms," p. 33.

[35]New York Times, 20 April 1919, p. 16.

the committee was "unfair," "prejudiced," and "a tool of the Secretary of War." Ansell expressed the belief that the committee should have heard his views first before allowing testimony by defenders of the existing system. Apparently, Ansell regarded himself as a "prosecuting attorney," giving him the right to present the initial arguments. The committee chairman, Judge S. S. Gregory of Illinois, informed the outspoken judge advocate that the committee, rather than either the War Department or Ansell, would determine the hearing schedule.[36]

Ansell was also unhappy over the assignment of Colonel Wigmore as liaison between the bar association and the War Department. He seemed to think that this assignment would result in covert bias by the committee toward the views of General Crowder and the military staff. Chairman Gregory, obviously trying to placate the aroused officer, pointed out that the War Department's representative was there only to provide the committee with easier access to government documents. Gregory commented that the military representative would exercise no special influence on the results of the committee's investigation. In discussing Wigmore, Judge Gregory characterized the colonel, a longtime acquaintance, as "one of the foremost law school teachers and legal authorities." The committee chairman then qualified his praise of Wigmore, noting that "he has had practically

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[36]New York Times, 22 April 1919, p. 10; ANJ 56:1026. In addition to Gregory, the other members of the committee were: Judge Andrew A. Brue of North Dakota, Martin Conboy of New York, John Hinkley of Maryland, and William P. Bynum of North Carolina.

no experience as a lawyer. The chief difficulty I have had with him in the American Bar Association is that he has the attitude of knowing everything and wants to instruct everybody."[37] Ansell was apparently mollified by the committee chairman's conciliatory attitude and the implicit criticism of Colonel Wigmore.

Continuing his appearance before the ABA committee the following day, Ansell reviewed the justice controversy for the committee members and repeated his suggested solutions. The judge advocate again denied that the 1916 revision of the Articles of War had made any positive systematic or substantial changes to the military code. He reiterated his consistent position that "the code is not a code of law; it is not buttressed in law, nor are legal conclusions its objectives."[38] On the revisory issue, Ansell cited recent statements by Crowder and Baker to show that they had undergone "a change of heart" and were now calling for authority where they had previously opposed Ansell on the subject.[39]

The basis of the former Judge Advocate General's solution to the justice problem was his contention that the powers vested in the President to command the army and those vested in the Congress to make rules of government for the army were two different things. Ansell wanted a program of military law "answerable only to Congress."

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[37]New York Times, 22 April 1919, p. 10.

[38]New York Times, 23 April 1919, p. 16; Ansell, "Military Justice," p. 16 (quotation).

[39]New York Times, 23 April 1919, p. 16.

Pointing out that by statute the Judge Advocate General came under the supervision of the Chief of Staff, Ansell proposed replacing the existing command-dominated legal structure with a "thoroughly judicial system" which would be free of interference "by the Chief of Staff or anyone else."[40] Repeating his solution in a later article, Ansell gave an example of the "interference" which disturbed him. Writing in the Cornell Law Quarterly, he discussed the President's authority to prescribe "the rules of evidence" in courts-martial. Ansell noted that the President was given this authority by a new article, the thirty-eighth, in the 1916 revision to the Articles of War. Commenting that "formerly, by the unwritten law military, courts-martial recognized . . . that they should apply the rules of evidence applied in the Federal criminal courts, that is to say, the common law rules as modified by Congress," Ansell claimed that the change in procedure was unwarranted. According to the former general, the right to prescribe the rules of procedure which govern the results in criminal prosecutions was a legislative, "not an executive function."[41]

During his testimony before the ABA committee, Ansell insisted on detailing numerous specific courts-martial cases which illustrated his charges of "gross legal errors." Some of the committee members objected to this extensive review of previous

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[40] Ibid.

[41] Ansell, "Military Justice," p. 12.

evidence, but Chairman Gregory allowed the judge advocate to continue. Ansell cited one hundred cases which he claimed "have been so poorly tried that not one human being can now say that the trial sustained the punishment."[42]

In a subsequent speech before the Pennsylvania Bar, Ansell extended his criticisms to the military court members. He claimed that "no man, as a rule, has cruder legal appreciations than the professional soldier" and castigated military men for their subordination of judicial protections to the power of command. Stressing the fact that American courts-martial were not required to have anyone with or over them who was competent "to govern them in matters of law,"[43] Ansell quoted the nearly eighty-year-old classic criticism of British courts-martial in Warren's "Letter to the Queen":

> It would, indeed, seem as reasonable to expect fifteen military men capable of conducting satisfactorily a purely judicial investigation, dependent in every stage on the application of principles of a jurisprudence with which they cannot have become acquainted, as to imagine the fifteen judges of your Majesty's superior and common law courts at Westminister competent to form a correct opinion concerning critical military operations dependent upon pure strategical science.[44]

To those who explained away the effects of judicial error by citing

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[42]New York Times, 25 April 1919, p. 7.

[43]"Manuscript entitled 'Military Justice' by Lieut. Col. S. T. Ansell, delivered on June 26, 1919, at Bedford Springs, Pa., before the Pennsylvania Bar Association," conclusion, reprinted in 58 Cong. Rec. 3475 (1919).

[44]"Warren's 'Letter to the Queen,' p. 8," quoted in ibid. See also, Ansell, "Military Justice," p. 13.

post-war clemency board actions, Ansell answered that clemency was "the forgiveness of sin" rather than "the correction of injustice."[45]

Ansell told the audience of Pennsylvania lawyers that since military trials did not require members to be trained in the law,

> proceedings of courts-martial . . . must be expected to be, and they are, wrong from beginning to end; wrong in fact; wrong in law; wrong in the conduct of the inquiry; wrong in the finding; wrong in the advice given by compliant and impotent law officers, who recommend the approval of such proceedings' wrong in everything. And yet of such errors there can be no review, not even by any military authority superior to the officer who convened and governed the court and finalized its proceedings.[46]

Ansell told the bar association, as he had told the ABA committee, that the generic and specific defects in the system required immediate remedy.

Following the completion of Lieutenant Colonel Ansell's testimony, the chairman of the ABA committee announced that the hearings would be moved to Chicago in order to take additional testimony. At the same time, Gregory revealed that tentative reforms advocated by the committee included:

> The appointment of a qualified legal officer as presiding judge of courts-martial, to rule upon all law questions; the requirement of a unanimous verdict by the court on all death sentences, or those involving dishonorable discharge or more than two years' imprisonment; the creation of a system of trial of commissioned officers before courts composed of commissioned officers, and of enlisted men before what would in practice be juries of enlisted men, with a qualified officer presiding as judge; the creation of a power for the revision of findings and sentences for legal error, to be lodged in the War Department; and, finally, promulgation of verdicts of acquittal in open court, with immediate

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[45] Ibid., section 8.

[46] Ibid., conclusion.

release of the defendants.[47]

Questioned by reporters about these tentative reforms, Ansell said that he was reserving judgment until the committee made its final report, to see how closely they paralleled his own extensive proposals.[48]

While Ansell was demanding radical changes before the bar association committee, the Judge Advocate General of the Army was equally busy defending continuance of the military program in its existing form. In a speech before the Chicago Bar Association, General Crowder declared the existing system of military justice to be the "most perfect legal system in any of the jurisdictions of the United States."[49] Former Secretary of War Henry L. Stimson supported Crowder when he defended the military program as one of "indeterminate sentences and probation which is in advance of that in almost any state in the Union." Crowder credited indeterminate sentences as one of the reasons why, "even in extreme cases, . . . no 'irreparable harm'" had resulted from any wartime imprisonment. Stimson stated that if consideration were given to the infrequent use of the death penalty and to the reductions effected by the post-war clemency board, the "uproar about excessive jail sentences really vanishes

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[47]New York Times, 25 April 1919, p. 7; "The Court Martial on Trial," Nation 108 (3 May 1919):679.

[48]New York Times, 25 April 1919, p. 7.

[49]New York Times, 27 April 1919, sec. 3, p. 2.

away into thin air."[50]

Secretary of War Baker, however, was not as certain of the perfection of the military justice system as he was two months earlier when he wrote Crowder that he was convinced "that the conditions implied by these recent complaints do not exist and had not existed."[51] On 10 May 1919, Baker appointed several officers to a board to conduct another separate investigation of military justice. This Board of Investigation was in addition to Baker's earlier order to Inspector General Chamberlain to review the personal confrontation between Crowder and Ansell. The newly appointed board consisted of three veterans of service in France: Major General Francis J. Kernan of the regular army, Major General John F. O'Ryan of the New York National Guard, and Colonel Hugh W. Ogden, former judge advocate of the Forty-second Division.[52] This investigative body, popularly known as the Kernan Board, was directed to evaluate Ansell's proposed changes and the measures proposed in the Chamberlain Bill. Ansell regarded the army board as "prejudiced," intimating that "the board had been named . . . to defend the system in the event the special committee of the American

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[50]"Placing the Court Martial on Trial before the Country," Current Opinion 66 (May 1919):274 (first and second quotations), 275 (third quotation). See also, "letters to the editor," ANJ 56:1121.

[51]Letter, Newton D. Baker to Judge Advocate General Crowder, 1 March 1919, reprinted in ANJ 56:983.

[52]ANJ 56:1511-12. One of the reasons why Ansell found this particular board so objectionable was that General Kernan was a West Point classmate and longtime friend of Crowder.

Bar Association . . . should return an adverse report."[53]

In the meantime, the ABA committee began its hearings in Chicago. While the new witnesses were generally lower ranking than the previous parade of major generals, they were also more critical of the system. Colonel Eugene R. West, chief of the legislative section of the Judge Advocate General's Department, advocated "more complete preliminary investigation by competent officers" and using "only thoroughly competent officers" for courts-martial boards. He further recommended that "better counsel . . . [be] assured both the accused and the Government."[54]

Joseph Wheless, former judge advocate for the Central Department with the rank of major, termed military courts as "ephemeral and haphazard." Wheless told the committee that he personally had reviewed some six hundred "examples of the striking incompetency of courts-martial to weigh evidence." Most witnesses, like Wheless, offered several suggestions for improving military justice, however, the majority of the witnesses agreed that the most important change needed was that "trained law officers should be available as counsel for the accused."[55]

Another common complaint from the Chicago witnesses was that commanders overused the judicial system. Earlier, testimony as to

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[53]Lockmiller, Crowder, p. 211.

[54]New York Times, 11 June 1919, p. 7.

[55]New York Times, 14 June 1919, p. 8.

the proliferation of courts-martial prompted the New York Times to remind its readers that in his memoirs General William T. Sherman said: "Too many courts-martial in any command are evidence of poor discipline and inefficient officers." The Times editorialized that "too many petty and minor infractions are tried before courts-martial where it [the alleged crime] gets blown all out of proportion."[56] The majority report of the ABA committee also singled out the tendency to use the courts for trivial offenses, referring to "the enormous and absolutely unnecessary number of courts-martial cases."[57]

In July, the special committee of the bar association submitted its overall recommendations concerning the system of military justice to the Secretary of War and to the public. While generally favoring the existing practice of military law, the committee was divided in its opinions on several issues. The majority report was favored by three members, while Chairman Gregory, with the concurrence of the member from North Carolina, William P. Bynum, wrote a minority report. In their report, the majority stated:

> We by no means share in the prevalent opinion that the present Articles of War and the practice and procedure which is provided for and advised in the Manual of Courts-Martial is medieval, or cruel, or arbitrary, but rather are of the opinion that if the letter and spirit of these articles and of this manual were lived up to and thoroughly appreciated, there would

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[56] New York Times, 25 May 1919, sec. 3, p. 1.

[57] "Report of the Special Committee of the American Bar Association," p. 37, quoted in Bogert, "Reforms," p. 21.

be little ground for complaint.[58]

In making this statement, the majority were ignoring the fact that extensive complaints existed, indicating that the "letter and spirit" were not being "lived up to"--an obvious indication that something was wrong. Although the report supported Ansell's belief that the individual soldier needed more instruction in the Articles of War, it generally favored the few changes advocated by General Crowder. The overall effect of the report was to set-back Ansell's plans for radical alteration of the system of military justice. The former general already had suffered a blow to his hopes on 5 July when the Secretary of War disapproved his recommendation that the Kernan Board conduct a complete review of the cases of all military prisoners.[59]

On 19 July 1919 Lieutenant Colonel Samuel T. Ansell, convinced that he was surrounded with picked supporters of Crowder and Baker who would not give his ideas a fair hearing, terminated his twenty-four year career in the army by submitting his resignation. He told reporters he resigned so he could better continue his fight for reform of courts-martial procedures and military law.[60] The outspoken legal expert, no longer restrained by the inhibitions of his position in the army, immediately began

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[58]New York Times, 17 July 1919, p. 3; Lockmiller, Crowder, pp. 211, 212 (quotation).

[59]Ibid., p. 212; San Antonio Express, 6 July 1919, p. 5.

[60]San Antonio Express, 20 July 1919, p. 4; ANJ 56:1641.

a tirade against all who failed to agree with his views of the military code. Before he resigned, he wrote a letter to the president of the American Bar Association, which was not made public until after his resignation. In it Ansell protested the divided report of the investigating committee and criticized both the majority and minority reports. He charged the members of the committee with being partial to the existing system, questioned their fitness to judge the program, and complained about the methods used to select the witnesses who appeared before the committee. The former judge advocate accused the committeemen of deliberately leading the testimony of witnesses so that it would justify the committee's preconceived ideas, while subjecting Ansell's proposals "to prejudice and uncomprehending analysis."[61] Ansell further claimed that the Judge Advocate General and the Secretary of War were "bitterly resentful" of his legitimate criticisms.[62]

In reply to the ex-officer's criticisms, Judge Gregory wrote the ABA president a lengthy letter. Commenting that he felt the lawyers on the committee did the best they could, Gregory explained that the disagreement on the report was a natural one, considering the complexity of the subject being investigated. He then addressed Ansell's charges and actions.

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[61]Letter, S. T. Ansell to George T. Page, 17 July 1919, quoted in the San Antonio Express, 28 July 1919, p. 7; Lockmiller, Crowder, p. 212 (quotation).

[62]San Antonio Express, 28 July 1919, p. 7.

> I wish to say a few words as to the specific statements made by General Ansell in his letter. He is a man with a grievance. He feels that he has been unjustly treated by the military authorities. As to that, the committee made no investigation. . . . I do say, however, that it seemed to me to be rather inconsistent with efficiency either in the Army or elsewhere to keep a man at the head of an important department who was continually railing at everybody in that department and denouncing its methods publicly and persistently, and also criticizing with great severity, and, as it seems to me, sometimes with marked injustice, his official superiors. General Ansell seems to have understood that this committee was constituted to try the great case of Ansell vs. Crowder; that as plaintiff he was entitled to take charge of his side of the case, to have an issue framed, and to prosecute it--the committee to act as a court. This was not the understanding of the committee. We did not propose to have General Ansell take charge of our inquiry and run it, but we proposed to run it ourselves, in our own way, giving him every opportunity to be heard and to have people that he thought should be heard brought before the committee, or their views presented as they saw fit.[63]

In the meantime, on 30 July, the Army Board of Investigation reported the findings of its probe of the justice system. These veterans of wartime service recommended formulation of one new article of war and minor changes in thirty other articles; however, they found no radical defects in the system itself. Like Generals Menoher and Wood, the Kernan Board felt that any "just criticism was not due to inherent defects," but was a result of actions "by inexperienced personnel at times of great stress."[64]

Secretary Baker supported the Kernan report as reflective of the wide spectrum of military opinion, noting that of 225 officers questioned by circular, only forty-four believed that the basic

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[63]Letter, S. S. Gregory to George T. Page, n.d., quoted in Lockmiller, Crowder, pp. 212-13.

[64]San Antonio Express, 31 July 1919, p. 4.

system was wrong, and another sixty-seven identified weaknesses they felt needed correction. At the same time, Baker condemned the bill introduced by Senator Chamberlain for proposing that the review power of the President and Secretary of War be reassigned to a separate court of military appeals. Both Baker and the Kernan report also disagreed with another section of the Senate bill--the use of enlisted personnel as members of courts-martial boards. Exploiting the increasing anti-Red hysteria of the general public, the Kernan report drew a parallel between enlisted board members and the soldiers and workers councils of revolutionary Russia.[65]

In this attitude, the military hierarchy had a surprising ally in Ansell, who was also opposed to the employment of enlisted members in military trials. In general, however, the former legal officer denounced the army board for advocating "rough and ready" justice. Their report, he claimed, sustained the army view that discipline could only be achieved through terrorization. When the American Bar Association endorsed the Kernan report, Ansell charged that the ABA, Kernan, and Inspector General investigations were all biased; and he accused Secretary of War Baker of "packing" all three bodies of inquiry in order to deceive the public.[66]

Ansell did not restrict his personal attacks just to the

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[65]San Antonio Express, 25 August 1919, p. 1.

[66]New York Times, 25 April 1919, p. 7; San Antonio Express, 20 August 1919, p. 14 (first quotation); 30 August 1919, p. 6 (second quotation).

investigatory agencies. In early August, he accused General Wood of being reactionary and joining other "narrow professionalists" in hiding the need for reform.[67] When William Howard Taft published a defense of the justice system, Ansell's response was a harsh diatribe which asserted that the ex-President was advocating injustice and brutality for the sake of discipline. Senator Chamberlain and Representative Johnson, in Paris investigating courts-martial sentences and charges of mistreatment of American prisoners, joined in denouncing Taft's article. They implied that Taft's defense came at the instigation of Judge Advocate General Crowder, rather than because of any real belief in the military justice system.[68]

Increasingly, the original purposes of the investigations and hearings were being lost in the partisan charges and counter-charges being made by various politicians and individuals. In addition, the growing debate over the peace treaty and the question of American participation in international organizations tended to divert both public and political attention from the well-worn issue of military law. The series of violent race riots that broke out during the long, hot summer of 1919 served to occupy whatever head-line space remained.[69]

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[67] San Antonio Express, 4 August 1919, p. 2.

[68] ANJ 57:73; San Antonio Express, 16 September 1919, p. 4.

[69] For discussions of the racial violence which broke out in the summer of 1919, see: August Meier and Elliot Rudwick, "Black Violence in the 20th Century: A Study in Rhetoric and Retaliation," in Violence in America: Historical and Camparative Perspectives,

By the fall of 1919, the public clamor of mid-spring had died down and only the continued hearings before the Senate Military Affairs Committee on the Chamberlain Bill, plus occasional outbursts and articles by Ansell in national publications, kept the issue before the public. A similar, but separate issue, the mistreatment of American military prisoners in France and the subsequent court-martial of some of the officers responsible, served to create a new wave of journalistic sensationalism. Ansell remained in the public eye by obtaining a temporary appointment as counsel for the House investigating committee formed to look into this prison brutality.[70]

In late November, another brief flurry of publicity occurred when the delayed "Annual Report of the Judge Advocate General" for 1918 was finally made public. Included in this report were special summaries of cases decided since the declaration of war. General Crowder rather reluctantly noted that the appendix statistics showed "some absence of uniformity in the trial of cases, in the punishments imposed, and in the standards of conduct required by different division, cantonment, and department commanders." The report pointed out that while the death penalty had been adjudged 145 times, the sentence had been consumated in only thirty-five cases. The Judge

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eds. Hugh D. Graham and Ted R. Gurr (New York: New American Library, 1969), pp. 399-411; James P. Comer, "The Dynamics of Black and White Violence," ibid., pp. 444-64; Allan D. Grimshaw, ed., Racial Violence in the United States (Chicago: Aldine Atherton, 1969), pp. 1-115.

[70]New York Times, 19 July 1919, p. 8; 1 August 1919, p. 15; 10 February 1920, p. 8; ANJ 56:1642.

Advocate General stated that "no member of the Military Establishment has been put to death because of a purely military offense."[71] This surprising admission effectively refuted the often repeated claim that military men were the only ones qualified to sit as judges in military trials because the crimes were of a military nature, and thus not amenable to civilian judgment.

In another apparent reversal of position, General Crowder took credit for the establishment of the Board of Review in his office and described this board as responsible for review of all trial records. He further indicated that the duties of this administrative branch included the approval, modification, or reversal of courts-martial reviews before their submission to the Judge Advocate General. This description was nearly the same as Ansell's original claim of revisory power for the office. Crowder's change of attitude was further indicated when the "Annual Report" referred to the Judge Advocate General as a "court of last resort."[72]

After further skirmishes between the War Department and Senator Chamberlain, on 16 April 1920, the Senate Military Affairs Committee favorably reported out a bill to reform the system of military justice. As expected, the bill was a compromise mixture of Chamberlain's original proposal, Ansell's suggestions, the ABA committee's recommendations, and numerous amendments offered by the

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[71]New York Times, 28 November 1919, p. 14; Annual Reports: 1918, 1:230 (first quotation), 233 (second quotation).

[72]Ibid., 1:227 (quotation), 230-31.

War Department. Included in the bill were provisions allowing enlisted men to serve on courts-martial boards; giving defendants the right to civilian counsel; requiring a thorough, documented preliminary investigation before preference of charges; authorizing the Judge Advocate General's review board to order rehearings; limiting military sentences to the maximum allowed under the civil codes; requiring the use of the same rules of evidence as in Federal District Courts; requiring a three-fourths, rather than a two-thirds, concurrence in death penalties; and requiring a two-thirds, rather than a simple majority, vote in all other sentences. Three days later, the Senate, by unanimous vote, made this measure an amendment to the Army Reorganization Bill. In the final version, additional lobbying by the War Deaprtment was successful in getting some of the more drastic changes eliminated, such as the provision for enlisted board members. However, the major portions of the measure were finally enacted in June 1920.[73]

Although the resultant legislative act made some important changes in military law, particularly in regard to protection of the individual from aberrational procedures and in assigning revisory powers to the office of the Judge Advocate General, it failed to disabuse the armed forces from their view that judicial control was

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[73]New York Times, 17 April 1920, p. 19; 20 April 1920, p. 17; 59 Cong. Rec. 8662 (1920) (report of Presidential signiture of H.R. 12775 [Public, no.242], An Act to amend an act entitled "An Act for making further and more effective provision for the national defense, and for other purposes" approved Jun. 3, 1916, and to establish military justice); 41 Stat. 787 (1920).

a necessary function of command. Unfortunately, the identification of problem areas had become bogged down in a clash of individual personalities, and advanced legislation was rejected on the basis of both political and personal partisanship. The 1920 revision of the Articles of War corrected some of the surface faults in the system, but the solution of many of the underlying problems remained for the future.[74]

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[74]Some congressmen recognized that this bill did not correct the numerous miscarriages of justice which occurred during the war. Representative Thomas D. Schall of Minnesota introduced a resolution, H. J. Res. 361, recommending that the President pardon all persons convicted by courts-martial between 6 April 1917 and 1 January 1920 for offenses not involving moral turpitude. 59 Cong. Rec. 7505 (1920). No general amnesty was ever given, however, and clemency was still being acted on in some World War I cases as late as 1956. See, Letter from the Bureau of Military Justice to William Frazier, Case 109045, RG 153.

CHAPTER VI

CONCLUSION

Traditionally, most Americans have had little interest in military affairs during peacetime. The era following World War I was no exception; by the time Congress approved the 1920 revision to the Articles of War, the general public had lost interest in the army's problems. Immediately upon cessation of active hostilities, the swollen monolithic army created to meet the temporary emergency needs of war rushed back to civilian pursuits, leaving management of the skeletonized military forces once more in the hands of a small corps of professional officers.[1] The remaining regular forces, forced to accept the minor judicial alterations spawned by the Ansell-induced post-war investigations, made virtually no effort to further apply the lessons learned from the World War I military justice problems.

The army of the 1920s and 1930s, reduced to a miserly existence in both numbers and appropriations, was satisfied to accept the 1920 code as a final solution to the military justice controversy. Military leadership encouraged this attitude as

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[1]World War I demobilization occurred in a greater rush than even that following the Civil War. By 30 June 1919, 2,736,644 officers and men had been discharged. Within the year, the massive wartime army had been reduced to less than 130,000 men. Weigley, History of the Army, p. 396.

Crowder's proteges filled the post of Judge Advocate General of the Army and Pershing's followers succeeded him in the position of Chief of Staff.[2] Although individual articles of war were amended in 1931, 1937, 1942, and 1948, only the latter change was either substantial or significant.[3] The 1920 Articles of War remained the basis for the administration of military justice until passage of the major reform measure in 1950, the Uniform Code of Military Justice.[4]

Guidance concerning the application of military law to members of the army continued to be provided by subsequent editions of the Manual for Courts-Martial. The 1921 edition of this manual, published to reflect the 1920 alteration in military law, was, in turn, replaced by a new edition in 1928. However, the 1928 printing made no important changes in military law procedures, reflecting only some minor textual modifications as a result of a 1923 Army Headquarters request for suggestions from various commanding officers. The 1928 edition also was reduced in size by eliminating some of the

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[2]Following Crowder's retirement in 1923, Judge Advocate Generals of the Army included Walter A. Bethel, Edward A. Kreger, John A. Hull, Blanton Winship, and Arthur W. Brown, all of whom worked for Crowder in the Provost Marshal General's office. Lockmiller, Crowder, pp. 150, 205. Pershing served as Chief of Staff from 1921 to 1924. This position was later held by Charles P. Summerall, Douglas MacArthur, and Malin Craig, veterans of service with Pershing in France. Weigley, History of the Army, pp. 390, 392, 415, 560.

[3]96 Cong. Rec. 1353 (1950) (remarks of Senator Kefauver).

[4]William B. Aycock and Seymour W. Wurfel, Military Law Under the Uniform Code of Military Justice (Chapel Hill: University of North Carolina Press, 1955; reprint ed., Westport, Conn.: Greenwood Press, 1972), p. 14.

material of the 1921 edition, "partly because it was thought that many matters of detail ought to be left to judgment and common sense."[5] This 1928 volume, with only occasional "pen and ink" changes, remained in effect until after the end of World War II.[6]

Despite the post-World War I investigations, the heirarchy of the army had not changed its attitude toward the relationship between military law and discipline. Twenty-eight years after Pershing objected to interference with his control of military justice in France and asked for more authority to approve death sentences, the commander of the Third Army in World War II, General George S. Patton, Jr., stated:

> The purpose of military law is administrative rather than legal. As the French say, sentences are for the purpose of encouraging the others. . . . Army Commanders or Corps Commanders should have the authority to approve the death sentence. It is utterly stupid to say that General Officers, as a result of whose orders thousands of gallant and brave men have been killed, are not capable of knowing how to remove the life of one miserable poltroon.[7]

During Senate hearings on military justice in 1919, Secretary

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[5]U.S., War Department, A Manual for Courts-Martial, U.S. Army, 1928 ed., reprinted 1936, p. vii.

[6]Examples of directed changes to the 1928 edition ranged from War Department Circular No. 14, 1 February 1940, modifying disciplinary action for failure to take prophylactic treatment after illicit sexual intercourse, to War Department Bulletin No. 6, 9 February 1942, announcing Executive Order No. 9048, Suspending the Limitations Upon Punishments for Violations of Articles of War 58, 59, and 86. Ibid., posted changes to pp. 97, 257.

[7]58 Cong. Rec. 6497 (1919) (remarks of Senator Chamberlain); George S. Patton, Jr., War As I Knew It (Cambridge, Mass.: Houghton Mifflin, 1947), p. 362.

of War Baker opposed appellate systems for the army as making the army legal machinery too inflexible. During Senate hearings on military justice thirty-one years later, Major General Thomas H. Green, current Judge Advocate General of the Army, also insisted that there was no need for a Court of Military Appeals. General Green further testified against any plan for inclusion of civilian judges on any appeals courts, repeating the ancient military argument that "military justice is a field of law which requires . . . experience and training in military matters."[8]

The final solutions to the problems identified in World War I, emasculated as they were by post-war politicians and militarists, left the system of military law almost as unprepared in 1941 as it was in 1917. During World War II, virtual carbon-copies of the earlier judicial difficulties arose in both the continental United States and in the various overseas theaters. Again, as the army grew to an unprecedented size, the number of courts-martial also rose to inconceivable levels. During these war years there were more than ninety thousand general courts-martial alone. The allegations of wrongs and injustices heard in 1918-19 were once again echoed in 1945-46. The Judge Advocate General's office, once more forced to respond to charges of excessive and arbitrary sentences in wartime courts-martial, re-established the clemency boards. This

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[8]Baker before the Senate Military Subcommittee, reported in the New York Times, 5 November 1919, p. 20; Green before the Senate Military Subcommittee, quoted in 96 Cong. Rec. 1304 (1950) (remarks of Senator Tobey).

time their surveys would cover over thirty thousand cases. However, despite the work of the clemency boards and the army's rehabilitation program, at the end of 1945 a large share of the more than forty thousand prisoners in federal penal institutions were there as a result of sentences of military courts-martial.[9] Obviously, the program of military jurisprudence was still not capable of dealing with the problems of vast wartime armies.

Senator Estes Kefauver commented that "the same type of criticism [as occurred in 1918-19] took place during and since World War II and, in response to it, the Army and Navy, both, introduced amendments to their basic statutes in the Eightieth Congress."[10] Faced with public and political calls for judicial revision, the army ordered a post-war study of court-martial sentences by a committee chaired by former Justice Owen Roberts and a study of court-martial procedures by another committee under the leadership of Judge Arthur Vanderbilt. Repeating history, the American Bar Association also appointed a committee to hold hearings on military justice; however, this time "the bitter personal element was lacking."[11]

More significantly, this time major revision of the military legal system had the active backing of high civilian officials. In

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[9]Bishop, Justice Under Fire, pp. 117, 162 nn. 10, 11; Lockmiller, Crowder, p. 215.

[10]96 Cong. Rec. 1353 (1950) (remarks of Senator Kefauver).

[11]Ibid.; Lockmiller, Crowder, p. 215.

1947 a national military establishment was created and the Secretary of War was replaced by a Secretary of Defense. Despite the opposition of many professional officers, the first Secretary of Defense, James V. Forrestal, favored a single system of law for all the armed forces. Under the sponsorship of the Department of Defense, Representative Overton Brooks of Louisiana, and Senator Estes Kefauver of Tennessee, the Uniform Code of Military Justice was passed by Congress and signed into law by President Harry S. Truman on 6 May 1950. This law combined into one code the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws for the Coast Guard.[12]

This 1950 military code finally incorporated into law many of the reforms first proposed more than thirty years earlier. Among the more radical changes was the right of enlisted defendants to request that at least one-third of the court-martial board be composed of enlisted members. This change, originally proposed in the 1919 Chamberlain Bill, gave American enlisted men virtually the same right that soldiers in France and Germany had enjoyed since the nineteenth century.[13]

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[12]Ibid., p. 215 n. 29; The full title of the act, which was effective 31 May 1951, was "An act to unify, consolidate, revise and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice." H.R. 4080 [Pub. L. 96-506], 96 Cong. Rec. 6640 (1950). The full text of the Uniform Code of Military Justice is reprinted in U.S., Department of Defense, Manual for Courts-Martial, United States, 1969 (Revised edition), Appendix 2, pp. A2-1 thru A2-37.

[13]Art. 25(c), Uniform Code of Military Justice; Bishop,

Another major alteration in courts-martial procedure was creation of an independent military judge to advise the court and rule on points of law during courts-martial. Responsible only to the Judge Advocate General of his branch of the service, and required to be a qualified and certified lawyer, the military judge gave the court some of the independence from command influence that Ansell had been so insistent on in 1919. The 1968 Military Justice Act further expanded the role of this military judge by giving the accused the right to have the military judge, sitting alone, act as both judge and jury in all but cases involving the death penalty.[14] In theory, this particular provision totally eliminated any direct influence on the trial by the convening authority.

Significant problems originally identified in 1919 were solved by provisions in the new code which established stringent requirements in the qualifications of defense counsels for serious cases, expanded the rights of the accused to counsel during pre-trial investigation, and prohibited the reviewing official from overturning findings of acquittal. Some critics saw this "softening" of the code of military justice as a government attempt to "extend some of the amenities of the affluent society to the Army." A noted military historian, Russell F. Weigley, commented that "many

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Justice Under Fire, p. 48 n. 19.

[14]"Military Justice Act of 1968," Act of 24 October 1968 [Pub. L. 90-632], 82 Stat. 1335; Arts. 16, 33, Uniform Code of Military Justice.

professional officers saw in the relaxing of military justice the cause of a gradual blunting of the Army's combat edge, and they were to blame the new code for many of the shortcomings of American soldiers in 1950."[15]

The most far-reaching of the modern changes to the code of military justice were the provisions for appellate review of courts-martial sentences. Controversy over this topic was the original cause of disagreement between Ansell and his superior in 1917, and was the most frequent target of attack by those who accused the military program of being arbitrary and inflexible. The Uniform Code of Military Justice created a review and appellate system comparable, if not superior, to that enjoyed by defendants in a non-military criminal case. In addition to mandatory trial reviews by the convening authority and a command level staff judge advocate, a Court of Military Review was also established in each branch of the armed forces with automatic review authority over more serious cases.[16] A final level of further appeal was made possible by the

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[15]Arts. 19, 27, 38(b), Uniform Code of Military Justice; Weigley, History of the Army, p. 503 (quotations). In the second quotation the year "1950" is possibly a misprint. It is assumed that Weigley is referring to the period of the Korean War, or perhaps the entire decade, rather than just to a single year. If so, then the correct final phrase for the quotation should be "in the 1950s." Significantly, this is almost the only reference in Weigley's otherwise excellent history to either military law or its problems. Weigley, like so many military historians, avoids the complexities of the topic by avoiding the entire topic.

[16]Joseph Bishop claims that "from the standpoint of sheer quantity and availability of appellate review, the military convict is plainly better off than the civilian." Justice Under Fire, p. 38;

creation of the Court of Military Appeals, the military equivalent to the Supreme Court. This Court of Military Appeals, consisting of three judges "appointed from civil life by the President, by and with the advice and consent of the Senate,"[17] gave the military the independent judiciary that Ansell had demanded in vain during his 1919 confrontation with Judge Advocate General Crowder.

The central figure in the World War I controversy, Samuel T. Ansell, lived to see many of the provisions for which he so futilely argued in 1919 adopted in the Uniform Code of Military Justice of 1950. Following his resignation from the army, the ex-judge advocate formed a law firm in Washington, D.C., where he continued to actively practice until his death in 1954 at the age of seventy-nine.[18] While Ansell's tactics in 1918 and 1919 may have been questionable from the standpoint of strict military discipline, it was fitting that he was present to see his views finally vindicated after thirty years.

The other major figure in the World War I confrontation, Major General Enoch H. Crowder, did not survive to see the changes

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Art. 66, Uniform Code of Military Justice. Originally created in 1950 as Boards of Review within each service branch, the Military Justice Act of 1968 changed the name of these tribunals to Courts of Military Review. These courts consist of three judges, either military or civilian, in the office of the Judge Advocate General of the respective service.

[17]Art. 67, Uniform Code of Military Justice.

[18]Ansell's obituary noted that the ex-judge advocate was presented the Distinguished Service Medal "for exceptionally meritorious and conspicuous service" as acting Judge Advocate General during World War I and that, at the time, he was the youngest general officer in service. New York Times, 28 May 1954, p. 23.

following the second World War. Crowder felt that he had been vindicated when the American Bar Association Committee and the Army Board of Investigation found no organic faults with his program of military law in 1919.[19] General Crowder continued as Judge Advocate General of the Army until 1923; however, political enemies blocked his promotion to lieutenant general in both 1919 and 1922.[20] Widely respected for his knowledge of international law, Crowder served as United States Ambassador to Cuba from 1923 to 1927, and then practiced law in Washington, D.C., until his death in 1932.[21] According to his biographer, David Lockmiller, "he [Crowder] never forgave his enemies, Generals March and Ansell, and the feeling was no doubt mutual."[22]

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[19]Lockmiller, Crowder, p. 215. Lockmiller notes that Crowder "never forgave those who 'cast slurs' upon the whole court-martial system as such, and he left no stone unturned to refute the 'extreme and exaggerated criticims' which in his opinion were unjustly and needlessly calculated to undermine public confidence."

[20]Ibid., pp. 191, 225.

[21]Obituary, New York Times, 8 May 1932, sec. II, p. 5. Justice Felix Frankfurter, who as a young man served as a judge advocate and knew Crowder well, described him as "one of the best professional brains I've encountered in [my] life" and "a heroic character." Felix Frankfurter, Reminisces, quoted in Bishop, Justice Under Fire, p. 103 n. 11.

[22]Lockmiller, Crowder, p. 260. Crowder and General Peyton C. March "had maintained a sort of private feud for thirteen years" before March's appointment as Chief of Staff, apparently stemming from Crowder's superior rank while both men were observers in the Russo-Japanese War. Ibid., p. 187. Lockmiller reports that Crowder refused a selected burial plot in Arlington National Cemetery when he found that the plot reserved for March was a little higher on the hill and would overlook Crowder's plot. Ibid., p. 260.

Senator Chamberlain, the final character in the World War I disputes, lost his seat in Congress in the elections of 1920. The extent to which his participation in the military justice controversy was motivated by his break with President Wilson and his personal dislike of Baker and Crowder will never be known. What is certain, however, is that whatever his motivations, the Oregon Senator was instrumental in preventing Crowder's promotion in 1919. As chairman of the powerful Senate Military Affairs Committee, Chamberlain gave public voice to the criticisms of military justice that might otherwise have been disregarded. After his defeat for the Senate, Chamberlain returned to the private practice of law in Oregon until his death in 1928.[23]

The reforms of 1950 and 1968 did not stop criticism of the system of military justice. Critics continued to insist that military law essentially ignores the constitutional rights of servicemen, levies unnecessarily harsh and arbitrary sentences for minor violations, and is administered by puppet-like creatures, totally dominated by tyrannical commanders.[24] The wide-spread public dissatisfaction with the Viet Nam War did much to continue popular acceptance of these critical judgments.

However, scholars infrequently have surfaced who take neither

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[23] 58 Cong. Rec. 6491-6503 (1919) (remarks of Senator Chamberlain); Obituary, New York Times, 10 July 1928, p. 23.

[24] For an example of current (and distorted) criticism, see Robert Sherrill, Military Justice is to Justice as Military Music is to Music (New York: Harper & Row, 1970).

the "heaven" or "hell" approach. Joseph W. Bishop, a civilian professor of law and noted authority on the practice of military law, regards overall "modern" military justice as "not appreciably rougher or more summary than civilian criminal process." The Yale professor points out that "in some respects . . . it gives the accused more substantial protection [than civil justice]" and concludes that "it is unlikely that soldiers today [1972] run much, if any, greater risk of unjust conviction than do civilians."[25]

Whatever the validity of arguments either for or against the existing practice of military law, there is little doubt that the controversy will continue into the future. Ansell's polemic outbursts in 1919 made public a subject that was essentially of concern mainly to militarists until the twentieth century; however, like the creatures of Pandora's box, once exposed, the subject can never be hidden away again. Those who would resist continued alteration and improvement of the military's legal program should consider the thought expressed in the Army Regulations of 1835 that:

> The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered.[26]

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[25]Bishop, Justice Under Fire, p. 23.

[26]Army Regualtions, 1835, Art. 35, para. 1, quoted in Manual for Courts-Martial, 1917, p. xvi.

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