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A COMPARATIVE STUDY OF MILITARY JUSTICE REFORMS IN BRITAIN AND AMERICA

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I.

INTRODUCTION

The Articles of War and the Rules for the Government of the United States Navy which were adopted by the Continental Congress in 1775 were patterned after the corresponding military and naval codes in effect at the time in Great Britain.[1] Since their initial adoption, they have each been amended on several occasions, and have finally been brought together into a single set of articles known as the Uniform Code of Military Justice, enacted in 1950.[2] Similarly, the British statutes and procedures relating to military justice have been revised from time to time, most recently as a result of the experience gained in World War II. In this article it is proposed to compare some of the more important changes introduced in the British system with the corresponding changes in our own. Obviously, space does not permit discussion of each change made. Accordingly, three topics have been selected for detailed treatment: the status and function of the judge advocate or law officer of a court-martial, the status and functions of the Judge Advocate General and of his office and the system of appellate review. An attempt will then be made to summarize some of the other more important changes. Of necessity, emphasis has had to be placed on the general court-martial.

II.

BACKGROUND OF THE CHANGES

A remarkable feature of these changes is their similarity. Working independently of each other, the British and American committees which studied the subject found themselves grappling with almost the same problems and in many areas came up with virtually the same solutions. The chronology makes this clear. At the time that the Van-

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1. WINTHROP, MILITARY LAW AND PRECEDENTS 953 (1895 ed., 1920 Reprint); 3 WORKS OF JOHN ADAMS 68 (1851). See Pasley and Larkin, *The Navy Court-Martial; Proposals for its Reform*, 33 CORNELL L.Q. 195, 197 (1947).

2. 64 STAT. 107 (1950); 50 U.S.C.A. §§ 551-728 (1951). (Hereafter referred to as the "Uniform Code," and cited in subsequent footnotes as UCMJ.)

derbilt, McGuire, Ballantine and Keeffe Committees, and Father White, were making their respective studies of the United States Army and Navy court-martial systems,[3] only the Oliver Report of 1938 on the British Army system[4] was available, and that in a somewhat cryptic summary. The Morgan Committee, which drafted the Uniform Code, had some knowledge of the work of the Oliver Committee, and of the two committees which were appointed after the War to study the British Army and Navy systems (the Lewis Committee and the Pilcher Committee), but lacked time to make a detailed study of the report of the former, and completed its work before the reports of the latter were available. Conversely, there is no evidence in the Lewis or Pilcher Reports[5] that these committees even knew about, much less relied upon, any of the American studies which had been made.

To understand these British reports, and the action taken thereon, some knowledge of at least the basic framework of British military law is necessary. The underlying Army statute is the Army Act of 1881,[6] which supplanted the Army Discipline and Regulation Act of 1879,[7] itself a consolidation of the old Articles of War and the Mutiny Act. By a quirk of history, having its origin in the traditional fear of a standing army, the Army Act remains in force only for such time as may be specified in an Annual Act bringing it into force or continuing it.[8] The practice has been to keep the Army Act in effect on a year to year basis by so providing in the Army (Annual) Act, which is now the Army and Air Force (Annual) Act. The Army Act sets forth general provisions relating to discipline, military offenses, courts-martial and the like. It is supplemented by the Rules of Procedure, which are made, altered, or repealed by the Crown, through the Secretary of State for War. These rules cover, *inter alia*, the convening, constitution and procedure of courts-martial, the confirmation, revision and execution of findings and sentences of courts-martial, the necessary forms of orders relating to courts-martial, and other matters necessary

3. Report of War Department Advisory Committee on Military Justice to the Secretary of War (1946); Report of the McGuire Committee to the Secretary of the Navy (1945); Reports of Ballantine Committee to the Secretary of the Navy (1943, 1946); Report of the General Court Martial Sentence Review Board to the Secretary of the Navy (1947); WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (1947).

4. Report of the Army and Air Force Courts-Martial Committee, 1938, English Command Paper No. 6200 (1940). English Command Papers are hereafter cited as CMD. This report is hereafter cited by its CMD. number.

5. Report of the Army and Air Force Courts-Martial Committee, 1946, CMD No. 7608 (1949); First and Second Reports of the Committee Appointed to Consider the Administration of Justice under the Naval Discipline Act, 1950, CMD No. 8094 (1950), CMD No. 8119 (1951). (Hereafter these reports will be cited only by CMD number.)

6. 44 & 45 VICT., c. 58 (Reprinted with amendments to date, in MANUAL OF MILITARY LAW, PART I, 1951 at 192-424 (8th ed. 1952).

7. 42 & 43 VICT., c. 33.

8. MANUAL OF MILITARY LAW, PART I, 1951 at 182 (8th ed. 1952). *Cf.* U. S. CONST. Art. I, § 8, cl. 12.

to carry the Army Act into effect. Finally, there are the Queen's Regulations, which cover other matters of detail and procedure. One striking difference between this system and our own is that many matters which we feel it necessary to cover by statute are not found in the Army Act but in the Rules of Procedure.[9]

Since creation of a separate Air Force in 1917, that Department has had its own Air Force Act, Rules of Procedure and King's (now Queen's) Regulations.[10] The provisions of the two systems are virtually identical, however, and both the Army Act and the Air Force Act are implemented by a single Army and Air Force (Annual) Act.

The Royal Navy is governed by a different system of military law. Here the basic statute is the Naval Discipline Act of 1866, as amended.[11] This act is supplemented by the Naval Court-Martial Regulations, the Regulations for Disciplinary Courts, and other instructions, orders, forms and rules of evidence, found in the Admiralty Memorandum on Naval Court-Martial Procedure.[12]

Interestingly enough, despite the fact that Great Britain has had a single Ministry of Defence for a longer period of time than the United States, no attempt has yet been made in Great Britain to consolidate these three (really two) systems of military law into one, comparable to our own Uniform Code. The British committees were apparently sufficiently impressed by the differences in needs and functions as between the Army and Navy to conclude that continued difference in practice was warranted.[13] (The Air Force case was a special one: that service, having only recently separated from the Army, naturally adopted the Army code as its own, with appropriate changes in terminology). An exception is the Courts-Martial (Appeals) Act, 1951,[14] which, as we shall see, sets up a single system of appeal from decisions of Army, Navy and Air Force courts-martial.

III.

The Work of the Committees

The Oliver Committee was appointed March 18, 1938, under the chairmanship of Mr. Roland Oliver, M. C., K. C., (later a Justice of the High Court, King's Bench Division), by the Secretaries of State

9. The Rules of Procedure, 1947, with amendments to date, are found in Manual of Military Law Part I, 1951 at 425-573 (8th ed. 1952).
10. See Manual of Air Force Law (2d ed. 1933, reprint 1939) with current amendments.
11. 29 & 30 Vict., c. 109. Printed, as amended, in accordance with the Naval Discipline Act, 1922 (12 & 13 Geo. 5, c. 37) in *Admiralty Memorandum on Naval Court-Martial Procedure* 4-27 (B.R. 11, revised 1937; reprinted with amendments, 1943). (Hereafter cited as B.R. 11.)
12. See note 11 *supra*.
13. Cmd No. 8094 at 6, ¶ 6 (1950). But *cf. id.* at 53, ¶ 24.
14. 14 & 15 Geo. 6, c. 46.

for War and Air to examine the court-martial system under the Army and Air Force Act, and particularly to consider the question whether it was desirable and practicable to allow a person convicted by court-martial a right of appeal to a civil court. The committee held private hearings, at which all interested parties were invited to testify (very few responded), and submitted its report on July 28, 1938.[15] The committee found the existing system eminently satisfactory and was particularly struck by the fact that, although it had made a "studied search for cases of injustice covering a period of 20 years, and from all over the world," it had discovered not a single one.[16] The committee's report did make a number of important recommendations concerning the appointment, constitution and functions of the Judge Advocate General's Office, as well as some relatively minor recommendations on other matters. It recommended against the granting of a right of appeal to a civilian tribunal. The committee's report was published by the Goverument in May of 1940, with the explanatory statement that, in view of the fact that the war had broken out in the meantime, the Government found it impossible to place any of the committee's recommendations into effect until hostilities should end.[17]

On November 4, 1946, the War Office and Air Ministry appointed a new committee, under the chairmanship of the Honorable Mr. Justice Lewis, O.B.E., a member of the High Court, King's Bench Division, to review the recommendations of the Oliver Committee "in the light of the experience gained in the late war and of the composition of the Army and the Royal Air Force," to reconsider the question of appeal, to investigate the punishing powers of courts-martial and of commanding officers, and "to make recommendations upon these and kindred matters."[18] The Lewis Committee held hearings, examined witnesses and studied over 200 memoranda submitted to it. On April 13, 1948, it submitted an exhaustive report containing some 60 or 70 specific recommendations.[19] While agreeing generally with the conclusions of the Oliver Report, the Lewis Report suggested a number of fairly radical changes, and in particular recommended that a right of appeal to a civilian tribunal be granted. Some of the more important of these recommendations will be discussed in greater detail below.

Although some of the recommendations of the Lewis Committee were put into effect at once, final action on the others was delayed until a study could be made of the naval system. On February 17, 1949, the First Lord of the Admiralty appointed a committee, under the chair-

15. CMD No. 6200 (1940).
16. *Id.* at 5.
17. *Id.* at 2.
18. CMD No. 7608 at 3 (1949).
19. CMD No. 7608 (1949).

manship of the Honorable Sir Gonne St. Claire Pilcher, M. C., a Justice of the High Court, Probate, Divorce and Admiralty Division, to consider whether any changes were desirable in the administration of justice under the Naval Discipline Act.[20] The Pilcher Committee held hearings and considered memoranda submitted to it, and submitted two reports, the first on February 20, 1950,[21] dealing with the naval court-martial system as such, and the second on November 6, 1950,[22] dealing principally with the summary powers of commanding officers. The Pilcher Committee also recommended that a civilian appellate court be established, though on a slightly different basis from the one proposed by the Lewis Committee.

In January 1951 the Government published its conclusions on the recommendations of the Lewis and Pilcher Committees in the form of a report by the Minister of Defence to Parliament, outlining (1) the recommendations of each committee which had been accepted, with or without modification; (2) those on which a final decision had not yet been reached; and (3) those which had not been accepted.[23] The more important of these conclusions will now be discussed.

IV.

THE LAW OFFICER OR JUDGE ADVOCATE

One of the most interesting developments has been in the position of the law officer or, as he is called in Britain, the judge advocate of the court-martial.

A. *Prior Law*

Prior to World War II, the situation was as follows:

U. S. Army: A "law member" was designated by the appointing authority for each general court-martial.[24] Such designation was a jurisdictional requirement but, so long as the order appointing the court included a law member, he could be excused from attending (although this rarely happened in practice) without defeating the court's jurisdiction.[25] He was preferably to be a member of the Judge Advocate General's Department, when one was available, otherwise an officer deemed especially qualified by the appointing authority. The decision of the latter on the availability of a JAGD officer was final and could not be collaterally attacked in *habeas corpus* proceedings.[26]

20. CMD No. 8094 at 5 (1950).
21. CMD No. 8094 (1950).
22. CMD No. 8119 (1951).
23. Courts-Martial Procedure and Administration of Justice in the Armed Forces, CMD No. 8141 (1951). (Hereafter cited only by CMD number).
24. 41 STAT. 788 (1920), 10 U.S.C.A. § 1479 (1927) (Article of War 8).
25. This rule was changed by the Elston Act, 62 STAT. 628 (1948).
26. Hiatt v. Brown, 339 U.S. 103 (1950).

The law member was a full-fledged member of the court, and therefore had to be a commissioned officer. His rulings on admissability or exclusion of evidence were final, but on other interlocutory questions were subject to being overruled by majority vote.[27] He did not rule on challenges.[28] He retired with the court and voted on the findings and sentences. He customarily instructed the other members of the court on the law applicable to the case, the rule of reasonable doubt, and so forth, but this was in closed session and did not become part of the record.[29]

U. S. Navy: The Navy had no law member, but a "judge advocate," whose duty it was to present the case for the prosecution. He had the further duty of advising the members of the court on legal questions, and to see that the rights of the accused were protected, especially if the latter was not represented by counsel.[30]

British Army: The general court-martial had a "judge advocate," who sat with the court in open and closed sessions but did not vote. Within the United Kingdom, he was designated by the Judge Advocate General; elsewhere by the appointing authority. He did not have to be an officer, but could be a barrister temporarily commissioned for that purpose, or a regular civilian judge who sat in wig and gown. If he was an officer, it was not required that he be legally qualified. His duties were, generally, to represent the Judge Advocate General and to advise the court, as well as the prosecution and defense, on questions of law and procedure, to sum up the evidence, to advise the court on the law relating to the case and to act impartially to see that the interests of the Crown and of the accused were fully protected. His opinions were not binding on the court, but the court was enjoined not to disregard them except for very weighty reasons.[31]

British Navy: Each general court-martial had a judge advocate. Normally, he was a duly appointed Judge Advocate of the Fleet, or his Deputy, who was present within the command; otherwise the convening authority appointed a deputy judge advocate, or in default of such appointment, the president of the court did so.[32] In general, the duties of the judge advocate of a naval court-martial were similar to those of the judge advocate of an army court-martial. Again, his opinions were advisory only and not binding on the court.[33]

27. 41 STAT. 793 (1920), 10 U.S.C.A. § 1502 (1927) (Article of War 31). This rule was also changed by the Elston Act, 62 STAT. 631 (1948).
28. 41 STAT. 793 (1920), 10 U.S.C.A. § 1502 (1927) (Article of War 31).
29. This custom became a requirement under the Elston Act, 62 STAT. 631 (1948).
30. NAVAL COURTS AND BOARDS §§ 359, 400, 401 (1937 ed., 1945 reprint).
31. Rules of Procedure, 1947, Rule 103; MANUAL OF MILITARY LAW, PART I, 1951 at 39, 59, 500-01. (8th ed. 1952).
32. Naval Discipline Act, § 61, *supra* note 11; B.R. 11 at 16, 50, 52. (Rev. 1937, reprint 1943).
33. B.R. 11 at 52-54 (Rev. 1937, reprint 1943).

B. *Present Law*

Uniform Code of Military Justice: Under the Uniform Code, every general court-martial, Army, Navy, or Air Force, has a law officer, appointed by the convening authority. He must be a commissioned officer, who is a member of the bar of a federal court or of the highest court of a state, and who is certified as qualified for such duty by the Judge Advocate General of his service, and he is required to be present at the trial.[34] He rules upon all interlocutory questions, other than challenges. His rulings are final, except that a ruling upon a motion for a finding of not guilty, or on the question of sanity, may be overruled by a majority of the court.[35] He is required to instruct the court, on the record and in the presence of the accused and of counsel for both sides, as to the elements of the offense charged, as well as on the presumption of innocence, the rule of reasonable doubt, and so on.[36]

By virtue of this provision, the Navy has gained what it previously had not had, a law officer for its general court-martial. The position of the Army law member, on the other hand, has been substantially changed, in that he has been taken off the court, deprived of his vote, required to give his instructions in open court, and, in general, assimilated much more than had previously been the case to a civilian trial judge.[37]

Lewis Report: The Lewis Report made only a few recommendations with respect to the position of the judge advocate of a British Army (or Air Force) court-martial:

(1) That the judge advocate (if retained as such) should not retire with the court when the latter considers its findings.[38] The Oliver Committee had made a similar recommendation.[39] It was premised mainly on the consideration that, since the judge advocate had already instructed the court on the law of the case in open court, it was unnecessary for him to retire with the court when it voted on the findings, and that for him to do so created the appearance at least of possible injustice to the accused.[40] This recommendation was put into effect administratively in 1947.[41] However, the judge advocate continues to retire with the court, but does not vote, when it considers

34. UCMJ, arts. 26, 39, 50 U.S.C.A. §§ 590, 614 (1951).

35. UCMJ art. 51(b), *id.* § 626.

36. UCMJ art. 51(c), *ibid.*

37. This was a highly controversial point. In the drafting of the Uniform Code, before submission to Congress, it was one of the few issues which had to be resolved personally by the Secretary of Defense.

38. CMD No. 7608 at 26, 55 (1949).

39. CMD No. 6200 at 13-14 (1940).

40. *Id.* at 14 (1940); CMD No. 7608 at 26 (1949).

41. CMD No. 7608 at 26 (1949); CMD No. 8141 at 6 (1951); Rules of Procedure, 1947, Rule 63(c); MANUAL OF MILITARY LAW, PART I, 1951 at 480 (8th ed. 1952).

the sentence or any interlocutory matter such as a motion for a finding of not guilty.[42]

(2) Alternatively, and preferably, that the judge advocate be replaced by a Judge Martial, or Deputy Judge Martial, furnished by the Judge Advocate General, who would be president of the court and act as a judge at an assize court, robed as King's Counsel, and who should cast the deciding vote on the sentence in the case of a tie.[43] The Government has not accepted this recommendation, but has agreed to require that in all cases the judge advocate be a person with legal training.[44]

Pilcher Report: The principal recommendations of the Pilcher Committee under this heading were as follows:

(1) That in all serious cases, (*e.g.*, capital cases and cases presenting difficult questions of law or evidence) judge advocates be chosen from King's Counsel and other barristers experienced in criminal law, the Deputy Judge Advocate of the Fleet, or former holders of that office.[45]

(2) That in cases of less difficulty and gravity, specially selected Supply Officers with the requisite legal training and aptitude for trial work (so-called "starred" officers) be appointed as judge advocates.[46]

(3) That in relatively minor cases, "unstarred" Supply Officers be employed.[47]

(4) That civilian judge advocates sit in legal robes.[48]

(5) That the judge advocate give all his advice in open court, that he sum up on the legal issues before the finding and that he not retire with the court when it votes on the finding.[49]

(6) That the president be empowered to authorize the judge advocate, on the advice of the latter, to hear arguments as to admissibility of evidence and applications for separate trials in the absence of the court. (A typical case where this might be appropriate would be where the admissibility of a confession was in issue, and the arguments thereon might well affect the court's opinion as to the guilt or innocence of the accused.)[50]

(7) That courts be instructed by the Admiralty to follow the advice given by the judge advocate or record the reason for their failure to do so.[51]

42. Rules of Procedure, 1947, Rule 63(b); MANUAL OF MILITARY LAW, PART I, 1951 at 480 (8th ed. 1952).
43. CMD No. 7608 at 43, 58 (1949).
44. CMD No. 8141 at 15 (1951).
45. CMD No. 8094 at 21-22, 44-45 (1950).
46. *Id.* at 22-23, 45. The term "Supply Officer" means an officer in the Supply and Secretariat Corps, some of the members of which are assigned legal duties.
47. *Id.* at 23, 45.
48. *Id.* at 25, 45.
49. *Ibid.*
50. *Id.* at 24-25, 45.
51. *Id.* at 23-24, 45.

(8) That the judge advocate not be required to advise the court on the rules and regulations of the service generally, since he might be a civilian whose competence would not extend to such matters, and consequently it would not be suitable for the court to be obliged to follow his recommendations thereon.[52]

The Government has accepted all the above recommendations, except the last two. It is willing that the judge advocate's advice be binding on points of law, and has accepted (7) to this extent. This limited acceptance makes (8) unnecessary.[53]

Summary: By virtue of the above changes, the position of the law officer of the court in each of the four systems (now really three) is much closer than formerly. The only significant differences which remain between the British and American systems in this regard are:

(1) In Britain, the judge advocate may be a civilian.

(2) In the British Army, the rulings of the judge advocate are not binding on the court, even on questions of law, although the court is enjoined not to disregard them except for weighty reasons.

(3) In Britain, the judge advocate still retires with the court (but does not vote) when it considers the sentence, or if it should close to consider any interlocutory matter.

There is, however, a significant difference in practical result. In America, faulty or incomplete instructions by the newly created law officer have been a major cause of reversals by the Court of Military Appeals. No such result appears to have happened in England, where for a long time judge advocates have been summing up and giving instructions on the law in open court. The difference is no doubt due to the novelty of the arrangement in this country and consequent inexperience on the part of law officers.

VI.

The Judge Advocate General

Many of the recent reforms have focused on the position and status of the Judge Advocate General. In this area the British and American systems have shown a number of important differences. If anything this divergence has increased, although in all cases the purpose of the changes has been the same, namely, to give greater independence and responsibility to the Judge Advocate General.

In the United States, the Judge Advocate General was, and is, a member of the armed force with which he serves, with the rank of major general or rear admiral. In Britain the Judge Advocate General

52. *Id.* at 24, 45.
53. Cmd No. 8141 at 19, 21, 22 (1951).

of the Land and Air Forces is a civilian official appointed by the King. Until 1951 he was subject to the orders of the Secretaries of State for War and Air. For nearly a century prior to 1893, however, he was a Privy Councillor, a member of the Government and usually a member of Parliament, with direct access to the Sovereign. From 1893 to 1905, he was the President of the Probate, Divorce and Admiralty Division of the High Court.[54] The Judge Advocate General of the Fleet is also a civilian official, usually a King's Counsel in civil practice, who acts as legal adviser to the Board of Admiralty.[55]

A. *Recent Changes — United States*

(a) *Army*: The Elston Act, which formed Title II of the Selective Service Act of 1948, provided for a separate Judge Advocate General's Corps, with a minimum strength, permanent appointments and a separate promotion list. Under this act, it is provided that the Judge Advocate General shall be the legal adviser of the Secretary of the Army and of all officers and agencies of the Army, and that all members of the Corps are to perform their duties under the direction of the Judge Advocate General. The Judge Advocate General, the Assistant Judge Advocate General and other general officers in the Corps are to be appointed by the President, with the advice and consent of the Senate, from among officers of the Corps who are recommended by the Secretary of the Army.[56]

The stated purpose of these provisions was to establish in the Army a corps of qualified legal officers who should be entirely free from command control. Congress felt so strongly on this subject that the House Committee on Armed Services wrote these provisions into the bill as it was originally proposed by the Army, despite the opposition of Under Secretary Royall and Lieutenant General Collins, and retained them in spite of "strenuous objections" by Secretary of War Patterson and the then Chief of Staff, General Eisenhower.[57]

Unquestionably, establishment of the Corps has been an important morale factor in attracting legal officers to the Army. It may be questioned, however, whether it was ever calculated to free courts-martial from "command control." Obviously it could not do this because courts-martial were and are appointed by local commanders, not by the Judge Advocate General or anyone acting for him. And no one has ever seriously contended that the Judge Advocate General in Washington was a creature of the military. Even if he were, it is hard to see how establishment of the Corps changed his position very much. He was,

54. CMD No. 7608 at 7 (1949).
55. CMD No. 8094 at 14 (1951).
56. 62 STAT. 643 (1948), 64 STAT. 270 (1950), 10 U.S.C.A. §§ 61-1 through 65 (Supp. 1951).
57. H.R. REP. No. 1034, 80th Cong., 1st Sess. 8-11 (1947).

and is, legal adviser to the Secretary and a member of the Army Staff. However, on military justice matters, he reports directly to the Secretary of the Army.[58] It may further be questioned whether the new "Corps" differs very substantially, in the final analysis, from the old Judge Advocate General's "Department."

As a matter of fact, during the hearings on the Air Force Organization Act of 1951, Congressman Kilday observed that in establishing the Corps the members of the House Armed Services Committee were under the misapprehension that they were transferring a certain amount of the military functions from the command to the Judge Advocate General, whereas in fact they had done no such thing but had merely provided for a separate promotion list and for accelerating promotions of some JAG officers.[59] And in the hearings on the Army Organization Act of 1950, General Collins seemed to have forgotten all about his prior opposition to the idea of a Corps.[60]

(b) *Air Force*: The Elston Act was enacted after the Air Force had won its status as a separate military department by virtue of the National Security Act of 1947.[61] Accordingly, a bill was introduced into Congress to prevent any hiatus in the military justice situation in the Air Force. This bill, which became law on June 25, 1948, provided that "the Articles of War and all other laws *now in effect* relating to the Judge Advocate General's Department, the Judge Advocate General of the Army and the administration of military justice within the United States Army" should apply to the Air Force.[62] (Italics added) The Elston Act had been approved the day before, June 24, 1948, but was not to become effective until February 1, 1949.[63] Faced with this legal puzzle, the Air Force propounded a paradox: The Elston Act consisted of two main parts, Sections 201 through 243 being amendments of the Articles of War and Sections 246 through 249 establishing the Corps. Obviously, said the Air Force, Congress intended to apply the new Articles of War, but not the Corps, to the Air Force. The first part of this astonishing proposition received judicial sanction in 1950, but the court's opinion made no distinction between the two parts of the Act, and by implication at least applied them both to the new Air Force.[64] However this may be, the question was thoroughly explored in the hearings on the Air Force Organization Act of 1951,[65] and Congress

58. U.S. Govt. Organization Manual 1952-53 at 139 (Rev. as of July 1, 1952).
59. *Hearings before Full Committee on Armed Services on H.R. 1726*, 82d Cong., 1st Sess. 12 (1951). The short-term effect has actually been to delay promotions.
60. *Hearings before a Subcommittee of the Committee on Armed Services on H.R. 5794*, 81st Cong., 2d Sess. 6176 (1950).
61. 61 STAT. 502 (1947), as amended, 5 U.S.C.A. §§ 626 *et seq.* (Supp. 1950).
62. 62 STAT. 1014 (1948).
63. 62 STAT. 642 (1948).
64. Stock v. Department of the Air Force, 186 F.2d 968 (4th Cir. 1950).
65. *Hearings before Subcommittee No. 2 of Committee on Armed Services on*

accepted the Air Force plea that a corps not be imposed upon it, although the Act is so worded as not to preclude the Air Force from establishing a corps if it so desires.[66] The Judge Advocate General of the Air Force, unlike his counterpart in the Army, reports to the Secretary through the Chief of Staff on all matters.[67] In fact he is officially described as "legal adviser to the Chief of Staff."[68] However, he is made a permanent major general.[69]

(c) *Navy*: The Navy has no General Staff, comparable to the Army Staff or Air Staff, and the Judge Advocate General of the Navy reports directly to the Secretary and not through the Chief of Naval Operations. Congress has made no recent change in the statute establishing his office,[70] but has provided for a group (not a corps) of legal specialist officers who receive legal training and are assigned to perform legal duties only, but who are also available to perform certain other duties formerly assigned only to "unrestricted" line officers.[71]

(d) *Uniform Code*: The Uniform Code does not change the above situation, although the question whether a corps should be established for each service was considered and debated at length.[72] In effect, Congress has decided to "wait and see" before imposing on the Navy and Air Force the "experiment" it has instituted for the Army. However, by a separate section of the statute which enacted the Uniform Code, it was made mandatory that the Judge Advocate General of each armed force, exclusive of the then incumbents and exclusive of the Coast Guard, be a member of the bar with at least eight years' experience in legal duties as a commissioned officer.[73] As a matter of fact, the new system of appellate review provided by the Code curtails some of the powers previously granted the Judge Advocate General of the Army under the Elston Act.

H.R. 399, 82d Cong., 1st Sess. (1951); *Hearings before Full Committee on Armed Services on H.R. 1726*, 82d Cong., 1st Sess. (1951); *Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, on H.R. 1726*, 82d Cong., 1st Sess. (1951).

66. 65 STAT. 332 (1951), 10 U.S.C.A. § 1840 (Supp. 1951). See SEN. REP. No. 426, 82d Cong., 1st Sess. 4-5 (1951).

67. 65 STAT. 327-29 (1951), 10 U.S.C.A. § 1811-15 (Supp. 1951).

68. U. S. Govt. Organization Manual, 1952-53 at 165, (Rev. as of July 1, 1952).

69. 65 STAT. 332 (1951), 10 U.S.C.A. § 1840 (Supp. 1952). See 97 CONG. REC. 646 (1951).

70. 21 STAT. 164 (1880), 29 STAT. 251 (1896), 40 STAT. 717 (1918), 5 U.S.C.A. § 428 (Supp. 1950).

71. 61 STAT. 869 (1947), 34 U.S.C.A. § 211b (Supp. 1951).

72. *Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 618, 626-29, 637, 641, 677, 704-05, 742, 769, 804-06, 832, 977-80, 1115-21, 1124-29, 1134-36, 1289-97, 1298-1302 (1949); *Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, on S. 857 and H.R. 4080*, 81st Cong. 1st Sess. 120, 157-58, 167, 203, 206, 282-83, 287, 291-93, 315-19 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 8-9 (1949); SEN. REP. No. 486, 81st Cong., 1st Sess. 6 (1949).

73. 64 STAT. 147 (1950), 50 U.S.C.A. § 741 (1951).

B. *Recent Changes — Great Britain*

(a) *Army and Air Force*: Following the lead of the Oliver Committee, the Lewis Committee made the following principal recommendations with respect to the Judge Advocate General:

(1) That he be appointed on the recommendation of the Lord Chancellor and be responsible to him.

(2) That he continue to act in an advisory capacity to the Secretaries of State for War and Air.

(3) That the three separate departments of his office, the Military Department,[74] the Air Force Department and the "Judicial Department," cease to be combined in one office.

(4) That the Military Department be set up as a separate Department under the Secretary of State for War, in charge of a "Director of Army Legal Services," staffed as at present with officers having legal qualifications, who would have the duty, as at present, of preparing cases for trial by court-martial and, where necessary, conducting such cases for the prosecution.

(5) That the Air Force Department be similarly constituted under the Secretary of State for Air.

(6) That the Judge Advocate General be responsible only for the work done by the "Judicial Department" (which is staffed with civil servants with legal qualifications and officers "seconded"—*i.e.*, detailed —from the Military and Air Force Departments), namely, the furnishing of judge advocates for courts-martial, the review of court-martial proceedings, and advising on questions of law arising out of such proceedings.

(7) That this separation of functions extend to Commands abroad in cases where the latter are furnished with a Deputy Judge Advocate General and with Deputy Directors of Army and Air Force Legal Services.

(8) That the rates of pay, pension, terms of service and promotion in the new Departments be such as to attract lawyers of skill and experience.

(9) That the title "Judge Advocate General" be changed to "Chief Judge Martial," that his status and remuneration be not less than that of a puisne (*i.e.*, associate or assistant) Judge of the High Court of Justice, and that he retire at the age of 70.[75]

The Government has accepted all these recommendations except the last-named. The new constitution of the office and separation of func-

74. The term "Department" as here used does not mean an "executive department," but what we would call a "Division" of the Judge Advocate General's Office.

75. CMD No. 7608 at 23-25, 55 (1949).

tions were accomplished administratively on October 1, 1948.[76] The provisions for appointment by Her Majesty, on the the recommendations of the Lord Chancellor, of the Judge Advocate General and his immediate assistants, for their legal qualifications, rates of pay, retirement, pensions and so forth, are set forth in Part II of the Courts-Martial (Appeals) Act, 1951, enacted August 1, 1951. Under this act, the Judge Advocate General (unless appointed from among the Vice JAGs or Assistant JAGs) is required to have 10 years' experience as a barrister-at-law or advocate, his retirement age is 70, and his salary is to be determined by the Lord Chancellor with the approval of the Treasury. Corresponding provisions, with lower figures, are established for his assistants.[77]

(b) *Navy*: The Pilcher Committee made no specific recommendations with respect to the status of the Judge Advocate of the Fleet. However, Part II of the Courts-Martial (Appeals) Act, 1951, provides for his appointment by the Crown upon the recommendation of the Lord Chancellor, and provides for the same legal experience, tenure, rates of pay and so on, as in the case of the Judge Advocate General of the land and air forces.[78] For some reason which does not immediately appear, no provision is made in the Act for a Deputy or Assistants.[79] Apparently it was also thought unnecessary to provide for a separation of functions comparable to that instituted for the Army and Air Force.

Summary: It is evident from the foregoing that the British have instituted far more drastic changes in the status of the Judge Advocate General than have we. Not only is he, as formerly, a civilian; he is now completely outside the military departments, serving the latter only in the capacity of an adviser, and is responsible, together with his entire office, to the Lord Chancellor, who not only recommends his appointment but even fixes his salary. If such an arrangement were even conceivable under our Constitution, we would say that he was a member of the judicial branch of the Government.

VII

APPELLATE REVIEW

Rather than prolong this article by comparing the different systems of appellate review which have prevailed in the United States Army and Navy during World War II, during the brief period the Elston

76. CMD No. 8141 at 5, 14, 18 (1951).
77. 14 & 15 GEO. 6, PART II, §§ 29-35 (1951).
78. *Id.* § 28.
79. Perhaps because of the different function performed in the Royal Navy by the Deputy Judge Advocate of the Fleet, who is a naval officer. He does not share the duties of the Judge Advocate of the Fleet, and is a "deputy" in name only. See CMD No. 8094 at 11, 14 (1950).

Act was law and since the Uniform Code came into effect, only the appellate system established by the latter will be outlined, as a basis for comparison with the changes which have been introduced in British military law.

A. *United States*

Under the Uniform Code, every sentence of a court-martial must be approved by the convening authority before it may be ordered executed.[80] In general court-martial cases, the convening authority is required to obtain the written opinion of his staff judge advocate or legal officer before acting on the sentence.[81] In addition, every sentence which affects a general or flag officer, or extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, must be reviewed by a Board of Review, established in the office of the Judge Advocate General of the service concerned. Each board of review consists of at least three legally qualified officers or civilians. The board of review reviews the entire record and has authority to weigh the evidence. It affirms only such findings of guilty, and the sentence, or such part thereof, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. If it sets aside the findings and sentence it may order a rehearing (unless the reversal is based on lack of sufficient evidence), or it may order that the charges be dismissed.[82]

In addition to the boards of review established in each service, the Uniform Code establishes a Court of Military Appeals, consisting of three civilian judges, appointed by the President, with the advice and consent of the Senate, each for a term of fifteen years and each at an annual salary of $17,500.[83] This court reviews the record, after review by a board of review, in three types of cases:

(1) All cases in which the death sentence has been imposed, and all cases of general or flag officers.

(2) All cases which the Judge Advocate General of the service concerned orders forwarded to the court for review.

(3) All cases in which, upon petition of the accused and for good cause shown, the court has granted a review.[84]

Under (3), the accused has 30 days from the time he is notified of the decision of a board of review to file his petition. The court is required to act thereon within 30 days of receipt.[85] The court considers only questions of law, and, except in mandatory cases under (1), con-

80. UCMJ arts. 60-65, 50 U.S.C.A. §§ 647-52 (1951).
81. UCMJ art. 61, *id.* § 648.
82. UCMJ art. 66, *id.* § 653.
83. UCMJ art. 67(a), *id.* § 654.
84. UCMJ art. 67(b), *ibid.*
85. UCMJ art. 67(c), *ibid.*

siders only the issues which are raised by the Judge Advocate General in cases under (2), or which are specified in the grant of review under (3).[86] The court has the same power as a board of review to order a rehearing or to order dismissal of the charges.[87]

There remain a small residue of general court-martial cases (*e.g.*, sentences of confinement for less than one year, without dismissal or discharge) as to which review by a board of review is not required. These are examined in the office of the Judge Advocate General. If the latter finds them not legally sufficient, or for any other reason so directs, they are then reviewed by a board of review, but in those cases the accused does not have the right to petition the Court of Military Appeals for a further review.[88]

The Uniform Code provides that a finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudiced the substantial rights of the accused.[89] This rule applies to each successive review, from that by the convening authority to the final review (if granted) by the Court of Military Appeals.

The Uniform Code provides for the appointment of qualified appellate counsel by each Judge Advocate General, to represent the Government and the accused respectively, before a board of review or the Court of Military Appeals, when directed by the Judge Advocate General or requested by the accused, as well as in certain other situations specified in the Code. The accused may, if he chooses, be represented by civilian counsel provided by him.[90]

In addition to the above system of review, the Code permits an accused, in certain types of cases, to petition the Judge Advocate General for a new trial on the basis of newly discovered evidence or fraud on the court. Such petition must be filed within one year after approval of the sentence by the convening authority. If it is filed while the accused's case is pending before a board of review or the Court of Military Appeals, the board, or court, as the case may be, acts upon it instead of the Judge Advocate General.[91]

While much of the above is new, a good deal of it was found, in one form or another, under the old systems. Both the Army and the Navy had boards of review, the former by statute since 1920,[92] the latter by administrative action.[93] Moreover, all Army and Navy general court-martial sentences were at least reviewed in the Office of the

86. UCMJ art. 67(d), *ibid.*
87. UCMJ art. 67(e), *ibid.*
88. UCMJ art. 69, *id.* § 656.
89. UCMJ art. 59(a), *id.* § 646.
90. UCMJ art. 70, *id.* § 657.
91. UCMJ art. 73, *id.* § 660.
92. 41 STAT. 797 (1920).
93. See Pasley and Larkin, *The Navy Court Martial: Proposals for Its Reform*, 33 CORNELL L.Q. 195, 223 (1947).

Judge Advocate General.[94] The Elston Act created a Judicial Council of three generals which had powers somewhat comparable to those of the Court of Military Appeals.[95] That act also authorized a petition for a new trial, actually on a broader basis than the Uniform Code.[96]

B. *Great Britain*

British Army: Prior to the recent changes the system of review followed in the British Army approximated that followed in the American Army before the introduction of boards of review, *i.e.*, prior to World War I. The findings and sentence of a general court-martial required confirmation by the King, or an officer deriving authority from him. This authority was usually delegated to the convening authority, but within the United Kingdom, and occasionally abroad, the authority to confirm a sentence of death or penal servitude, or cashiering or dismissal of an officer, was not delegated. The confirming authority could, before confirmation, send a case back to the court for revision of the finding and sentence, or of the sentence only. Proceedings in revision took place in closed court and no additional evidence could be taken. The sentence could not be increased in such proceedings. If the findings and sentence were not confirmed, the trial was considered a nullity, and a re-trial could be ordered by the confirming authority. However, unless the King was the confirming authority, the re-trial was not supposed to be ordered without prior consultation of the Judge Advocate General.

A confirming authority subordinate to the King could withhold confirmation and refer the case to a superior confirming authority. The confirming authority could not alter or amend a finding (other than by directing proceedings in revision) but he was permitted to mitigate, remit, commute, reduce, or suspend execution of a sentence.

No appeal as such existed, but the proceedings were examined in the Office of the Judge Advocate General, and if found illegal or "unjust," the findings and sentences were subject to cancellation, variation, or remission by "superior military authority." Moreover, the accused could at any time thereafter petition the confirming authority or any reviewing authority to reconsider his case. If such petition involved a question of law, it was referred to the Judge Advocate General. In addition, an accused had an unlimited right to petition the Sovereign for relief.[97]

British Navy: The Navy review system was substantially similar.

94. 41 STAT. 797 (1920), 21 STAT. 164 (1880), as amended, 10 U.S.C.A. § 1522 (1927).
95. 62 STAT. 635 (1948).
96. 62 STAT. 639 (1948).
97. MANUAL OF MILITARY LAW, PART I, 1951 at 52-57 (8th ed. 1952); CMD No. 7608 at 14 (1948).

If a confirming authority had any doubt as to the legality of the finding or sentence, he referred it to the Admiralty before putting it into effect. No death sentence (except for mutiny) could be ordered executed until it had been reviewed by the Admiralty. All other sentences were reviewed by the Admiralty after action by the confirming authority. The Admiralty had power to suspend, annul, or modify any sentence, except a death sentence, which could only be remitted by the Crown.

In reviewing court-martial sentences, the Admiralty referred them to the Judge Advocate of the Fleet for his report. The Admiralty generally followed the advice of the latter on legal matters, but was not required to do so.

Similar rights of further petition to superior military authority or to the Sovereign were available to an accused convicted by a Navy court-martial, as in the case of an accused convicted by an Army court-martial.[98]

The Courts-Martial (Appeals) Act, 1951: As we have seen, the Oliver Report recommended no change in this system of review, as it applied to the Army and Air Force, except with respect to the status and organization of the Office of the Judge Advocate General.[99] However, the Lewis Committee recommended that an appeal on questions of law should be allowed to a special "Courts-Martial Appeal Court," to consist of three members drawn from among the Chief Judge Martial (the proposed new title for the Judge Advocate General), the Vice-Chief Judge Martial, the Judges Martial of his Office and a panel of King's Counsel approved by the Lord Chancellor.[100] They further recommended that this system of appeal should eventually replace the system of confirmation, and of review by the Judge Advocate General, but that the right to petition the Sovereign should continue.[101] However, superior military authority would continue to review the sentence with a view to possible mitigation, remission or commutation, and an accused could continue to petition superior military authority to this end.[102]

The Pilcher Committee recommended a similar system of civilian review, but recommended a single appellate tribunal independent of all three Services to hear appeals from all courts-martial. This tribunal should consist of three members drawn from a panel of King's Counsel (or other experienced criminal counsel) appointed by the Lord Chancellor. The opinion of such tribunal would (although

98. Naval Discipline Act, §§ 53 (1), 69, 74, 74A, *supra* note 11; CMD No. 8094 at 14-15 (1950).
99. CMD No. 6200 at 12-13 (1940).
100. CMD No. 7608 at 29-33, 56-57 (1949).
101. *Id.* at 32, 57.
102. *Id.* at 33-35, 57.

delivered in open court) take the form of advice to the Board of Admiralty, which would be expected to act in accordance therewith.[103]

The Government has accepted these recommendations in principle, although it has made some substantial modification therein. For example, while it has gone along with the idea of a civilian appellate tribunal, it has retained the existing system of confirmation, on which the appeal to the new tribunal has been superimposed. On the other hand, the new civilian court is on an even higher level than envisaged by either of the committees. This court has been established under the Courts-Martial (Appeal) Act, 1951, enacted August 1, 1951, and effective May 1, 1952.[104]

This Act provides for an elaborate panel from which members of a "Courts-Martial Appeals Court" are to be drawn and which consists of:

(a) The Lord Chief Justice and the puisne Judges of the High Court.

(b) Lords Commissioner of Justiciary nominated by the Lord Justice General.

(c) Judges of the High Court of Justice in Northern Ireland nominated by the Lord Chief Justice of Northern Ireland.

(d) Other persons of legal experience appointed by the Lord Chancellor.

In any particular case, the Court is summoned by direction of the Lord Chief Justice with the consent of the Lord Chancellor, and is duly constituted if it consists of an uneven number of Judges, of not less than three, of whom at least one must be drawn from classes (a), (b) or (c) above unless the Court is directed to sit outside the United Kingdom and the Lord Chancellor thinks it expedient to dispense with this requirement.[105]

The appeal is only from the findings, not the sentence, and must be on leave of the Court.[106] Except in the case of a death sentence, the accused is first required to file a petition with the Admiralty or the Secretary of State for War or Air praying that his conviction be quashed, and must wait until a prescribed period has elapsed or until he is notified that his petition has been denied.[107] He may then file a petition for leave to appeal to the Court, within a period to be prescribed by rule. In considering whether to give leave to appeal, the Court may consider the opinion of the Judge Advocate General or the Judge Advocate of the Fleet.[108] If the Court considers the application

103. CMD No. 8094 at 38-41, 47 (1950).
104. Courts-Martial (Appeals) Act, 1951, 14 & 15 GEO. 6, c. 46; MANUAL OF MILITARY LAW, PART I, 1951 at 637 (8th ed. 1952).
105. Courts-Martial (Appeals) Act, 1951, 14 & 15 GEO. 6, c. 46, §§ 1-2.
106. *Id.* §§ 3, 4.
107. *Id.* § 3(2).
108. *Id.* § 4(6).

for leave to appeal to have been "frivolous or vexatious," it may order that the sentence shall begin to run from the date of the order dismissing the appeal.[109] It may also impose costs, in a proper case, against the unsuccessful party to an appeal.[110]

The Act provides that the Court shall allow the appeal if it thinks that the finding is unreasonable, cannot be supported having regard to the evidence, or involves a wrong decision on a question of law, or that on any ground there was a miscarriage of justice. In all other cases, the Court shall dismiss the appeal; it may also dismiss the appeal, even if it finds error, if it considers that no substantial miscarriage of justice has actually occurred. If the Court allows the appeal, it shall quash the conviction.[111]

The Court ordinarily has no power over the sentence, but it may reduce the sentence to the legal limit, or if it finds some, but not all, of the findings to have been proper, or that the accused should have been convicted of a lesser included or "substituted" offense, it may substitute such lower sentence as it deems proper. The Court may also quash a sentence on the ground of insanity.[112] Unless the Court otherwise directs, the sentence, if upheld, begins to run from the date it would have begun to run had there been no appeal, and not from the date of affirmance by the Court.[113]

The decision of the Court is ordinarily final, but if the Attorney General, upon application made to him within fourteen days, certifies to the appellant, the Admiralty, the Army Council, or the Air Council, that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought, an appeal to the House of Lords shall lie.[114] However, the Royal prerogative of mercy is not affected by the Act.[115]

The Act allows the Judge Advocate of the Fleet, and the Judge Advocate General, to refer cases to the Court when in their opinion, a question exists which should be determined by the Court, and allows the Admiralty, or the Secretary of State for War or Air, to do so if some new matter has come to their attention which makes it expedient that the finding be considered by the Court.[116]

If a conviction is quashed under the Act, the accused may not be tried again for the offence involved, either by court-martial or by any other court.[117] Apparently there is no provision in such a case for a new trial or a rehearing.

109. *Id.* § 4(7).
110. *Id.* § 13.
111. *Id.* § 5.
112. *Id.* § 6.
113. *Id.* § 6(5).
114. *Id.* § 7.
115. *Id.* § 27.
116. *Id.* § 20.
117. *Id.* § 16.

The Court is empowered to subpoena documents and other exhibits, to obtain opinions from the members or judge advocate of the court-martial which heard the case, examine witnesses and refer questions to a special commissioner for inquiry and report.[118]

The Act makes provision for legal aid and for the assignment by the Court of counsel to appellants who lack the means to retain private counsel.[119] It also requires the Admiralty, Army Council, or Air Council, as the case may be, to defend appeals from convictions by courts-martial of their respective services.[120]

The Act includes numerous other provisions on procedural matters, and provides for the issue of rules of court.[121]

In general, the whole scheme is remarkably similar to that set up under the Uniform Code, but with these significant differences:

(1) Unlike the Court of Military Appeals, the Courts-Martial Appeals Court is in no sense part of the executive, nor is it a court which specializes in military law. Its members may, and do in fact, include the Lord Chief Justice and other high-ranking judges. It must be summoned on the direction of the Lord Chief Justice with the consent of the Lord Chancellor.

(2) It can hear appeals from any court-martial, general, district, field, or disciplinary, without regard to the severity of the sentence imposed.

(3) On the other hand, there are no mandatory appeals, except for those cases referred to the Court by the Judge Advocate of the Fleet, the Judge Advocate General, the Admiralty, or the Secretary of State for War or Air.

(4) The Court has broad powers to consider evidence, and even to receive new evidence.

The Courts-Martial (Appeals) Act has been in effect since May 1, 1952. It does not appear that the new Court has been flooded with appeals since that date.[122] Its first appeal, from an Army court-martial, was heard on May 1, 1952.[123] The Lord Chief Justice himself, and Mr. Justice Hilbery and Mr. Justice Devlin, both of the Queen's Bench Division of the High Court, heard the appeal. It involved the case of Private (Acting Corporal) Tom Houghton, R.A.S.C., convicted of the murder of Captain Herbert Mason, at Fayid, Egypt, on February 9, 1952. The Lord Chief Justice first announced some procedural rules which the Court would follow:

118. *Id.* § 8.
119. *Id.* § 10.
120. *Id.* § 12.
121. *Id.* §§ 21-26.
122. Perhaps because of the possibility of incurring costs, or the penalty attached to "frivolous or vexatious appeals." See notes 109, 110 *supra.*
123. Regina v. Houghton, The Times, May 27, 1952.

(a) It would adopt the usual practice of the Court of Criminal Appeal and treat applications for leave to appeal from convictions involving capital sentences as the hearing of the appeal itself.[124] (However, this rule would be followed only if the death sentence still stood after action by the confirming authority; if it had been commuted, the appeal would be treated like an ordinary appeal.)

(b) The Court would not ordinarily grant an appellant leave to be present at the hearing of his appeal,[125] but would do so only when satisfied that the presence of the appellate would be useful and would serve the ends of justice.

On the merits, the Court dismissed the appeal. The opinion, delivered by the Lord Chief Justice, was admirably brief, at least as reported in The Times:

> "After stating the facts in the case, his Lordship said that this was the sort of case which the Court dealt with over and over again in its civil capacity. The motive was the oldest in the world for murder, consuming and overwhelming jealousy. An attempt had been made to show that the appellant was insane; but there was no evidence that the man was suffering from any disease of the mind."

The first appeal from a naval court-martial is reported in The Times for November 15, 1952.[126] Former Lieutenant-Commander Alastair Campbell Gillespie Mars, D.S.O., D.S.C. and Bar, had been convicted on four charges of disobeying orders and being absent without leave, and had been sentenced to dismissal. The appeal was heard before the Lord Chief Justice, Mr. Justice Hilbery, and Mr. Justice Havers, of the Probate, Divorce and Admiralty Division of the High Court. It appeared that on each of two separate occasions the appellant had failed to comply with a document appointing him an officer of a named naval vessel and directing him to report for duty, his justification being that he had written to the Admiralty "declining" the appointment, and stating that he intended to disregard it. The documentary evidence introduced on the first charge consisted of an Admiralty document informing the appellant that the Lords Commissioners of the Admiralty had appointed him Lieutenant-Commander R.N. of her Majesty's ship Phoenix and directing him to repair to his duties at Portsmouth on April 28, 1952. This document was signed: "By command of their Lordships, J. G. Lang."

Appellant's counsel offered the ingenious, albeit highly technical,

124. The accused had merely applied for leave to appeal against the conviction.

125. The Act (§ 11) provides that an appellant shall not be entitled to be present at the hearing except where rules of court so provide or the Court gives him leave. In this case appellant had asked that such leave be given, so that he might be seen by a Home Office alienist.

126. Regina v. Mars, The Times, Nov. 15, 1952.

argument that, while this document amounted to notification of a purported appointment, no actual order by the Lords Commissioners of the Admiralty had been proved at the court-martial; in fact that the clerical officer of the secretary of the department concerned had testified that she had prepared the appointment of the appellant after receiving a note from the Naval Assistant to the Second Sea Lord; that this did not prove that an order had been issued by the Lords Commissioners, indeed was inconsistent with that. This bit of chop logic utterly failed to convince the members of the Court, but Queen's Counsel Paget pursued it none the less. The Lord Chief Justice observed that the whole discipline of the Army, Navy and "everything else" would fail if counsel's argument was right, and asked whether the First Lord and Second Sea Lord were to be called on to prove an order every time that one was given. Counsel blandly assured him that this would not be so at all, cheerfully admitting that, if the conviction were reversed, the only result would be that in the future appointments would be differently worded!

In delivering the Court's judgment, Lord Chief Justice Goddard observed that, when appellant had written to the Admiralty returning the document and saying that he would not obey it, "a senior civilian officer, a principal, wrote to him, sending back the document, and saying:

> "'I am to inform you that the fact that you have been appointed to her Majesty's ship Phoenix bears no relation to your recent request to be permitted to retire from the Royal Navy. That request has been laid before my Lords and their decision on it will be communicated to you in due course. You are in the meantime, therefore, required to act as directed in the enclosed letter of appointment.'
>
> "If that was not an order he (his Lordship) did not know what was. The appellant's appointment had been given in the way that all such Admiralty orders were signified—on a printed form. That printed form was the appointment because it contained the words 'hereby appoint.' In the opinion of the Court the court-martial had been right and there was nothing in the appeal, which would be dismissed."

It would appear that the new Courts-Martial Appeals Court does not propose to be hyper-sensitive in passing upon appeals from convictions by courts-martial.

VIII

Other Changes

Enlisted Men on Courts-Martial

Both the Lewis Committee and the Pilcher Committee considered the question whether warrant officers and enlisted men ("other ranks"

or "ratings") should be eligible to sit on courts-martial, only to reject it.[127] The Lewis Report, however, includes a minority view on this point, in the form of an addendum filed by Mr. A. R. Blackburn, M.P.[128] In accordance with the views of the majority, however, the Government has made no attempt to introduce this change. In this respect, therefore, the British system differs from our own under which, if an enlisted accused so requests, one-third of the members of a general or special court-martial must be enlisted persons.[129]

Legal Aid Before and During Trial; Pre-Trial Investigation

Under the British Army Rules of Procedure in effect prior to 1947, an accused was entitled to be represented at his trial by private counsel paid for by him, or represented by an officer known as the "defending officer," or assisted by any other person, known as the "friend of the accused." A "friend" could advise the accused and suggest questions to be put by him to witnesses, but could not himself actively participate in the trial.[130] The Navy system was similar, except that if the accused had no specific wishes as to defense counsel, it was the duty of his Divisional Officer to assist him.[131]

The Oliver Committee had recommended that this system be strengthened by providing legal aid similar to that provided to civilians prosecuted for crime.[132] This recommendation was further studied by a special committee appointed by the Army Council in 1946. On recommendation of this committee, a system was put into effect in 1947 in the Army, Navy and Air Force under which an accused is now provided with legal aid in certain types of cases.[133]

The Lewis Committee stated that it welcomed this scheme, but made the additional recommendations:

(a) That it be the duty of every commanding officer to insure that, before a man is brought before him charged with a court-martial offense, he should be advised by a suitable person (not necessarily a lawyer) of his own choice or, failing such choice, selected by the commanding officer.[134]

(b) That the taking of the Summary of Evidence (generally equivalent to our pre-trial investigation) be by a permanent district court-martial president or other officer with suitable experience or legal qualifications, that the evidence thereat be given on oath, and that

127. CMD No. 7608 at 49-51, 60 (1949); CMD No. 8094 at 19 (1950).
128. CMD No. 7608 at 61-62 (1949).
129. UCMJ art. 25(c), 50 U.S.C.A. § 589 (1951).
130. CMD No. 7608 at 20 (1949).
131. CMD No. 8094 at 12 (1950).
132. CMD No. 6200 at 15 (1940).
133. CMD No. 7608 at 20-21 (1949); CMD No. 8094 at 58 (1950).
134. CMD No. 7608 at 21, 54 (1949).

the accused should be present and be entitled to be represented by counsel.[135]

The Government has accepted the first of these recommendations, but still has the other under advisement.[136] (Some portions of the latter actually represent existing procedures, for example, an accused is now entitled to be present at the taking of the Summary, and the evidence thereat may be on oath if the accused so demands or the commanding officer so directs.)[137]

On the problem of legal representation during the trial, the Pilcher Committee recommended:

(a) That the accused's Captain see that a competent defending officer be available, whether or not the accused requests help in this regard, and for this purpose full use be made of Supply Officers who had had the more advanced legal training.

(b) That the title "accused's friend" be abandoned in favor of "defending officer."

(c) That the defending officer be allowed to examine and cross-examine witnesses as of right, and not as a matter of the court's permission.

(d) That when served with charges, each accused be given a leaflet explaining his rights before, during, and after trial.[138]

The Government has accepted all these recommendations except, strangely enough, the one concerning the title to be given to the accused's counsel, a matter which one would hardly expect to be regarded as controversial.[139]

The Pilcher Committee also made a number of recommendations concerning pre-trial investigations, including the following:

(a) That the accused be informed of his rights in all cases, and not merely, as at present, "in serious cases likely to form the subject of a court-martial."[140]

(b) That the accused's Divisional Officer take a more active part in pre-trial investigations, and be under a duty to examine or cross-examine witnesses wherever this seems advisable.[141]

These recommendations are still under advisement by the Government.[142]

It would appear that the British services still follow somewhat

135. *Id.* at 21-23, 54-55.
136. CMD No. 8141 at 5, 12-13 (1951).
137. *Id.* at 13.
138. CMD No. 8094 at 28-29, 46 (1950).
139. CMD No. 8141 at 20, 22 (1951).
140. CMD No. 8119 at 8, 19 (1951).
141. *Id.* at 8-9, 19.
142. CMD No. 8141 at 24 (1951).

different practices in this area, and that our own system is more advanced.[143] The Uniform Code provides:

(a) That a defense counsel be appointed for every general or special court-martial, without prejudice to the accused's right to retain private counsel.[144]

(b) That at a trial by general court-martial both trial counsel and defense counsel be legally qualified and be certified as competent by the Judge Advocate General, and at a trial by special court-martial, defense counsel be legally qualified if trial counsel is.[145]

(c) That a formal pre-trial investigation be held before any charge is referred to a general court-martial, and that accused have the right to be present, to cross-examine witnesses, to present testimony in his own behalf and to be represented by counsel.[146]

Vote on Findings and Sentence

United States

Prior to the Uniform Code, the rules applicable to the Army and Navy differed. The Code, following in the main the prior Army procedure, requires a two-thirds vote for a finding of guilty (except where the death penalty is mandatory, in which case unanimity is required). Similarly, it requires a two-thirds vote on the sentence, except that if the sentence exceeds ten years a three-fourths vote is required, and for the death sentence a unanimous vote on the sentence (but not on the findings) is required.[147] Voting is by secret written ballot,[148] and the findings and sentence are announced as soon as determined.[149]

Great Britain

Army and Air Force

The rule has been that findings and sentence were determined by majority vote, except that a death sentence imposed by a Field General Court-Martial required unanimity.[150] The Lewis Committee recommended that a *unanimous* vote be required on the findings (whether of guilt or acquittal), but that no change be made in the rule relating to the vote on the sentence. In the event of a disagreement there should be a re-trial before a different court-martial.[151] The Government has not accepted this recommendation.[152]

143. A British commentator has observed that the Lewis Report gives "insufficient attention" to the problem of defense counsel. Griffith, *Report of the Army and Air Force Courts-Martial Committee 1946 (Cmd 7608)*, 12 MOD. L. REV. 223 (1949).
144. UCMJ art. 27, 50 U.S.C.A. § 591 (1951).
145. *Ibid.*
146. UCMJ art. 32, *id.* § 603.
147. UCMJ art. 52, *id.* § 627.
148. UCMJ art. 51(a), *id.* § 626.
149. UCMJ art. 53, *id.* § 628.
150. MANUAL OF MILITARY LAW, PART I, 1951 at 48, 52, 281, 507 (8th ed. 1952).
151. CMD No. 7608 at 27-28, 55 (1949).
152. CMD No. 8141 at 15 (1951).

Navy

The Navy rule has been the same as the Army, except that the death sentence, and a finding of guilty where the offense carries a mandatory penalty of death, requires four votes out of five, or if the court comprises more than five members, a two-thirds vote of those present.[153] The Pilcher Committee, after considering the recommendations of the Lewis Committee on this matter, recommended no change.[154] Mr. R. E. Manningham-Buller, K.C., M.P., and Mr. A. L. Ungoed-Thomas, K.C., M.P., however, filed a minority report urging the views of the Lewis Committee.[155] The Government has decided to make no change.[156]

Other Matters Relating to Voting

Neither report recommends any change in the present system, followed in all three services, whereby the vote is taken orally, in inverse order of rank. The Lewis Report, however, recommended that the findings and sentence in all cases be announced as soon as determined,[157] and the Government has accepted this recommendation.[158] The Pilcher Committee does not seem to have considered the point.

IX

Conclusion

In the final analysis neither the British nor we have made any really revolutionary changes in our systems of military justice. While this may not please the advocates of all-out reform, it represents the more realistic approach in that it recognizes that the problems are too complex to admit of facile solutions. At least it seems significant that both countries, proceeding independently, have reached very similar results.

In both cases, the most significant change has been the introduction of a civilian appellate tribunal. Along the same lines, the British have placed the Judge Advocate General and his reviewing functions completely outside the armed services, and have assigned his other functions to new officers within the services. We have done nothing comparable to this. On the other hand, we have accomplished something which the British have not attempted, the unification of our two different systems of military law, and the complete rewriting of our old Articles in a modern, comprehensive Code of Military Justice, sup-

153. B.R. 11 at 12, 63 (1937).
154. Cmd No. 8094 at 31-34, 46 (1950).
155. *Id.* at 49-53.
156. Cmd No. 8141 at 20 (1951).
157. Cmd No. 7608 at 26-27, 55 (1949).
158. Cmd No. 8141 at 6 (1951).

plemented by a single manual of procedure.[159]

For much too long a time, each of the two great English-speaking nations has proceeded in almost complete ignorance of what the other has been doing in the area of military justice. Now that each has revised and reformed its system, almost by accident along parallel lines, it is time that this gap be bridged. Each has much to learn of the other, and the experience gained by the one under its new system cannot help but be beneficial to the other under its reformed procedure. If this article, by explaining to each what the other has done, helps to bridge the gap, and pave the way toward such mutual exchange of ideas and experience, it will have achieved its purpose.

159. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951; Exec. Order No. 10214, 16 FED. REG. 1301 (1951), as amended by Exec. Order No. 10256, 16 FED. REG. 6013 (1951).