THE GENERAL BOARD

United States Forces, European Theater

MILITARY JUSTICE ADMINISTRATION IN THEATER OF OPERATIONS

MISSION: Prepare Report and Recommendations on Military Justice Administration in Theater of Operations.

The General Board was established by General Order Number 128, Headquarters, European Theater of Operations, U. S. Army, dated 17 June 1945, as amended by General Order Number 182, dated 7 August 1945 and General Order Number 312, dated 20 November 1945, Headquarters United States Forces, European Theater, to prepare a factual analysis of the strategy, tactics, and administration employed by the U. S. Forces in the European Theater.

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THE GENERAL BOARD
UNITED STATES FORCES, EUROPEAN THEATER
APO 408

MILITARY JUSTICE ADMINISTRATION IN THE THEATER OF OPERATIONS

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PREFACE

Prior to the preparation of this study and the five other studies of the Judge Advocate Section of The General Board, a detailed questionnaire was sent to each judge advocate in the European Theater of Operations. The questionnaire was divided into six major parts, each part corresponding to one of the studies which was contemplated. Answers to this questionnaire were received from many officers, and in this manner there was obtained a representative cross section of the problems, opinions and experiences of army, corps, division, base section and other judge advocates who had served in the European Theater of Operations during part or all of the period from January, 1942 to May, 1945.[1] Upon the premise that these replies provided an exceptionally valuable source of information, constant use of the various opinions, conclusions and suggestions has been made in the following pages. To insure objectivity of presentation and analysis, except in the discussion contained in paragraphs nine and ten, specific reference has been omitted in this study to the officer or officers who made a particular comment or shared an opinion. It is contemplated that the answers to the questionnaire will be made available as part of the source material supporting the six studies.

The following abbreviated forms of citation have been used in the footnotes in this study:

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1. The number of judge advocates whose replies related to this study, and the units they represented, were: Army -5, Army Group - 3, Corps - 5; Division - 14, Base Section - 15, Port - 2, Headquarters U. S. Forces - 5, Air Forces - 10. Many of the officers had experience with more than one kind of unit. In addition to the data in the questionnaires, valuable material was obtained in personal interviews with a number of judge advocates. The names of these officers are: Questionnaires - Colonels C. E. Brand, E. M. Brannon, C. E. Cheever, F. P. Corbin, Jr., J. C. Hyer, H. D. De Mar, C. B. Mickelwait, J. N. Owen, L. A. Prichard, R. F. Welch; Lieutenant Colonels N. E. Allen, B. M. Ayars, E. R. Bentley, B. O. Bowman, J. R. Cumming. F. P. Eresch, M. J. Her, B. S. Hill, E. H. Marsh, Frank McNamee, Jr., A. B. Moore, W. M. Moroney, A. E. Pierpont, J. W. Riley, C. T. Shanner, J. D. Smith, D. D. Snepp, H. D. Shrader, J. M. Wilson; Majors J. W. Bishop, J. P. Corriea, M. A. Crusius, A. N. Davis, F. J. Gafford, Benito Gaguine, P. M. Greenwell, C. B. Maynard, J. P. Nash, R. S. Pasley, R. F. H. Pollock, Dudley Porter, Jr., G. J. Williams; Captains J. J. Adams, L. E. Beckmire, F. R. Bolte, J. F. Curran, P. S. Despit, Jr., P. H. Ford, C. P. Gotwals, Jr., P. W. Jones, C. W. Manning, M. J. Mehl, G. L. Stoetzer, Cornelius Wiarda, Jr., W. M. Wolff, J. B. Young; First Lieutenants R. E. Hone, J. J. O'Keefe, Jr., Second Lieutenant R. S. McKay; Interviewed: Colonel D. L. O'Donnell; Lieutenant Colonels W. F. Burrow, C. C. Harris, C. T. Shanner; Majors Benito Gaguine, E. J. Haberle. L. L. Mitchell; Captains J. J. Adams, R. E. Leasure, O. B. Scott, H. J. Stuetzer, Jr.

Com Z	-	Communications Zone, European Theater of Operations.
Dig Op ETO	-	Digest of Opinions, European Theater of Operations, issued by the Branch Office of The Judge Advocate General with the European Theater of Operations.
ETO	-	European Theater of Operations.
ETOUSA	-	European Theater of Operations, United States Army.
Form 20 Ledger	-	Form 20 Ledger in the Branch Office of The Judge Advocate General with the European Theater of Operations.
Letter, BOTJAG-E 250.481	-	Letter BOTJAG-E 250.481, Subject: "Memorandum, Partial History BOTJAG, etc," Branch Office of The Judge Advocate General with the European Theater of Operations, 10 May 1945.
MJ Cir	-	Military Justice Circular issued by the Branch Office of The Judge Advocate General with the European Theater of Operations.
SHAEF	-	Supreme Headquarters, Allied Expeditionary Forces.
SOS	-	Services of Supply, European Theater of Operations.
TSFET	-	Theater Service Forces, European Theater.
USFET	-	United States Forces, European Theater.

MILITARY JUSTICE ADMINISTRATION IN THEATER OF OPERATIONS

CHAPTER 1

INTRODUCTORY

SECTION 1

SCOPE

1. The period covered by this study is from 1 January 1942 to 8 May 1945. The study is not intended to be a statistical document but some figures are necessary to reflect the problems in the administration of military justice in a theater of operations. Unless otherwise indicated, the statistics included herein are for the time from 18 July 1942 to 1 May 1945, inclusive. The number of American soldiers who served in the European Theater of Operations between 1 January 1942 and 1 June 1945 was 4,182,261.[1]

2. Number of Jurisdictions. Before May, 1942, records of trial by general courts-martial were sent to the Office of The Judge Advocate General in Washington, D. C. for review by a board of review or the Military Justice Division; after that time, 148 separate general court-martial jurisdictions reported cases in the European Theater of Operations to the Branch Office of The Judge Advocate General with that Theater.[2] Neither actual figures nor reliable estimates are available as to the number of inferior court-martial jurisdictions.

SECTION 2

NUMBER OF COURT-MARTIAL CASES

3. The total number of general court-martial cases reported to the Branch Office of The Judge Advocate General with the European Theater of Operations was 10,672, involving 12,120 accused,[3] divided as follows:[4]

Enlisted men:	11,106
White:	8,613
Colored:	2,493
Enlisted women:	1
White:	1
Officers:	1,013

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1. P. 34, Vol II, No. 2, The Judge Advocate Journal, Summer, 1945.
2. Form 20 Ledger.
3. Letter, EOTJAG-E 250.481.
4. A compendium of these cases compiled from records at the Branch Office of The Judge Advocate General with the ETO is attached as Appendix 1.

Male:
White : 980
Colored: 25

Female:
White : 8

In a typical month (April, 1945), the number of accused tried by the several forces and the average time from confinement to the action of the reviewing authority were:[5]

Service Forces: 602 accused, 67.2 days:[6]
Air Forces : 178 accused, 56.4 days; and
Field Forces : 796 accused, 51.8 days.

a. One hundred and eighty-seven officers and 874 enlisted men tried by general courts-martial were acquitted on all charges and specifications.

4. Inferior Courts-Martial. Statistics of the total number of inferior court-martial cases tried by all forces in the European Theater of Operations are not available at this time. However, between 1 July 1942 and 31 May 1945 (excepting the month of January, 1943), there were 32,360 accused tried by special courts-martial and 64,420 accused tried by summary courts-martial in the Army Service Forces.[7] From 1 July 1943 to 30 June 1945, the Army Air Forces reported 10,743 accused tried by special courts-martial and 19,036 accused tried by summary courts-martial.[8] These totals are:

Accused tried by special courts-martial - 43,103[9]
Accused tried by summary courts-martial - 83,456

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5. Memorandum, BOTJAG-E, Subj: "Memorandum for Staff Judge Advocates," Branch Office of The Judge Advocate General with the ETO, 1 May 1945.
6. Includes Ground Force Reinforcement Depots.
7. Compiled from records at Headquarters, Theater Service Forces, European Theater. See Appendix 2.
8. Compiled from records at Headquarters, United States Air Forces in Europe. See Appendix 3.
9. In the Army Air Forces, the rates per 1,000 men were: special courts-martial, 14.86, and summary courts-martial, 26.32. For the year ending 30 June 1945, by races the rates per 1,000 were: special courts-martial - white 14.42, colored 31.10; summary courts-martial - white, 25.02, colored 75.71.

CHAPTER 2

TYPES OF OFFENSES

SECTION 3

MILITARY

5. Absence Without Leave. A total of 3,857 cases for 5,834 separate absences in violation of Article of War 61 were tried by general courts-martial.[1] Of these, 731 accused were in the Army Air Forces; a rate of 0.92 per 1,000 men.[2] It is estimated that the sentences averaged 15 years' confinement. Such figures as are available of the number of accused tried for this offense by inferior courts are:

	Special Courts	Summary Courts
Army Air Forces[2] (1 July 1943 to 30 June 1945)	4,717	7,225
Army Service Forces[3] (1 July 1942 to 31 December 1942; 1 February 1943 to 31 May 1945)	19,527	31,048
TOTALS	24,244	38,273

a. The only general problems encountered in these cases was the myriad of difficulties surrounding morning reports and documentary proof of the termination of the absence. These matters of evidence are discussed in paragraphs 40a and 40c of this study.

(1) Failure to provide specifically in the Manual for Courts-Martial[4] that the Table of Maximum Punishments, as applied to the 61st Article of War, was not suspended except as to absence without leave caused many inferior courts to impose, and reviewing authorities to approve, excessive sentences for other violations of that Article.

b. Absences without leave while en route from one station to another were usually difficult and sometimes impossible to prove, especially in commands wherein Reinforcement Depots were located. The quantum of evidence expected by the Branch Office of The Judge Advocate General with the European Theater of Operations was:

(1) That the accused was actually on duty at the old station;

(2) That he was ordered to make a change of station and was notified of the order;

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1. Letter, BOTJAG-E 250.481.
2. From records at Hq U. S. Air Forces in Europe.
3. From records at Hq Theater Service Forces, European Theater.
4. Manual for Courts-Martial, 1928, par 104c, page 97.

(3) That the accused actually departed from the old station pursuant to the order;

(4) The distance, mode of travel and usual travelling time; and

(5) That the accused did not arrive at the new station and had no permission to be absent.[5]

In most commands, these cases were proved by the less exacting and more practical manner outlined on page 94, TM 27-255 because of the inability to meet the stricter (and, admittedly more desirable) standards desired by the Branch Office of The Judge Advocate General.

6. Desertion. There were 1,963 accused convicted of desertion in the European Theater of Operations.[6] The death sentence was imposed upon 139 of them;[7] the average sentence as approved by the reviewing authority was about 20 years.[8] Statistics have not yet been compiled to indicate how many of these cases involved violations only of Article of War 58 and how many of them involved violations of Article of War 58 because of Article of War 28.

a. A substantial number of staff judge advocates experienced no difficulties in the trial or review of cases involving ordinary desertion. But many found that the extract copies of morning reports accompanying the charges were insufficient to prove the initial absence[9] and that proof of the termination of the absence was either difficult or, for practical purposes, impossible.[10] One infantry division staff judge advocate overcame the second of these difficulties simply by omitting from the specification, the words alleging return to military control. One officer suggested that an arbitrary length of time be fixed, after which absence without leave would become desertion as a matter of law. He argues that such a rule would serve the double purpose of simplifying the court's problem of finding the intent to desert and would also greatly reduce extended absences without leave. Another would

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5. MJ Cir 3, 2 Jul 45.
6. Letter, EOTJAG-E 250.481.
7. See Appendix 4. Officers having general courts-martial jurisdiction answered three questions which were put to them by the CG, ETO, on the effectiveness of the death sentence in desertion cases as a deterrent:

	Yes	No
Army Ground Forces	45	35
Army Air Forces	4	14
Army Service Forces and Miscellaneous	3	7
TOTALS	52	56

(From records in the Office of the Staff Judge Advocate, USFET).
8. Exact figures of sentences imposed are not available. The figure given here and those used throughout this Chapter (except for murder and rape) are the approximations of an officer, who, because of his position, is qualified to furnish the estimates. There was one execution of the death sentence upon conviction of two specifications of desertion.
9. See paragraph 40a, this study.
10. See paragraph 40c, this study.

distinguish between ordinary desertion and desertion which involved cowardice and would make the death penalty legal only in the latter class of cases.

b. Two invasions were mounted from the United Kingdom, the invasion of Northern Africa and the invasion of Northern France. Each of these campaigns caused the judge advocates in the United Kingdom to be confronted with many cases involving Articles of War 28 and 58 and they were aided neither by an adequate discussion of the subject in the Manual for Courts-Martial nor by decided cases.

(1) The first problem was to devise a means whereby the soldier could be warned of the impending movement and its hazardous nature and in a manner that the warning could later be proved at a trial without the testimony of witnesses who participated in the briefing. An army corps adopted this procedure: A warning of the impending hazardous operations was given at a regular company formation. The roll was called and each member of the unit stepped forward in response to his name. A certified copy of the roll of those present and the warning given was attached to the morning report and one copy of the roll went to the personnel adjutant and was thus, by reference, incorporated in the morning report.[11]

(2) It was subsequently held by a Board of Review that the specific intent to avoid hazardous duty (a necessary element of proof) could not be inferred solely from evidence and proof to the effect that accused was absent without leave after his unit had been alerted for overseas service and that the accused had received notice of such impending movement.[12] Courts could not take judicial notice of the destination of the unit or the fact that it was embarking upon a hazardous undertaking.[13] This problem was solved by adducing proof, for example, that personnel of the accused's unit had been engaged in actual preparations for a forward movement; that the accused actually did not participate in the hazardous duty;[14] or that the accused had innoculations, inspections, issues of clothing and equipment.[15]

(3) Another of the difficulties the judge advocates faced resulted from a decision that a specification charging desertion with intent to avoid hazardous duty would not sustain a finding of guilty of ordinary desertion.[16]

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11. Page 230, First U. S. Army Report of Operations, 20 Oct 43 to 1 Aug 44, Annex No. 20.
12. CM ETO 2398 Pennington, 1944; CM ETO 2432 Durie, 1944; and CM ETO 2481 Newton, 1944; but see CM ETO 455 Nigg, 1943.
13. CM ETO 455 Nigg, 1943.
14. CM ETO 2473 Cantwell, 1944.
15. CM ETO 4054 Carey etal, 1944.
16. CM ETO 7397 DiCarlo, Jr, 1945.

(4) The difficulty of proving actual intent to avoid hazardous duty led several staff judge advocates to allege such an offense merely as an aggravated absence without leave in violation of Article of War 61. The facts were stated in the specification as aggravation and not as additional elements to prove; a full statement of the facts in the specification prevented a severe sentence from appearing excessive and thus reflecting upon the administration of military justice.[17]

(5) Proof of intent to avoid hazardous duty was not so difficult in "battle-line" cases, cases which arose out of actual and not anticipated campaigns, and convictions under those circumstances were generally upheld. Proof that the unit of the accused was either engaged in actual combat or performing highly important tactical missions during the absence of the accused was sufficient to establish requisite intent.[18] Proof in this type of offense was also facilitated by the legal propriety of alleging both the intent to avoid hazardous duty and the intent to shirk important service, provided that such allegations were in the disjunctive and not the conjunctive.[19]

7. Misbehavior before the Enemy. Four hundred and ninety-four general courts-martial cases for violation of Article of War 75 were tried in the European Theater of Operations[20] and the death sentence was imposed upon 29 accused. None of these sentences was executed.[21] Almost all of these prosecutions were charged under the first portion of the Article. The analysis of that part of the statute and its application in the European Theater of Operations is illustrated by the following diagram:

"MISBEHAVIOR BEFORE THE ENEMY[22]

Any officer or soldier who — before the enemy —
- (1) misbehaves himself
- (2) runs away
- or
- (3) shamefully abandons
- or
- (4) delivers up
- or
- (5) by any
  - (a) misconduct
  - (b) disobedience
  - or
  - (c) neglect

endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend,

. . . shall suffer death or such other punishment as a court-martial may direct."

17. Page 233, First U. S. Army Report of Operations, 20 Oct 43 to 1 Aug 44, Annex No. 20.
18. CM ETO 2481 Newton, 1944.
19. MJ Cir 7, 15 Aug 44.
20. Letter, BOTJAG-E 250.481.
21. See Appendix 4.
22. CM ETO 2602 Picbulas, 1944.

It was the general policy, whenever possible, to allege offenses which might be in violation of Article of War 75 as violations of either the 58th or 64th Article of War;[23] but, in one instance, application of the policy caused a Board of Review to say: "Had this charge been so laid (under Article of War 75), it would have been easily proved and complicated legal questions could have thus been avoided."[24] Some judge advocates, especially in air force commands, experienced difficulty with the words "before the enemy"; the subject is discussed in paragraph 9 of this study. Others found witnesses unavailable either because of battle casualties or because their presence was indispensable in combat.

8. Sentinel Offenses.

a. From 9 September 1943 until after 8 May 1945, the policy in the European Theater of Operations was stated as follows:

> "Misbehavior of sentinels in a theater of operations is a very serious offense which in the absence of extenuating or mitigating circumstances of a very high order requires trial by general court-martial."[25]

The effect of this policy is reflected by available statistics. Nine hundred and thirty-five sentinel cases were tried by general courts-martial[26] while, in the air forces and service forces combined, there were only 820 accused tried by special courts-martial for sentry or guard offenses.[27] The average sentence, as approved, was about five years. Many judge advocates who answered the questionnaire believe that except in combat zones, it was unwise to require trial by general courts-martial; that consideration should have been given to the nature and place of the duty the sentinel performed. Several suggest that legislation be enacted defining an intermediate offense between those now defined in Article of War 86 and those now tried as violations of Article of War 96; the new offense to be applicable in most cases arising in the zone of the interior and in rear echelons. Some officers expressed approval of the opinions which tended to make proof of some of the technical niceties unnecessary.[28] None disapproved of this trend.

b. The tenor of another phase of the replies to the questionnaire is epitomized by a former army judge advocate who wrote: "There was an unnecessarily large number of offenses by sentinels. Generally, these offenses indicate poor training, poor administration in the unit or a failure to inculcate the importance of guard duty."

9. Refusals to Fly. Records of United States Air Forces in Europe reveal nine general court-martial trials and convictions of air force personnel in the European Theater of Operations for cowardice before the enemy for refusing to fly in combat missions. These cases all arose in heavy bomber units based in England and involved one officer and eight enlisted men. Six were charged and convicted under Article of War 75, but records in five of the cases

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23. See Appendix 5.
24. CM ETO 5293 Killen, 1944.
25. Sec II, par 64, Cir 72, Hq ETOUSA, 9 Sep 43. Cf, par 2b (5), ltr WD, subj: "Uniformity of sentences adjudged by general courts-martial," 5 Mar 43.
26. Letter, ETOTJAG-E 250.481.
27. Appendices 2 and 3.
28. SPJGJ 1942/1033, 3 Bull JAG 99; CM NATO 1757 (44), 3 Bull JAG 146.

were held legally insufficient by the Branch Office of The Judge Advocate General with the European Theater of Operations on the ground that the accused were not before the enemy while in England before the take-off. The leading case was CM ETO 1226, Muir, 1944.[29] In the sixth case,[30] tried subsequent to the Muir holding, by exceptions and substitutions, the accused was found guilty of the specification except the words "before the enemy", and not guilty under Article of War 75 but guilty of a violation of Article of War 96. This case was sustained on review. Of the three remaining cases, one[31] was brought under Article of War 58 charging desertion to avoid hazardous combat flying duty; the second[32] was brought under Article of War 64 for willfully disobeying the command of a superior officer to fly on a combat mission; and the third[33] was charged under Article of War 96 for willfully puncturing the oxygen line of a B-17 aircraft to prevent a scheduled combat mission. The records of trial in these three cases were all ultimately held legally sufficient and the sentences, as approved, were, respectively, confinement at hard labor for two, 25 and 12 years.

a. The principle of the Muir case was overruled by The Judge Advocate General's Department on 29 January 1945, in an opinion upholding the conclusion reached in a similar case which arose in the North African Theater of Operations. In that case, it was held that a soldier is chargeable under Article of War 75 not only when he misbehaves while in direct contact with the enemy, but also in case he similarly conducts himself when he is part of a tactical operation which will lead to immediate uninterrupted contact with the enemy.[34]

b. That only one of the nine accused was an officer is partly because in heavy bomber combat crews there were usually two officers and seven enlisted men, and because officers were as a rule better educated and trained, perhaps a little older and more thoroughly screened during their vigorous training schedule.[35]

c. The fact that all refusals to fly, or other cases of cowardice, originated in bomber units was caused by the fact that the fighter pilot flew a fast maneuverable plane and could more easily and often extract himself from immediate danger. The bomber, on the other hand, was slower, much less maneuverable and more

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29. Other cases held legally insufficient:
U. S. vs. Pvt Roy E. Fraley, VIII Bomber Command, Eighth Air Force, GCMO No. 107, 28 Dec 43.
U. S. vs. Pvt. Sidney P. Atherton, Eighth Air Force, GCMO No. 9, 22 Jan 44.
U. S. vs. 2d Lt. Solomn (NMI) Zigman, Eighth Air Force, GCMO No. 12, 25 Jan 44.
U. S. vs. Pvt. Woodrow A. Taylor, Eighth Air Force, GCMO No. 39, 14 Mar 44.
30. U. S. vs. Pvt. Edward C. Coldiron, 506th Bombardment Sq, 44th Bombardment Gp, Eighth Air Force.
31. U. S. vs. Pvt. Michael P. Urban, 1st Bombardment Division, Eighth Air Force.
32. U. S. vs. Pvt. Carl F. Tibi, 578th Bombardment Sq, 328th Bombardment Gp, Eighth Air Force.
33. U. S. vs. Sgt. William E. McMullen, 730th Bombardment Sq, 392d Bombardment Gp, Eighth Air Force.
34. IV Bull. JAG, pp 11-12.
35. "War Neuroses in North Africa" by Lt Col Roy R. Grenker, MC, and Capt John P. Spiegil, MC, Army Air Forces.

vulnerable to attack. Consequently, the fighter pilot had less to fear, and much less reason to refuse to fly.[36]

d. Frequently, when it was determined that an officer lacked the moral fiber to fly in combat, reclassification proceedings were initiated. The case history of many officers who faced the reclassification board shows that they resigned their commissions for the good of the service. A number of these histories are given in "Psychiatric Experiences in the Eighth Air Force."

(1) Typical of such cases is that of a 2d Lieutenant pilot of a B-17 whose complaint was: "Fear of combat flying". This officer's reactions in combat were shown when on his first combat mission he became so frightened that he excitedly jerked the controls from the pilot and threw their plane out of formation to the point that the pilot had to join another group. This act was overlooked as being symptomatic of the lieutenant's first raid. On his second raid, however, he was so frightened that his presence in the plane was a handicap to the success of the mission and following which he told the flight surgeon that he was too frightened to go on a mission again. This officer was found to have no psychotic or neurotic symptoms. Rather than face the Reclassification Board, he resigned his commission for the good of the service.[37]

e. Enlisted men were tried by court-martial only in cases of outstanding cowardice or inexcusable acts of willfullness and deliberate intention to remove themselves from the possibility of combat flying. In the great majority of cases, enlisted men were reduced to the grade of private (all enlisted bomber crew members were non-commissioned officers), removed from flying status and assigned to ground duty.

(1) Illustrative of such cases is that of a technical sergeant radio gunner-engineer of a B-17 aircraft. Before he had ever flown a combat mission, he complained of irregular breathing, constriction of the chest, heavy heart beating and numbness of the finger tips. He complained so vigorously that he was admitted to a hospital, where the patient described his symptoms with indifference and yet with insistence of their importance. He seemed to have no conception of the possibility of their true relationship to situational anxiety. He remained in bed, covered high around his neck, and neither read nor spoke to others. No psychotic manifestations were observed. When returned to his unit by

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36. Interviews with Brig Gen R. M. Lee, Col J. C. McGehee, Army Air Forces, and Col O. B. Schrender, Air Surgeon, U. S. Air Forces in Europe.
37. Page 222, Psychiatric Experiences in the Eighth Air Force.

Central Medical Board as fit for full flying duties, he was reduced to the grade of private and removed from flying status.[38]

10. Refusal to Jump. Records of court-martial cases involving refusals to jump are not available but interviews with parachute infantry officers disclose that there were none in actual combat.[39] During the final training period in England prior to D-Day, a number of such cases were tried by general court-martial and the average approved sentence was confinement at hard labor for five years. However, charges were not preferred unless the accused refused to jump after being given a second opportunity.

a. Cases of refusal to jump are not comparable to refusals to fly in the air forces. Airborne missions are planned weeks in advance, and the period of training, practice and coaching for the event is not unlike that which occurs during the time a football team is being put in condition for the most important game of the season. Morale becomes very high and thoughts of danger connected with the mission are greatly minimized. When aboard the plane, the same coaching is continually in progress and prior to the jump, the equipment of each men is carefully checked by the jump chief. At the moment of the jump, the chief is out first, and following his descent the others are urged along by the assistant jump chief, who comes last. Consequently, the jumpers are swept out so rapidly one after another that there is little opportunity for any to refuse. Subsequent to a mission, a paratrooper or a glidist may perhaps never again undertake another; but if he should, such a mission would not follow the first for weeks or even three or four months. In the air forces, the ordinary airman may be required to engage in several missions in comparatively quick succession.

b. Any shrinking from hazardous duty or misbehavior before the enemy after the paratrooper or glidist reached the ground is not peculiar to air missions but is the same as that of the ground forces.[40]

11. Violations of the 64th Article of War.

a. There were 1,424 accused tried by general courts-martial in the European Theater of Operations for violations of the 64th Article of War. The numbers by separate offenses were:[41]

Willful disobedience	1,112[42]
Striking officer	120,
Drawing weapon against officer	97, and
Offering violence to officer	101.

It is estimated that the average sentence imposed for willful disobedience, as approved by reviewing authorities, was confinement for 15 years if the offense occurred in combat and for five years if it was committed in a non-combat zone.

b. No difficulties were experienced in the administration of this article except that portion of it pertaining to willful

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38. Page 236, Psychiatric Experiences in the Eighth Air Force.
39. Col R. H. Boyd and Maj Virgil P. Chilson, formerly with Airborne Divisions.
40. See par 7, this study.
41. Form 20 Ledger.
42. This includes six attempts, charged under AW 96.

disobedience. There were too many specifications laid under this charge when the order was given to a soldier who was obviously drunk; often the charge was even joined with a charge of drunkenness. This practice was severely criticized by the Assistant Judge Advocate General with the European Theater of Operations.[43] In another group of offenders who were improperly tried were those who said they would not obey an order in the future and were summarily placed in confinement before the time for compliance with the order had arrived.[44] A third category of improper uses of this Article includes those cases where the accused were ordered to do certain acts as punishment, either without compliance with Article of War 104 or when not legal punishment under it, and the order was disobeyed.[45] Finally, a number of cases were tried where the offender was placed in arrest because of some disparaging remark he made contemporaneously with the command he received but before he had an opportunity to obey the order given by the officer.[46]

(1) These cases which were tried by general court-martial and which provoked the admonitions of the Assistant Judge Advocate General are but a very small percentage of the charges alleging willful disobedience of an officer which were forwarded with recommendation of trial by general court-martial. Hundreds and hundreds were sent back for trials by inferior courts as violations of the 96th Article of War.[47]

c. Insubordinate conduct under the 96th Article of War could be punished by any appropriate sentence; the Table of Maximum Punishments does not apply.[48] Many cases which were believed too serious for trial for failure to obey but not proper for the application of Article of War 64 were tried under such a charge and specification. The tendency of staff judge advocates, or their commanding generals, to treat the charge of insubordination as a panacea for almost all incidents of disrespect and disobedience occasioned the Assistant Judge Advocate General to define the offense as a "behavior akin to a defiance of authority bordering on mutinous conduct." He reminded judge advocates that willful disobedience should be charged as a violation of the 64th Article of War and disrespect as a violation of Article of War 63.[49]

d. Comments of judge advocates who answered the questionnaire include, in substance: An offense similar to insubordination should be defined by the Articles of War and the charge of willful disobedience should be used only in the most exceptional cases, and when employed very drastic punishment should be imposed.

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43. MJ Cir 3, 3 July 45.
44. MJ Cir 8, 10 Oct 44.
45. MJ Cir 7, 15 Aug 44.
46. MJ Cir 6, 1 July 44.
47. From 1 July 42 to 31 May 45 (excepting Jan 43) 2,672 soldiers in the Service Forces alone were tried by special courts-martial for failure to obey (Appendix 2; these figures include offenses under AW 65).
48. CM ETO 1920 Horton, 1944.
49. MJ Cir 2, 17 May 45.

There were entirely too many cases of alleged violations of Article of War 64 where improper consideration had been given to the surrounding circumstances, such as drunkenness, combat fatigue or the pettiness of the order. "Military duty" is not defined in the Manual for Courts-Martial (paragraph 134b); it should be, and trifling duties such as "stand at ease," should be expressly excluded. Poor leadership, even to the inability to give an understandable direct order, was the direct cause of many of the charges of willful disobedience.

12. Mutiny and Sedition. Only 20 cases of mutiny (Including beginning, exciting or joining a mutiny) and two cases of sedition were reported to the Branch Office of The Judge Advocate General with the European Theater of Operations.[50] Fifteen accused received the death penalty but none was executed.[51] In none of these cases was either procedural or substantive difficulties encountered. The low number of mutiny cases is partly accounted for by the fact that most officers exercising general court-martial jurisdiction preferred to charge accused of violating the 64th Article of War when the facts, as they usually did, justified such a charge.

a. After October 1944, all mutiny and sedition trials and all cases in which there was evidence of mutinous conduct were held in closed session.[52]

13. Security in a theater of operations was of the utmost importance in the prosecution of the war, and it therefore became a material factor in the administration of military justice. Judge advocates, confronted with the necessity of punishing violators of security regulations, obtained no specific assistance from either the Articles of War or the Manual for Courts-Martial. Offenses were usually prosecuted as violations of standing orders. Consequently, in the cases of enlisted men, the maximum punishment which could be imposed was confinement at hard labor for six months and appropriate forfeitures. The general opinion of judge advocates is that such punishment was inadequate in many cases; the result was that the very large majority of such charges were referred to special courts-martial so no figures are available of the number of such offenses. From October 1942, until the end of hostilities, 42 cases involving violations of mail censorship, and from November 1942, 36 cases involving other security delinquencies were tried by general courts-martial.[53] Censorship offenses were usually charged as violations of European Theater of Operations directives;[54] those who were guilty of other wrongs involving classified material were tried for failure to obey War Department orders.[55]

a. Proof of postal censorship cases was difficult because, frequently, the basic evidence was not available. Trials were facilitated by an opinion which held that War Department AGO Form No. 912a, prepared and filed in the regular course of duty by a censorship officer, was admissible in evidence under the provisions of the Act of 20 June 1936, c 640, Section 1 (28 USCA 695) and that a duly authenticated copy of the report was also admissible. The

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50. Form 20 Ledger.
51. See Appendix 4.
52. Ltr, Hq ETOUSA, AG 350.4 MJA x 311.5, 29 Oct 43, subj: "Security of Court-Martial Trials Involving Mutiny."
53. Form 20 Ledger.
54. Cir 65, Hq ETOUSA, 26 Aug 43 and Cir 37, Hq ETOUSA, 21 Mar 44.
55. AR 38-5, 28 Sep 42 and Training Circulars No 15, WD, 16 Feb 43 and No 66, WD, 12 May 43, Pamphlet WD 21-1.

most important and helpful contribution of this opinion was the holding that a photostatic copy of the censored document, if made in the regular course of duty and certified as a true copy by the examining officer, was admissible in evidence equally with the original.[56]

14. Article of War 95. Officers who replied to the questionnaire state that they experienced no procedural or substantive difficulties with this Article of War; but The Assistant Judge Advocate General with the European Theater of Operations said it was one of the four Articles of War with which his office experienced the greatest difficulty in reviewing records of trial.[57] In any event, comparatively, it was not extensively used[58] and little of historical interest can be recorded of its application. The gist of some of the judge advocates' comments concerning its application is contained in the footnote.[59]

15. Fraternization. The military justice aspects of the non-fraternization policy were clouded by uncertainty, lack of enthusiasm, and frustration. Many commanding generals and their judge advocates believed that severe punishment should be inflicted.[60] But it was held that, unless the offense was so aggravated as to jeopardize the security of the United States forces or constitute some other offense, it was merely a violation of standing orders, for which the authorized maximum punishment for enlisted men is confinement at hard labor for six months and two-thirds' forfeitures for the same period.[61] Directives did not define the offense to the satisfaction of judge advocates; they often were in doubt whether a given set of facts constituted a violation of the order. Officers and others charged with the maintenance of discipline were reluctant to make on-the-spot corrections or arrests, partly because

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56. Ltr, AG 350.462 Op JA Hq ETO, 17 Mar 44, subj: "Admissibility in Evidence of Certain Documents Prepared in the Course of Military Censorship."
57. MJ Cir 4, 8 Apr 44.
58. Of the 75 accused tried, 64 were convicted and in 11 of those cases, the sentences were disapproved by the reviewing authority. In 44 of the remaining cases, the sentences were executed, in eight suspended and in one case, the sentence was commuted. (These figures are taken from general court-martial orders, Hq ETOUSA and HQ USFET for the years 1942-1945).
59. Too many were tried under it; AW 96 should be used except in the most serious cases (compare with caustic comments of the CG, USFET, in his actions published in GCMOs 349 and 415, Hq USFET, 1945, to the effect that the maximum sentence authorized under charges so improperly laid under AW 95 was wholly inadequate); courts were reluctant to convict; it is a shield for officers, compared to enlisted men; any offense for which an enlisted man would likely be confined should be conduct unbecoming an officer and gentlemen as a matter of law; it should not be used when charges can be laid under any other AW, except AW 96; it is satisfactory if wisely used; the decisions under the Article have gone too far in protection of an officer for failure to pay debts; and confinement and fines should be permissive punishments.
60. There were 80 general court-martial cases according to the Form 20 Ledger of the Branch Office of The Judge Advocate General.
61. MJ Cir 3, 2 Jul 45.

of uncertainty whether the supposed German was one or was a displaced person. Many courts were reluctant to convict; generally enforcement bogged down; from the standpoint of military justice, it has been compared with the National Prohibition Act.[62]

16. Charges involving self-inflicted wounds were almost impossible to prove, so they were rarely preferred. The magnitude of this offense and the helplessness of competent authority to cope with it is illustrated by the comments of an officer in the Office of the Staff Judge Advocate, United States Forces, European Theater, who wrote to The General Board:

"In connection with reviewing line of duty cases, we had numerous instances of self-inflicted wounds where personnel were in combat or where combat was imminent; usually, this would take the form of shooting through the toes of the foot and would occur without witnesses. We recognized that we were bound by the presumption in favor of line of duty; however, this type of case became so prevalent that some of us felt the ordinary rules governing line of duty determinations were inadequate. I believe, for instance, that evidence such as the following, which occurred very frequently, should be sufficient to rebut the ordinary line of duty presumption: The wound was self-inflicted; it occurred when combat was imminent; the soldier had indicated in other ways prior to the injury that he was trying to avoid combat.

"I believe that when a military organization is in combat, it must be recognized that every soldier, except those completely lacking in imagination, is scared and that it is wrong to place a premium upon the cowardly expedient of self-wounding in order to avoid the risks which must be borne by the soldier's comrades. I believe further that by present policies, we have been doing just that and have, in fact, encouraged self-wounding; the soldier usually receives a Purple Heart, exemption from combat, an honorable discharge and perhaps a pension for life as a reward for his cowardice.

"One medical officer reported that he had personally treated 25 cases of self-inflicted wounds, not one of which could be proved to be deliberate. This was long before the end of hostilities. I believe an analysis of self-inflicted wounds in the European Theater would reveal that they ran into many thousands; that they were accomplished in a more or less standardized way; and that there is every reason to believe that they were deliberate in most cases."

These observations are equally pertinent when applied to the administration of military justice. Another remedial suggestion made by judge advocates is that, after an appropriate study by medical and legal experts, if the wound is of a certain type, such as in the fleshy portion of the left limbs, the burden of proving its accidental origin be placed upon the wounded soldier.

17. Other Military Offenses. In addition to the offenses specifically discussed in the preceding paragraphs, there were numerous other military offenses which occurred with more or less frequency in the European Theater. These offenses were commonly charged as violations of Article of War 96, either as a disorder or neglect

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62. The facts stated in this paragraph are summarized from the answers of judge advocates to the questionnaire of the Judge Advocate Section, The General Board.

to the prejudice of good order and military discipline, conduct discrediting the military service, or a crime or offense not capital.[63] The range of different offenses was great but some of them presented continuing disciplinary problems. Offenses involving army vehicles were frequent. Drunken, negligent and reckless driving were constant sources of court-martial cases.[64] Unauthorized use of vehicles, frequently characterized as "joy riding," was similary common and sometimes a serious offense.[65] Offenses involving unauthorized carrying and discharge of weapons were frequent and constituted an anxious problem because of their relation to other more serious offenses such as assault and manslaughter.[66] Disorderly conduct, with and without drunkenness, was constantly a concern of commanders.[67] Offenses involving unauthorized use of passes and orders, and the forging of similar papers, were troublesome, particularly in connection with absence without leave and desertion.[68] Simple assaults and batteries and attemps to commit a variety of offenses were conventionally prosecuted under Article of War 96.[69] The large number of establishments and areas placed off-limits to military personnel occasioned many prosecutions for entering off-limit places.[70] Breaches of restriction, in a sense a corrollary of violations of Article of War 69, were punished under Article of War 96.[71] Possession and use of narcotics, especially marijuana, were fairly common and were also charged as violations of this latter Article.[72] In many instances, the analogy of a Federal or District of Columbia statute was employed for definition of the offense, to fix a maximum or for both purposes. In the main, judge advocates did not experience difficulty with offenses under Article of War 96,[73] although at least two of them objected to the general language of this provision and preferred a precise codification of offenses under it.

SECTION 4

CIVIL OFFENSES

18. Rape. By 1 July 1945, four white and 25 colored soldiers of the 169[74] accused who had been tried for rape had been executed. Fifteen others were executed after being convicted of both murder and rape.[75] Fourteen[74] received approved life sentences and the

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63. MCM, 1928, par 152, pp 187-191. In the case of officers, military offenses of this general character were sometimes charged as violations of AW 95. See MCM, 1928, par 151, pp 186-187.
64. 2 Dig Op ETO 653, 699-702. Many of these cases, like other cases discussed in this paragraph, found their way into special and summary courts-martial.
65. 2 Dig Op ETO 721-724.
66. Par 6b, Sec II, Cir 72, Hq ETOUSA, 9 Sep 43; par 6b, Sec IV, Cir 76, Hq ETOUSA, 4 Jun 45; 2 Dig Op ETO 646, 715.
67. Cases of this sort were especially numerous in inferior courts.
68. 2 Dig Op ETO 666, 668, 718-719. There were some prosecutions grounded on Sec 132, Title 18, US Code.
69. 2 Dig Op ETO 597-602, 605-612.
70. These cases were universally tried in inferior courts. Officers were generally punished under AW 104.
71. 2 Dig Op ETO 635.
72. 2 Dig Op ETO 698, 716.
73. Compare paragraph 32, this study.
74. Ltr, BOTJAG-E 250.481.
75. See Appendix 6.

average sentences of all others, as approved by the reviewing authorities, was 14 years' confinement at hard labor.[76]

a. Apart from the unavoidable improbabilities, uncertainties and inconsistencies appearing in the expected testimony of French, Belgian and German prosecutrices (this was no small problem), the greatest obstacle which confronted the judge advocates was that the perpetration of this crime came in two great waves;[77] judge advocate and provost marshal sections were not equipped with sufficient personnel to cope with the situations promptly.[78] Delay in investigations and trials was fatal to the production of satisfactory proof. An excerpt of a report of a corps judge advocate to the army judge advocate, taken from the files of the 12th Army Group, is illustrative and appears in the footnote.[79]

b. Once evidence was marshalled and witnesses assembled, the actual trials of rape cases presented no appreciable difficulties. However, the judge advocates who responded to the questionnaire were almost unanimous in their opinion that the 92d Article of War should be amended to permit the court, upon conviction, to fix any penalty including death. It was generally thought that the minimum authorized penalty was too severe in many cases and frequently led courts-martial to adopt acquittal as the unjustified but more acceptable alternative.

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76. Form 20 Ledger.
77. See Study, The General Board, USFET, "The Military Offender in the Theater of Operations."
78. A study of rape cases pending in the Ninth US Army in April 1945 and occuring in Germany discloses: Cases tried, 13; referred to trial, 7; tried or triable, 27; reported and unsolved, 18; under investigation, 14; Total, 79. (From the reports of corps judge advocates to the Army Judge Advocate. Different methods of reporting make it impossible to distinguish more clearly between the first and third items and the fourth and fifth classifications. The figures do not include 37 accused being investigated for assaults with intent to commit rape or other sex assaults.)
79. "The biggest difficulty is due to inexperienced efforts at investigation and failure to recognize valuable evidence and valuable clues when they are observed. The use of the CID has been of considerable help but it has serious limitations, which are: 1. They did not reach the scene promptly. 2. Their methods are slow and, for the rapidly moving situation which we have been undergoing, inadequate and antiquated. To illustrate what I mean by this: I learned of two rape cases after they had been investigated by the CID. I sent an officer from this headquarters who procured copies of statements from the CID, interviewed the witnesses, and charges were prepared, preferred and the accused went on trial on the day the unit received the CID report. Had the unit waited for the CID report, it would have been so far away from the scene of the crime as to make it impossible or impracticable to try the cases. For a time, I had four CID agent working out of my office, but due to the press of business they were recalled. The 75th Division now has two CID agents attached to that headquarters. It is my recommendation that an adequate number of CID agents be placed at Division and Corps headquarters. This will enable them to more promptly advise those concerned as to the evidence discovered. It will also enable them to more promptly go to the scene of any offense. Elaborate CID reports may make good files but they are of little value in the conviction of an accused."

19. Murder[80] trials did not, generally, present any unusual difficulties other than those inherent in the charge itself. Some judge advocates found by bitter experience that their trial judge advocates and defense counsel lacked the training and experience to conduct such cases properly.

a. Many of the judge advocates who responded to the questionnaire recommend that the courts be permitted to impose any sentence, in their discretion, including death.[81]

20. Manslaughter.

a. One hundred and thirteen accused were tried for (or convicted of, as a lesser included offense of murder charges) voluntary manslaughter.[82] The approximate average sentence impose included confinement for seven years.

b. Of the 305 accused tried for involuntary manslaughter in the European Theater of Operations, more than one-half, 167, were acquitted.[83] The sentence of those convicted averaged about two years.

c. The principal difficulties judge advocates encountered in manslaughter cases arose from the inadequate discussions of both volutary and involuntary manslaughter contained in paragraph 149a, Manual for Courts-Martial, 1928. Some judge advocates believe that the penalty for involuntary manslaughter should be increased, and some urge that homicide by negligence (particularly in the operation of a vehicle) be made a specific offense with a more severe penalty than may be imposed for reckless driving.

21. Larceny. Ten per cent of all cases tried by general courts-martial in the European Theater involved larceny of personal property.[84] A quarter of these cases involved larceny of property owned by the United States. The maximum authorized punishment was the same under Articles of War 93 and 94 and was graduated according to the value of the property.[85] The longest authorized sentence of confinement was five years. The estimated average sentence included the maximum period of confinement authorized by the proof of value in each case. Ordinarily, larceny of Government property was alleged under Article of War 94, but sometimes it was charged as a

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80. There were 290 murder cases. Ltr, EOTJAG-E 250.481. 72 accused were sentenced to death, but the sentences were commuted in all except 35 cases. 48 were sentenced to life imprisonment. The sentences of the others, as reduced and approved by the reviewing authorities, averaged eight years. Before 1 Jul 45, nine white and 23 colored accused had been executed (Appendix 6).
81. Compare the preceding paragraph.
82. Form 20 Ledger.
83. Form 20 Ledger. See par 70, this study.
84. There were 1,191 cases. Of this number, 270 cases involved property of the US, and 921 cases involved the property of others. Of the first group, 110 cases concerned property valued at more than $50 and 160 cases concerned property worth $50 or less. Of the second group, 427 cases involved property worth more than $50 and 494 cases concerned property worth $50 or less. Form 20 Ledger.
85. The Table of Maximum Punishments provided: more than $50, confinement for 5 years; less than $50 but more than $20, confinement for 1 year, $20 or less, confinement for 6 months. MCM, 1928, par 104c, pp 99-100. One JA thought the authorized confinement was too severe.

violation of Article of War 93.[86] Some difficulty was experienced in establishing ownership of stolen property, and there were some instances in which offenses, alleged as violations of Article of War 94, were not proved under this Article or could have been proved more easily under Article of War 93.[87] Proof of value was sometimes difficult, although this difficulty was avoided in part through use of official price lists.[88] In this connection, the difference between official and black market prices and rates of exchange presented some special problems.[89] Thus, a larceny of French francs constituted a more serious offense under the official rate of exchange that it did under the black market rate since the amount involved in terms of American dollars was greater.[90] Larceny of property from a French civilian was a less serious offense if the property was valued in French francs by ordinary pre-war prices or at the official rate of exchange rather than by present-day French prices or at the pre-war rate of exchange.[91] Property which was unavailable to civilians in Continental countries had no established market value, yet, in the opinion of some officers, the relatively modest prices stated in official price lists did not fairly reflect the gravity of an offense committed in a country where grossly inflated prices prevailed.[92] Usually, the value or, in the case of money, the amount of money was alleged in terms of dollars with a complementary allegation in terms of foreign money when that was necessary.[93]

a. Pillaging and Looting. Pillaging and looting in conquered and liberated countries were offenses of frequent occurrence and constituted a special disciplinary problem.[94] Offenses ranged from simple acquisition of a mattress for added comfort to armed and violent robberies. Frequently, looting or pillaging was accompanied or preceded by other offenses. In the opinion of some judge advocates, leniency and unwillingness to interfere on the part of some commanding officers contributed in important measure to the large number of instances of pillaging, looting and allied offenses.[95] To combat these offenses, several Articles of War were available. Article of War 75 enabled punishment of a

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86. CM ETO 1411, Riess, 1944; CM ETO 1764, Jones, et al, 1944. Cf the black market cases, discussed in par 22 of this study. For example, cases involving PX property. Cf CM ETO 7248, Street, 1945; CM ETO 1486, MacDonald, 1944; CM ETO 6232, Lynch, 1945; CM ETO 128, Rindfleisch, 1942; Sec 3, MJ Cir 7, 15 Aug 44. One JA suggested redraft of these articles along the lines of the Louisiana Criminal Code to simplify questions involving ownership of property.
88. CM ETO 5666, Bowles, 1945; Judicial notice was commonly taken of official price lists.
89. See generally, par 22 of this study.
90. CM ETO 8187, Chappell, 1945.
91. CM ETO 6217, Berkus, 1945.
92. CM ETO 5539, Hufendick, 1945.
93. CM ETO 1486, MacDonald, 1944; Sec 6, MJ Cir 2, 8 Feb 44; Sec 5, MJ Cir 2, 17 May 45.
94. Ltr, CG, Third US Army, 14 Mar 45; Ltr, SJA, Hq Ninth US Army, 3 May 45; Ltr, SJA, Hq XIII Corps, 13 Apr 45; Ltr, SJA, Hq XVI Corps, 16 Apr 45.
95. Pillaging, looting and allied offenses occasioned a substantial number of claims under the Foreign Claims Act. The Form 20 Ledger lists 39 cases of pillaging. Other cases are undoubtedly included in the totals for other allied offenses. It is believed that there were many instances of this kind of conduct which were not brought to trial.

soldier who quit his post to plunder or pillage. Article of War 89 was available for the prosecution of waste, spoil, willful destruction of property, depredation or riot. Article of War 93 provided means of punishing burglary, housebreaking, robbery and larceny. Article of War 96 enabled punishment of variations of the foregoing offenses and other offenses, such as fraternization and disorderly conduct. There was some confusion, however, in connection with prosecution of the general class of offenses just described, due in part to uncertainty about the scope of some of these articles and in part to failure to discriminate between the types of conduct which each prohibited.[96] Clarification of the relation of several of these provisions and more precise definition of offenses was thought to be necessary by several judge advocates.

32. Black Market Transactions.[97] Black market transactions presented a continuing problem in the European Theater of Operations, although not to any great extent in the United Kingdom. There were two general types of transactions: (a) sales and exchanges of property, and (b) sales and exchanges of currency.

a. Black market sales and exchanges of property.

(1) Black market sales and exchanges of property were largely the product of inflated prices resulting from civilian shortages of almost all kinds of goods in France and other continental countries. For example, cigarettes were sold for $1.00 to $2.50 per package. A five-cent chocolate bar was sold for 40 to 60 cents. An ordinary bar of toilet soap or laundry soap brought 50 cents to $2.00. Gasoline was sold for $4.00 to $6.00 per gallon. A pair of shoes brought $30.00 to $40.00. Other goods of all kinds brought similarly inflated prices. There were four general classes of transactions: (a) sale or exchange of property owned by the United States and either issued to military personnel or held by military units; (b) sale or exchange of property owned by a post exchange, a Red Cross unit or an Allied Government; (c) sale or exchange of property owned by military personnel but purchased from a post exchange or quartermaster store; and (d) sale or exchange of property owned by military personnel but acquired from non-governmental sources.

(2) To combat the consequences of these transactions, both to the economy of the country involved and to the discipline of the army and the economy

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96. For example, prosecutions under AW 75, see CM ETO 5445, Dann, 1945; CM ETO 5446, Hoffman, 1945; par 1b, Sec II, MJ Cir 1, 16 Apr 45; Sec I, MJ Cir 2, 17 May 45. Instances were reported where a soldier was charged with fraternization and, for example, robbery or pilfering on substantially the same facts.

97. No statistics are available concerning the number of black market cases as such. As it will appear in the following discussion, this is because many of the black market offenses were alleged and tried simply as violations of one of the existing AWs.

of the United States, several Articles of War were utilized. Some transactions violated Article of War 83 or 84. Some were preceded by a larceny in violation of Article of War 93. Many transactions directly violated or were preceded by a violation of Article of War 94. Still others contravened army regulations[98] or theater directives[99] and therefore could be alleged as violations of Article of War 96.[100] Most of the judge advocates found that these provisions furnished an adequate basis for the punishment of black market transactions, although several believed that the directives were not sufficiently explicit in defining prohibited conduct. Considerable difficulty was experienced by some judge advocates in proving Government ownership of property in prosecutions under Articles of War 83, 84 and 94,[1] and in establishing value for the purposes of punishment.[2] Difficulty was also encountered where the property involved was apparently owned by a post exchange or an Allied Government. Most of the judge advocates who discussed black market offenses agreed that The Table of Maximum Punishments did not authorize sufficiently severe sentences in aggravated cases. These officers believed that this obstacle could be eliminated by the simple expedient of amending The Table of Maximum Punishments. Only one officer explicitly approved charging such offense under Article of War 96 and some judge advocates expressed disapproval of this practice, although several stated that it had been followed in their commands. Several officers believed that the value of the property involved in terms of American money was not a criterion of the gravity of the offense and should not determine the severity of the sentence.

(3) The widely publicized railway cases[3] tried in Paris illustrate the aggravated black market offenses for which the authorized maximum punishments under Articles of War 83, 84 and 94 were believed to be wholly inadequate. In this instance, there was widespread theft from army supply trains and sale of stolen supplies of all kinds to civilian purchasers at inflated prices. The grave threat to the war effort resulting from this diversion of supplies

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98. Par 13, AR 210-65, 19 Mar 43; par 2a, AR 30-2290, 10 Aug 38; par 2e, AR 600-10, 2 Jun 42. Cf par 13d, AR 210-65, 12 Jun 45.
99. Par 7g, Sec I, Cir 53, Hq ETOUSA, 17 May 44; Ltr, AG 004 OpGA, Hq ETOUSA, 4 Apr 45. Cf pars 6h, 6j, Sec IV, Cir 76, Hq ETOUSA, 4 Jun 45; Ltr, AG 383 GEC-AGD, Hq USFET, 10 Sep 45.
100. MCM, 1928, par 134b, p 149.
1. MCM, 1928, pars 143, 144a, 150i, pp 158, 185; CM ETO 5659, Maze, 1945.
2. MCM, 1928, par 104c, pp 98-100.
3. 2 Dig Op ETO 622.

into unauthorized channels, the failure of the dollar value of the property to indicate the seriousness of the offenses, and the large number of soldiers who actively or passively participated in the wrongful acts,--these considerations induced the responsible officers to allege all of the offenses as violations of Article of War 96. Three general types of specifications were used.[4] In one, there was alleged a general conspiracy among named accused and other members of the unit involved to defraud the United States of military property during a critical combat period. In a second specification, substantially the same conspiracy, but only among named accused, was alleged against the soldiers named. In succeeding specifications, particularly sales, misappropriations, wrongful dispositions or possession were charged. This last specification followed the conventional form for charging a violation of Article of War 94,[5] but was enlarged to allege that the act occurred during a critical period of combat operations and resulted in diversion of vitally needed war supplies. The accused were tried[6] in joint or joint and common or common trials in groups of ten or fewer. The records of the first three trials were promptly reviewed by the staff judge advocate of the appointing authority and were forwarded under Article of War 50½ as test cases.[7] Review of the remaining records was subsequently completed but action of the appointing authority was withheld until the Board of Review had rendered its opinion in the first three cases. The Board of Review fully sustained the legal theory upon which these cases were tried.[8] By analogy to one federal statute,[9] the maximum punishment for conspiracy was limited to two years; and by analogy to another[10] dealing with national defense, the maximum punishment for specific wrongful dispositions, etc., was fixed at ten years. In an indorsement to the opinion in the Young case,

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4. See generally, "Final Report, Railway Pillaging Cases," SJA 350.491, 21 Jun 45, from the Staff JA to the CG, Seine Section, Com Z.
5. See Forms 110, 112, MCM, 1928, App 4, pp 252-253.
6. There were 45 trials. Altogether 198 accused, 190 enlisted men and 8 officers were tried. Of this number, 22 accused, 17 enlisted men and 5 officers were acquitted, and 176 accused, 173 enlisted men and 3 officers were convicted. Of the 176 who were convicted, 87 pleaded guilty and 89 pleaded not guilty. One conviction of an enlisted man was disapproved by the appointing authority. Three others were held legally insufficient by the Board of Review. Of the four disapproved, one was disapproved because of insufficient evidence, the other three because of the manner in which confessions were obtained by CID agents.
7. Par 6a, Sec VI, MJ Cir 1, 16 Apr 45.
8. CM ETO 8234, Young, et al, 1945; CM ETO 8236, Fleming, et al, 1945; CM ETO 8599, Hart, et al, 1945.
9. 18 U. S. C. 88.
10. 50 U. S. C. 105.

Brigadier General McNeil recommended that, by analogy to civil practice of fixing concurrent sentences, the maximum sentence not exceed two years for conspiracy or ten years for specific wrongful dispositions, etc., regardless of the number of specifications of which the accused was found guilty.[11]

(4) The principle of these cases and the authority to allege typical violations of Article of War 94 under Article of War 96 were narrowly limited to the kind of situation involved in the railway cases. Two days after the decision in the Young case, the Board of Review expressly confined the scope of this opinion to a situation where the wrongful acts of the accused were part of a wholesale diversion of Government property from normal distribution channels, circumstances which must be alled and proved.[12]

b. Black market sales or exchanges of currency were chiefly the product of differentials existing between official rates of exchange and the rates of exchange resulting from private transactions in several European countries. For example, the official rate of exchange set the value of the dollar at approximately 50 French francs[13] and the pound was officially valued at approximately 200 French francs, whereas in black market transactions, the dollar brought from 125 to 350 French francs and the pound brought from 450 to 1,000 French francs. Similar differentials existed in other Continental countries. In addition, it was reported that in the United States the pound and the French franc were valued in dollars below the official rate of exchange with the result that military personnel traveling from the United States to England or France could purchase pounds or francs in the United States at popular rates of exchange and profitably exchange them in Europe at the official rates. Various directives[14] forbade these different transactions and the wrongful possession of British and and American currencies. Violations were punished under Article of War 96.[15] Most judge advocates did not experience any particular difficulty in the trial of such cases. Some believed that directives were not sufficiently explicit in defining the offenses. There was some difficulty with the question whether or not it was necessary to allege and prove that the accused had notice, either actual or constructive through a reasonable opportunity to get

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11. The average sentence of the 3 officers was 18.3 years. The average sentence of the 86 enlisted men who pleaded not guilty was 23.3 years. The average sentence of the 87 enlisted men who guilty was 6.6 years(though it should be noted that the conspiracy specifications were withdrawn against all of the latter and their confessions were not introduced in evidence). The average sentence for all enlisted men approved by the appointing authority was 7.1 years. The longest sentence adjudged by the court was 50 years. The shortest sentence was 2 years. The longest sentence against an enlisted man approved by the appointing authority was 15 years and there were only four of this length.
12. CM ETO 6226, Ealy, 1945. See also CM ETO 9987, Pipes, 1945; CM ETO 5539, Hufendick, 1945. See generally, 2 Dig Op ETO 615-630; Sec II, MJ Cir 2, 17 May 45.
13. Cir 364, WD, 8 Sep 44.
14. E.g., ltr, AG 121 OpGA, Hq ETOUSA, 23 Sep 44; Sec IV, Memo 98, Hq Ninth US Army, 3 Nov 44.
15. CM ETO 7553, Besdine, 1945.

actual notice, of the directive in question.[16] In the cases of enlisted men, unlawful currency transactions were punished as violations of standing orders for which the maximum punishment was confinement for six months and partial forfeiture of pay.[17] Some judge advocates believed that this was a wholly inadequate punishment for an offense which was similar in some respects to black market sales and exchanges of property and threatened to impose an unwarranted burden of redemption by the United States of devalued foreign currency.[18]

23. Assaults. A total of 1608 assault cases (other than simple assaults) were tried in the European Theater of Operations.[19] The following table shows the number of the different categories of the offenses, the dates in parenthesis are the dates from which the tabulations begin:[19]

Assault and Battery :	(Sep 42)	304
Indecent Assault :	(Oct 44)	33
Assault with intent to do bodily harm :	(Oct 42)	152
Assault with intent to commit felony :	(Oct 44)	5
Assault with intent to do murder :	(Aug 42)	76
Assault with intent to do manslaughter :	(Aug 42)	14
Assault with intent to do rape :	(Aug 42)	293
Assault with intent to do robbery :	(Jan 43)	14
Assault with intent to do sodomy :	(Jun 43)	20
Assault with dangerous weapon :	(Sep 42)	683
Attempt to assault with dangerous weapon :	(Dec 42)	4

a. Cases repeatedly arose, particularly in the United Kingdom, of assaults on females which lacked some of the essential elements of assault to commit rape and other aggravated assaults as they are classified in the Manual for Courts-Martial but were more serious than simple assaults and battery. This type of offender was tried for "aggravated assault" or "indecent assault"; sentences to confinement for five years were held to be lawful.[20]

24. Carnal Knowledge of Female Minors. (Statutory Rape) Almost all prosecutions for this offense (there were 87 tried by general court-martial)[21] arose in the United Kingdom. The policy was firm there that all such cases must be referred to general courts-martial,[22] irrespective of the previous unchastity or immoral reputation of the complaining witness,[23] unless British officials con-

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16. See preceding note.
17. MCM, 1928, pars 104c, 134b, pp 100, 149.
18. Cf. the currency control plan established by Cir 139, Hq USFET, 10 Oct 45, which became effective 10 Nov 45.
19. Form 20 Ledger.
20. 1st Ind, CM ETO 4386, Green, et al, 1944; MJ Cir 3, 11 Aug 43; MJ Cir 6, 11 Nov 43.
21. Form 20 Ledger.
22. GO No 37, Hq ETOUSA, 9 Sep 43.
23. Ltr, AG 250.1 JA, Hq Western Base Section, SOS, ETOUSA, 9 Sep 43, subj: "Punishment for Statutory Rape," and 2d Ind, Hq ETOUSA, File: AG 250.4 MCA, 4 Oct 43.

sented to a trial by an inferior court.

a. Early in the war, efforts were made to try accused for this offense on the basis of British law, which treated it as of trivial importance. This practice was stopped by a statement by the Assistant Judge Advocate General that American courts-martial could not take judicial notice of British law and, furthermore, that such law was not to be applied by United States courts-martial; that the offense is denounced by Section 279 of the Federal Penal Code and chargeable under Article of War 96 as a crime or offense not capital.[24] In February 1945, The Judge Advocate General held that the Federal Statute did not apply to cases committed on foreign soil; and that, therefore, statutory rape should be prosecuted only as conduct of a nature to bring discredit upon the military service; but that the penalty of confinement for 15 years for the first offense provided by the statute could properly be imposed.[25]

b. The estimated average sentence was confinement for six months.[26] Because of such sentences, most judge advocates who expressed themselves on the subject stated that the appointing authority should have had discretion to refer such cases to any court which was proper in view of all of the circumstances. Many think that the offense should be specifically denounced by an Article of War.

25. Other Civilian Offenses. Other typically civilian offenses were committed more or less frequently in the European Theater. During the period from October 1942 to May 1945, for example, there were 116 cases of robbery and 159 cases of housebreaking tried by general courts-martial.[27] Cases of embezzlement of both private property and government property were similarly frequent. Prosecutions for sodomy were fairly common prior to January 1944, but after that time were less frequent because offenders often were administratively discharged.[28] Mayhem was believed to be a common offense, but few cases were tried and those that were tried were ordinarily charged as a violation of Article of War 96.[29] There were occasional cases of arson, burglary, forgery, perjury and false claims against the United States, but the total number of cases was not great. Generally speaking, judge advocates encountered no procedural or substantive difficulties with the offenses discussed in this paragraph except difficulties resulting from the inherent nature of the particular offense.

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24. MJ Cir 6, 11 Nov 43.
25. 4 Bull JAG 57, Feb 45.
26. Between 1 Jan 43 and 18 Sep 43, 27 accused were tried by general courts-martial. The results of those trials were: confinement 5 years - 5; confinement 1½ years - 3; confinement 3 months - 1; confinement 2 years - 1; confinement 6 months - 5; confinement 2 months - 1; restriction, 1 to 3 months - 8; acquittals - 3. (1st Ind (no file number), Hq SOS, ETOUSA, 18 Sep 43.)
27. Form 20 Ledger. The maximum authorized punishment for both offenses was ten years (MCM, 1928, par 104c, p 99), and the estimated average sentence for both offenses was five years.
28. Cir 3, WD, 3 Jan 44; par 2, AR 615-368, 7 Mar 45. Some potential sodomy cases involved the offense of contributing to the delinquency of a minor. See 2 Dig Op ETO 677-684. See also 2 Dig Op ETO 611.
29. 2 Dig Op ETO 705-706, 709-710 and par 16 of this study.

SECTION 5

PRISONERS OF WAR

26. Prisoners of War did not present any substantial problem in the administration of military justice. Early in the campaign, it was not the general policy to try them by either summary or special courts-martial, although it was decided by the Staff Judge Advocate of the European Theater of Operations that such courts had jurisdiction despite the fact that it is not conferred by either Article of War 13 or Article of War 14.[30] Later, trials of prisoners of war by inferior courts were permitted.[31] Only two prisoners of war were tried by general courts-martial.[32]

a. Commanding officers of prisoner of war enclosures relied substantially upon the forms of summary punishment permitted by the Geneva Convention of 27 July 1929 relative to the treatment of prisoners of war, in maintaining discipline within the enclosures. Some judge advocates were of the opinion that such punishment could be imposed only under the provisions of Article of War 104 and subject to the same procedure and limitations[33] and so advised the commanders of the enclosures. Others, and probably most, believed that summary punishment to the extent permitted by the Convention might be imposed. The question was not settled until 5 April 1945 when it was directed that summary punishment would be imposed only through a summary court-martial or under the authority of Article of War 104.[34]

27. Many Italian prisoners of war, after the surrender of Italy, were formed into service units and the personnel were thereafter known as cooperators. They were treated in the same manner as all other prisoners of war in courts-martial procedure, e.g., notice to the protecting power.

a. Almost all offenses committed by these men were of a trivial nature, such as pilfering of food, short absences without a pass or entering off-limit houses of prostitution. In March 1945, authority was granted to base section commanders for cause, and upon recommendation of the United States unit commander, to relegate cooperators to the status of prisoners of war and to return them to prisoner of war enclosures.[35] The application of this power to these petty offenders (with coincidental publicity to the cooperators) effectively ended the disciplinary problem.

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30. AW 12 gives general court-martial jurisdiction over any person "who by the law of war is subject to trial by military tribunals."
31. SOP No 56, Hq ETOUSA, 5 Apr 45.
32. Form 30 Ledger.
33. P 98, "Law of Land Warfare," JAGS Text No 7.
34. SOP No 56, Hq ETOUSA, 5 Apr 45.
35. Ltr, AG 332, Op NLS, Com Z, ETOUSA, 5 Mar 45, subj: "Organization and Employment of Italian Service Units."

CHAPTER 3

MILITARY JUSTICE PROCEDURE

SECTION 6

104TH ARTICLE OF WAR

28. **Officers.** Punishment was imposed upon officers under the provisions of Article of War 104 in numerous instances, but no statistics are available which reflect the extent of the use of this article. Judge advocates who replied to the questionnaire are overwhelmingly of the opinion that the use of Article of War 104 in the cases of officers was effective. A substantial majority of them think that a permanent record of such punishment should be made on the officers' WD AGO Form No. 66-1 card; this practice was followed in some commands.[1] A minority of judge advocates who answered the questionnaire favor sending a copy of all the papers employed to impose the punishment to the theater commander's judge advocate so that there would be an automatic review, or at least supervision, of the action of the officer imposing the punishment. Most commands permitted the officer accepting punishment to make such explanation as he desired, and this practice is favored by almost all judge advocates who replied to the questionnaire.

a. Sixty-nine per cent of the judge advocates replying to the questionnaire said that the amount of fines which may be imposed under Article of War 104 should be increased, mainly because of the large chasm that now separates punishment under that Article and the only alternative, trial by general court-martial. Suggestions as to the extent of the increase vary, but most favor forfeiting one-half of three months' pay.

b. With one exception, the judge advocates are unanimous in recommending that warrant officers and flight officers be included with commissioned officers in the group which may be fined under the provisions of Article of War 104. Seventy-seven per cent say that all officers to and including the grade of colonel should be subject to fines, and 65 per cent would extend the power to fine to and including the grade of lieutenant colonel.

(1) Of the five base sections in the United Kingdom, only one was commanded by a general officer during part of 1943.[2] All of these base sections had large troop populations and the commander of each of them exercised general court-martial jurisdiction. But to fine an officer under the

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1. AAF Regulations 35-6, 23 Nov 43 and 35-38, 16 Apr 45.
2. Central Base Section, Col Pleas Rogers (became Brig Gen 16 Mar 43); Western Base Section, Col Harry B. Vaughan (became Brig Gen 22 Feb 44 and Maj Gen 14 Nov 44); Eastern Base Section, Col Emmit G. Plank (became Brig Gen, 24 Feb 44); Southern Base Section, Col C. C. Thrasher (became Brig Gen 22 Feb 44); Northern Ireland Base Section, Brig Gen Leroy P. Collins. Eastern Base Section went to France in the late summer of 1944 as Base Section No. 1 and it later became Brittany Base Section. It was commanded by Col Roy W. Grower who became a Brig Gen 10 Nov 44. Western Base Section went to France in the late summer of 1944 as Channel Base Section. It was commanded by Col Fenton J. Jacobs, who became a Brig Gen 8 Nov 44.

provisions of Article of 104 the cumbersome practice of forwarding the correspondence to the Commanding General, Service of Supply (later Communications Zone) European Theater of Operations had to be employed.

29. Enlisted men. Sixty-one per cent of the replies to the judge advocate questionnaire stated that punishment imposed on enlisted men under Article of War 104 was effective in the European Theater of Operations, but many of those included the statement that it would have been more effective had greater punishment been permitted. Most of the 39 per cent who believed such disciplinary action was ineffective were from ground force organizations; their position is that under combat conditions withholding of privileges is meaningless and extra fatigue or hard labor is impractical to enforce. One officer said, "My experience as an enlisted man convinced me that Article of War 104 was a laughing matter among enlisted men." Suggestions made to The General Board include both confinement and forfeitures of pay as authorized punishments under this article:

a. In June, 1945, the commanding general of an infantry division recommended that forfeiture of ten per cent of an enlisted man's pay for one month be authorized as punishment under Article of War 104. Staff judge advocates within the 12th Army Group interviewed by the Staff Judge Advocate of the 12th Army Group generally opposed the plan because of the risk of abuse of the authority by youthful commanding officers. Accordingly, the Commanding General, 12th Army Group, recommended to the Commanding General, European Theater of Operations, that Article of War 104 not be amended in this respect.[3]

b. The Assistant Judge Advocate General said that in a surprisingly high percentage of cases serious error was committed in administering punishment under Article of War 104 and by inferior courts.[4] Ordinarily, there were no means by which the staff judge advocate of a command could assure himself that punishment of enlisted men under the provisions of Article of War 104 was imposed in a lawful manner and was legal punishment.

SECTION 7

PRE-TRIAL PROCEDURE

30. Investigation preliminary to filing charges. The usual offenses were generally investigated in an informal manner by an officer of the accused's unit. In cases disposed of by summary courts-martial or under Article of War 104 these investigations were sufficient; in those cases referred to special or general courts-martial more often they were not. Summaries of evidence (Par 32, Manual for Courts-Martial, 1928) usually were not prepared; the officer investigating in the first instance did not have adequate knowledge or training to adduce the essential, provable facts.

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3. 2d Ind, AG 250 (JA, Hq 12th Army Group, 12 July 1945 and informal memorandum of the SJA, 12th Army Group, 3 July 1945 on the subject.
4. MJ Cir 9, 14 Dec 1944; MJ Cir 7, 15 Aug 1944.

a. Preliminary investigations were usually not immediately conducted when the offense was committed in a distant command and the accused was apprehended there, unless the nature of the offense was such that the Criminal Investigation Department was promptly called into the case. There were exceptions where the accused was certain to be tried in the area where the offense was committed, e.g., Paris, France or London, England, and where he was likely to be tried there because civilian victims or witnesses were involved.

(1) The customary procedure was to notify the commander of the accused's organization by a "Delinquency Report," a form of which is attached as Appendix 7. The information required to complete this report was so meager that no investigation was prerequisite to its completion. It was believed from the information so furnished that the case would not be disposed of by reference to a summary court-martial or under Article of War 104, the burden thereupon fell upon personnel of the accused's unit to accomplish the investigation.

31. The Criminal Investigation Department of the Provost Marshal's Office.[5] More serious cases, especially those involving civilians, were referred to the Criminal Investigation Department for investigation. These investigators (with exceptions in two or three commands) worked under the direct supervision of the provost marshal. They performed a herculean task, and a very large number of convictions can be directly attributed to them. However, some judge advocates expressed the opinion that these investigators operated too slowly, laid too much stress upon obtaining a confession, and apportioned too little time to interviewing witnesses other than the accused and developing the broader aspects of the investigation. It is a fact, especially toward the end of the campaign in Europe, that more and more frequently courts were rejecting confessions, reviewing authorities were disapproving sentences, and boards of review were holding records of trial legally insufficient because the voluntary nature of a confession was doubtful.[6] Almost all judge advocates believe that Criminal Investigation Department teams should be retained but that they should operate under the supervision, if not the direction, of the staff judge advocate.

32. Charges and Specifications.

a. An allegation that the accused did, at APO 000, commit a certain offense was never proper pleading in the European Theater of Operations, although this form of allegation was sometimes employed. The geographical place of the offense was disclosed in the specifications; usually these places and names were so closely identified with the designation of an organization that it was necessary to classify charge sheets and all accompanying papers, including the records, "confidential." The result was that nearly every paper handled by a judge advocate was so classified and required consequent troublesome safeguarding

b. Appendix 4, Manual for Courts-Martial, 1928, was found inadequate for forms of specifications to meet situations frequently

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5. See footnote 79, Chapter 2, this study.
6. Cf footnote 6, 2d series, Chapter 2, this study.

arising in the European Theater of Operations. For example, there are no forms which a layman could readily adopt to allege:

(1) Violations of security;
(2) Violations of censorship;
(3) Statutory rape;
(4) Reckless driving;
(5) Involuntary manslaughter;
(6) Currency violations;
(7) Joy riding;
(8) Black market activities (under Article of War 96);
(9) Entering off-limit areas or establishments;
(10) Indecent assault;
(11) Wrongful discharge of a firearm (other than through carelessness);
(12) Insubordination; and
(13) Altering, or forging, a pass, or possessing such an instrument.

These offenses were very common in the European Theater of Operations; inexperienced officers could not be expected to be able to allege the offenses correctly and, in fact, they did not. Communications to judge advocates were usually very slow- sometimes impossible. The result was that some records of trial by inferior courts-martial had to be held legally insufficient by the general court-martial authority, and general court-martial charges were sometimes inartistic and often considerably delayed.

c. The following numbered forms (Appendix 4, Manual for Courts-Martial, 1928) were never, or almost never, used in the European Theater of Operations: 2, 3, 4 to 12 inclusive, 16, 17, 18, 40, 41, 43, 54 to 57 inclusive, 60, 62 to 65 inclusive, 73, 74, 75, 80, 82 to 85 inclusive, 121, 132, 145, 151, 157, 159, 164 and 166.

d. One of the major difficulties with charges and specifications resulted from the manner in which they were employed. Thus, it has been said:

> "The cases which causes the greatest trouble in this office are those where the offenses are over-charged. For example, assault with intent to rape, when the offense is really an aggravated assault or indecent behavior; assault with intent to do bodily harm instead of assault and battery; disobedience or orders when it should be fail to obey, or often drunk and disorderly conduct. Not only is it difficult to prove the more serious offense and often impossible to do so, but the results are bad in every way. The prisoner often gets too heavy a sentence which will cause repercussions back home against the Army, and clemency and restoration are made more difficult because of the long sentence. You will get better results in every way if the charges are drawn having in mind the appropriate sentence the accused deserves. It is not necessary to charge the maximum offenses that can be spelled out of the facts."[7]

33. Article of War 70 Investigations. The overwhelming majority of replies to the Judge Advocate's Section of The General

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7. MJ Cir 3, 11 Mar 1944; and see par 2, Sec I, MJ Cir 6, 1 July 1944.

Board's questionnaire contain the statement that Article of War 70 investigations in the European Theater of Operations were not adequate.[8] Among the causes assigned were that officers appointed for that office were too junior, untrained and inexperienced and were burdened with too many other duties. They were handicapped, particularly in France and Belgium, by the scarcity of skilled interpreters. Frequently the investigations were perfunctory. No effort was made to interview witnesses whose statements had already been obtained, or to verify or to enlarge upon the versions given, and insufficient attention was devoted to channels of inquiry consistent with the innocence of the accused. The concensus is that Article of War 70 investigations should have been conducted by permanent, skilled, trained investigators stationed at the regimental or equivalent level and that it is immaterial whether they are organized as teams or operate individually. Most judge advocates say that the investigation should be mandatory in all general courts-martial cases and also where new charges or specifications have been added that differ materially from those originally investigated.[9] However, judge advocates are almost unanimous in recommending against Article of War 70 investigations in special court-martial cases. It is urged by some that in cases involving enlisted men the investigation could and should be conducted by qualified non-commissioned officers.

34. Psychiatric examinations of accused prior to trial were widely employed;[10] in the First U. S. Army and in the Fifteenth U.S. Army every individual was given a thorough pre-trial psychiatric examination.[11] In most commands such an examination was not made unless the nature of the offense or the accused's history indicated its desirability and in some commands a psychiatric examination in every case would have been impracticable. If the issue was not raised prior to trial but the court questioned his sanity, it would request an examination and adjourn pending receipt of the psychiatric report. Usually, proper disposition of the case was facilitated if the examination had been conducted prior to trial and the results of the examination could be reflected in the advice of the staff judge advocate.

35. Advices. Staff judge advocates experienced no particular or unusual problems (except those of substantive law which are discussed in Chapter 2) in writing advices required by military law.[12] In some commands the volume of general court-martial charges was so great and personnel so limited it was found necessary to use mimeographed forms of advice. The advice was completed merely by filling in the pertinent personal data concerning the accused and the nature of the charges and specifications. Those who used these forms concede their undesirability but contend that necessity justified the practice. They say that in all cases charges and accompanying papers were studied and considered equally as carefully as if

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8. See also MJ Cir 3, 2 July 1945. The most favorable comments came from judge advocates of infantry divisions.
9. When charges of misbehavior before the enemy under AW 75 were changed to desertion under AWs 28 and 58, it was required that AW 70 be complied with. (Teleprinter message from Hq European Theater of Operations NO EX 13987, 27 Feb 1945.)
10. See X, MJ Cir 6, 1 July 1944.
11. See III, par 4a, Final After-Action Report, Judge Advocate Section, Fifteenth US Army and the reply of the former Staff Judge Advocate of the First US Army to the questionnaire.
12. MCM, 1928, par 35b, AW 70.

an individual advice had been written.

SECTION 8

TRIALS

36. Trial within Five Days.

a. The letter of The Judge Advocate General, file SPJGF 1944/10, subject: "Time Element in Trial by Courts-Martial,"[13] dated 14 February 1944 did not receive general distribution to officers exercising general court-martial jurisdiction in the European Theater of Operations until sometime in April, 1944. It was republished in part in Military Justice Circular No. 5, 10 May 1944. Plans for the trial of offenders at or near marshalling areas (the invasion of France was imminent) were complete by that time, and most of these plans called for trials within 24 hours.[14] The delay in the distribution of the letter resulted in the trial of many accused during the period immediately before and after 6 June 1944 in less than five days, and at least one record of such a trial was held legally insufficient by a Board of Review for that reason.[15]

b. Many combat organizations did not receive The Judge Advocate General's letter until months after the invasion because they were sealed in marshalling areas at the time of its distribution, their publications were already packaged and waterproofed, and, in France, their positions were constantly changing. It follows that its provisions were not observed by those organizations.

c. With the exceptions discussed in the two preceding sub-paragraphs, from June 1944 until 8 May 1945 accused were not tried in the European Theater of Operations within five days of the service of charges unless they expressly consented to such trial or unless military necessity compelled it. In the latter case, it was necessary for the record to show affirmatively that the exigencies of the military situation required immediate trial.[16]

37. Motions for Continuances presented no reported problems in the European Theater of Operations. Where the accused desired a continuance the usual practice was to arraign him and, perhaps, to hear such evidence as the trial judge advocate chose to adduce at that proceeding, and then to continue the case to a date agreeable to the accused and his counsel.

38. Common Trials. A common trial is the trial of two or more separately charged accused who allegedly have committed distinct but simultaneous offenses of the same character, in the same

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13. This letter recommends that an accused not be tried within five days of the service of charges upon him in the absence of the rare occasions when military necessity compels it.
14. Page 234, First US Army Report of Operations, 20 Oct 1943 to 1 Aug 1944, Annex No. 20.
15. CM ETO 3178, Steele, 1944.
16. CM ETO 4564, Woods, 1945 is the leading case on this subject. Sometimes, the showing in the record amounted only to a representation that military necessity existed without additional explanation.

place, and provable by the same witnesses.[17] Common trials were widely used in the European Theater of Operations. This procedure was expedient, for it resulted in only one trial by one court, but it was potentially prejudicial where one accused had confessed and had implicated a co-accused in his confession. The danger of harmful error was eliminated by advising the court that oral or written statements of a certain accused were evidence only against the accused making the statement and must not be considered as evidence against any other accused, and by deleting the names of or references to other accused when they appeared.[18] During almost the entire time embraced by this study, an accused could not be tried in a common trial if he objected to it;[19] but almost coincidentally with the cessation of hostilities it was held that where the appointing authority directed a common trial, the denial or granting of a motion to sever the cases was within the sound discretion of the court.[20]

39. An explanation of the rights of the accused as a witness and the meaning of a plea of guilty were usually made in inferior courts-martial cases and were almost always given in general courts-martial trials. Such explanation were incorporated in the record of trial. Originally, failure to make such explanations was the subject of individual letters from the Assistant Judge Advocate General (or his Chief of the Military Justice Division); subsequently memoranda on the subject were published in Military Justice Circulars No. 3, 11 March 1944, No. 4, 8 April 1944 and No. 6, 1 July 1944. After the distribution of Technical Manual 27-255, failure to advise the accused of his rights as a witness in substantially the language which it contained would invariably result in comment by the Staff Judge Advocate, European Theater of Operations, in cases reviewed by him. These repeated reminders had a salutary effect and practically eliminated this defect from all records of trial.[21]

40. Documentary Evidence.

a. Morning Reports. The admissibility of extract copies of morning reports was the chief procedural difficulty encountered by the staff judge advocate of one of the busiest jurisdictions. This difficulty, present in every command in greater or lesser degree, was occasioned by three main causes: (1) want of personal knowledge by the signer of the facts recited; (2) defective preparation and execution of the original morning report; and, (3) defective preparation and authentication of morning report extracts.

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17. CM ETO 6148, Dear, et al, 1945.
18. CM ETO 895, Davis, et al, 1944.
19. Par 13, MJ Cir 5, 4 Oct 1943.
20. CM ETO 6148, Dear, et al, 1945. (Cf Dig Op JAG, 1912-40, Sec 395(33), Dig Op JAG, 1912-40, Sec 1309, and par 91b, TM 27-255).
21. A similar warning was always given to military witnesses when it appeared that their testimony was likely to incriminate them. The question frequently arose whether the nationals of another country were entitled to be advised of their rights under AW 24 against self-incrimination (the statute provides "no witness. . .shall be compelled", etc) when testifying before courts-martial sitting in their own country. The problem was particularly troublesome in trials involving black market transactions where the witness was an accomplice of the accused and was liable to prosecution under the laws of his own country. So far as is known to The General Board, it was never decided whether such witnesses were entitled to be advised of any rights they might have by virtue of AW 24.

Slightly more than half the judge advocates agree that it is necessary to liberalize the rules respecting admissibility of morning reports. Almost a dozen specifically urge adoption of the rule of admissibility in Federal courts of records kept in the usual course of business.[22] Some believe that the frequently repeated requirement of personal knowledge on the part of the signer is unrealistic and should be abandoned; others favor strict application of the rule excluding hearsay evidence. During the period from January, 1942 to May, 1945, four different Army Regulations[23] and one Theater circular[24] governed the preparation of morning reports; but, although several[25] of these authorities permitted someone other than the unit commander to sign the report, the requirement of personal knowledge remained the same.[26] More than one judge advocate noted that personnel officers and, frequently in combat, company commanders, do not have personal knowledge of facts recited in morning reports. Failure to follow established procedure[27] in the preparation and execution of morning reports and extracts was responsible for many difficulties. Several judge advocates believe that the morning report extract form[28] should be simplified and accompanied by precise instructions which the most inexperienced personnel could not misunderstand. There were many judge advocates, even among those who did not favor greater liberality in admitting morning reports, who remarked the necessity of clarification of the mass of rules, sometimes apparently conflicting,[29] concerning the admissibility of morning report extracts.[30] It was suggested that emphasis be placed upon proper instruction of personnel whose duty it was to prepare morning reports and extracts. Finally, to combat the frequently experienced difficulty of obtaining any morning reports at all, it was proposed that one central office be designated as the repository of extract copies of morning reports of all units in a theater, and that each time a unit reported an unauthorized absence the unit be required immediately to send triplicate copies of the morning report to this central office.

b. Confessions and Admissions. Written confessions and admissions of the accused prior to trial supplied the necessary proof of the offense or offenses in a substantial number of cases tried in the European Theater. For the most part, the provisions of the Manual for Courts-Martial[31] afforded an adequate basis for decision of legal questions concerning this evidence. Considerable difficulty was experienced, however, in determing whether or not other evidence sufficiently established a corpus delicti.[32] This

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22. 28 USC 695; see CM ETO 4691, Knorr, 1945; Memo for TJAG, 30 Mar 1945, 1 Dig Op ETO 113-115.
23. AR 345-400, 25 Aug 1938; AR 345-400, 7 May 1943; AR 345-400, 1 May 1944; AR 345-400, 3 Jan 1945.
24. Cir 119, Hq ETOUSA, 12 Dec 1944
25. Par 6a, AR 345-400, 7 May 1943; Cir 119, Hq ETOUSA, 12 Dec 1944; par 43a, AR 345-400, 3 Jan 1945.
26. CM ETO 5633, Gibson, 1945; CM ETO 8631, Hamilton, 1945; CM ETO 10331, Jones, 1945.
27. AR 345-400, 3 Jan 1945. This was especially true of entries involving change of station.
28. Form No. 44, WD AGO.
29. Compare CM ETO 527, Astrella, 1943, with CM ETO 5414, White, 1945 and CM ETO 5593, Jarvis, 1945.
30. See generally, 1 Dig Op ETO 105-115.
31. MCM, 1928, par 114, pp 114-117.
32. MCM, 1928, par 114a, p 115; see Dig Op JAG, 1912-40, par 395 (11), pp 207-208; 1 Dig Op ETO 100.

was true, for example, in prosecutions under Articles of War 58 and 61 where a morning report was unobtainable to prove unauthorized absence but the accused had conceded it prior to trial. This problem was further complicated by the difficulty sometimes of distinguishing between confessions and admissions,[33] and the practical necessity of making the distinction since it was not necessary to establish a corpus delicti to support an admission.[34] It has been held[35] that in a desertion case the corpus delicti is the unauthorized absence; the corpus delicti in a simple case of absence without leave was not so clear.[36] In a desertion case admission by the accused only of unauthorized absence was not an acknowledgment of guilt of the crime charged, although it unquestionably involved acknowledgment of guilt of a lesser included offense. But it was never settled whether or not a pre-trial statement conceding absence without leave, inadmissible without a corpus delicti where only absence without leave was charged, was admissible without a corpus delicti where desertion was charged, and would sustain a conviction of the lesser included offense of absence without leave. There was also difficulty with confessions in which the accused had acknowledged guilt of several offenses and, for one reason or another, it was not possible to try him for all of them. It was frequently difficult to separate the various portions of the confession, yet there was often grave danger of prejudice to the accused if the entire confession was received.[37]

c. Other Documentary Evidence. The admissibility of documentary evidence was subject to the rule excluding hearsay evidence[38] except as this rule was expressly qualified by the Manual for Courts-Martial.[39] In consequence, reports of arrest or apprehension,[40] deliquency reports[41] and various other reports,[42] except documents receivable as official written statements, were not admissible in evidence.[43] A little more than half of the judge advocates favored greater liberality in admitting documentary evidence of all kinds; the remainder were opposed to any change. Almost a dozen

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33. MCM, 1928, pars 114a, 114b, pp 114, 116; Dig Op JAG, 1912-40, par 395(3), pp 198-199.
34. CM ETO 804, Ogletree, 1943; CM ETO 2535, Utermoehlen, 1944.
35. CM ETO 6221, Rodriguez, 1945; CM ETO 6810, Shanbaugh, 1945.
36. CM ETO 4915, Magee, 1944.
37. Some judge advocates attributed difficulty in using confessions to failure of the CID agents to obtain sufficient evidence to establish the corpus delicti. (See par 31 of this study). Other CID techniques occasionally presented difficulties. Sometimes several different agents questioned an accused and then one or two others obtained the confession; or each of two agents working together on the case elicited part of the confession out of the presence of the other. It was therefore difficult to establish that the confession was voluntary or rebut evidence of the accused that it was not. A further difficulty arose in trials of numerous accused where one accused had implicated one or more of the co-accused in a pre-trial statement. See MCM, 1928, par 114c, p 117 and par 38 of this study.
38. MCM, 1928, par 113a, 117a, pp 113-120.
39. MCM, 1928, par 117-119, pp 120-124.
40. CM ETO 1645, Gregory, 1944; CM ETO 1921, King, 1944.
41. CM ETO 5740, Gowins, 1945.
42. CM ETO 292, Mickles, 1943; CM ETO 438, Smith, 1943; CM ETO 5805, Lewis, 1945; CM ETO 1161, Waters, 1944.
43. MCM, 1928, par 117a, p 121.

expressly urged explicit adoption of the rule applicable in Federal courts in respect of records kept in the usual course of business.[44] Several officers believed there should be increased liberality but thought that admissibility should depend upon the character of the document as an official writing.[45] A half-dozen officers commented upon the difficulty of establishing apprehension or return to military control in prosecutions under Articles of War 58 and 61. All of the judge advocates who favored more liberal admissibility of documentary evidence believed that reports of apprehension should be admissible, although one officer thought this should be true only where it appeared that the entry was based upon personal knowledge, and one thought that liberality should not obtain in capital cases. One officer approved the admissibility of reports of apprehension but not delinquency reports. Another proposed that each unit apprehending a soldier immediately note the fact on its own morning report and transmit extract copies of the entry to the soldier's unit.

41. Stipulations. Written and oral stipulations were frequently used in military trials in the European Theater. Defense counsel were encouraged to save time, labor and expense by joining in stipulations relating to unimportant or uncontested matters.[46] These stipulations were of two types: (1) stipulations of fact obviating the necessity of other proof; and, (2) stipulations of expected testimony obviating the necessity of obtaining the witness but not necessarily the necessity of further proof.[47] They commonly included stipulations that the accused was in the military service, that he returned to military control on a specified date, that a named person died on a certain date from stated causes, and that the value of particular personal property was a stated amount. A stipulation was tendered by the side on whose behalf it was offered, and it was accepted or rejected by the law member subject to the objection of any other member of the court.[48] The Branch Office of The Judge Advocate General consistently emphasized the necessity for obtaining the express consent of the accused to all stipulations, for demonstrating in the record that the accused understood the stipulation, and for avoiding stipulations of essential elements of the offense or contrary to the plea of the accused.[49] There were instances in which stipulations apparently exceeded these limits.[50] In at least one case, a stipulation that the accused "returned" to military control was interpreted as some evidence of unauthorized absence.[51] Failure to obtain explicit consent of the accused to a stipulation was generally a non-prejudicial irregularity.[52]

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44. 28 USC 695; see CM ETO 2470, Tucker, 1944; see also, Memo for TJAG, 30 Mar 1945, 1 Dig Op ETO 113-115, and generally, 1 Dig Op ETO 102-104.
45. MCM, 1928, par 117a, p 121.
46. MCM, 1928, par 45b, p 39; TM 27-255, par 68b, p 62.
47. TM 27-255, par 68b, p 61.
48. TM 27-255, App 2, p 210, Acceptance or rejection was discretionary. CM ETO 1107, Shuttleworth, 1943.
49. Sec 3, MJ Cir 4, 8 Apr 1944; par 1c, Sec 1, MJ Cir 6, 1 July 1944; Sec VI, MJ Cir 9, 14 Dec 1944. See also MCM, 1928, par 126b, p 136; TM 27-255, par 68b, p 62.
50. CM ETO 3686, Morgan, 1944 (stipulation to prove corpus delicti); CM ETO 6810, Shambaugh, 1945 (stipulation to prove voluntary nature of confession); CM ETO 4564, Woods, 1945 (stipulation contrary to subsequent sworn testimony of the accused).
51. CM ETO 4915, Wages, 1944.
52. CM ETO 2951, Pedigo, 1944; CM ETO 739, Maxwell, 1943; CM ETO 5765, Mack, 1945; cf. AW 37.

42. Authentication of Documents of Record in a Foreign Country. It was frequently necessary for trial judge advocates (and, less frequently, defense counsel) to prove a public record of a foreign country, particularly records of birth. A Federal statute provides that in such cases the document must be authenticated by its custodian and, further, that a resident consular officer must certify that the authenticating officer was the lawful custodian of the record.[53] An opinion of a Board of Review holds that this statute is applicable to courts-martial and unless such a record bears the required certificate of a U. S. Consul it, upon objection, is inadmissible in evidence.[54] In most cases it was impracticable for military counsel in the European Theater of Operations to obtain such a certification.

43. Depositions.

a. The 25th Article of War authorizing the taking and using of depositions before military courts had no application in the European Theater of Operations, but the appointing authority had the power to direct the taking of depositions.[55] Practical considerations usually required written instead of oral interrogatories, and they were generally found to be unsatisfactory except for the proof of routine matters. Although actual statistics are not available, depositions were infrequently used during the operations in Europe.

b. The established procedure for depositions contemplates that the charges be referred to the trial judge advocate for trial prior to the time the interrogatories and cross-interrogatories were prepared and forwarded to the person before whom the deposition was to be taken. It was not infrequent that, by that time, an essential witness was a battle casualty and not available; hence, sometimes, cases could not be established because of a failure of proof. A more expeditious means of perpetuating testimony was needed.

c. Almost all trial judge advocates, at one time or another, were seriously handicapped by the provision of Article of War 25 which prohibits the use of depositions in capital cases except with the consent of the accused. The question whether or not they should be used in such cases was answered by an army staff judge advocate who favors their use in all cases, as follows: "If one knew the difficulty with witnesses and communications under field conditions, he would vote 'aye,' too." Only one-third of the officers who answered the questionnaire agree with this officer; the others concur with another staff judge advocate who wrote: "Much difficulty was experienced in the inability to use depositions in capital cases. However, it is felt that the life of the accused is of sufficient importance that no change should be made in this particular." A very few advance the suggestion that depositions of experts be admitted to prove the death and its cause in murder trials.

44. Admissibility of Previous Convictions.

a. Only two judge advocates who answered the questionnaire believe that no evidence of previous convictions should be considered

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53. 49 Stat 1563; 28 USC 695a.
54. CM ETO 2663, Bell, 1944.
55. CM ETO 567, Radloff, 1943.

by the court. They contend that when one has been punished for a past offense, the record should not operate to his detriment; that the wrongdoer should be punished only in proportion to the offense of which he stands charged. However, 70 per cent of the replies favor the admissibility of all previous convictions instead of the limited number now authorized by paragraph 79, Manual for Courts-Martial, 1928.

b. Seventy-two per cent of the judge advocates think that in officer cases prior punishments under Article of War 104 should be admissible in evidence in the same manner as are previous convictions at the present time.

45. Findings and Sentences. On 26 May 1944, a United States District Court held, in effect, that a finding of guilty of an offense for which the death penalty is authorized must be unanimous.[56] This decision was reversed on 20 December 1944 by a United States Circuit Court of Appeals.[57] In the European Theater of Operations, pending the Government's appeal, the death penalty was not executed unless all members present concurred in the finding of guilty. In all capital cases in which the death penalty was not adjudged, the unanimity of the vote on the finding was recorded if such was the fact.[58] This doubt cast on the long established procedure resulted in some confusion and, frequently, where there was a dissenting vote on the capital charge, a court would convict of a non-capital lesser included offense, e.g., absence without leave when the charge was desertion. This was the only difficulty encountered in the procedure governing findings and sentences, and judge advocates overwhelmingly advise against any change in the procedure if the present general system of courts-martial is to be retained. A few suggest that the same number of votes be required for the finding as is required for the sentence, particularly where the death penalty is imposed. One officer believes that to withhold announcement of sentences for purely military offenses would lessen criticism by the public and in the press.

46. Punishment of Officers. One of the most often repeated criticisms of the administration of military justice in the European Theater of Operations is that officers escape with less punishment than is imposed upon enlisted men for the same offenses. That there is a general basis in fact for this censure is recognized by the Secretary of War who said: "No sufficient reason exists for imposing a shorter term of confinement upon an officer than upon an enlisted man."[59]

a. Leniency of courts-martial toward officers is demonstrated by a study of general court-martial orders in the cases of officers published by Headquarters, European Theater of Operations (and Headquarters, U. S. Forces, European Theater) during 1945.

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56. Hancock v. Stout, 55 F Supp 330.
57. Stout v. Hancock, 146 Fed (2d) 741 (Certiorari was denied by the U. S. Supreme Court).
58. Letter EOTJAG-E 250.47, 20 June 1944, subject: "Death Penalty", Branch Office of The Judge Advocate General with the European Theater of Operations; par 6, MJ Cir 7, 15 Aug 1944; par 6, Sec VIII, MJ Cir 9, 14 Dec 1944.
59. Letter WD, 18 May 1945, AG 250.4 (16 May 45) OB-S-USW-M, subject: "Uniformity of Sentences Adjudged by General Courts-Martial."

The period covered was 1 January 1945 to 3 October 1945 but all offenses were committed prior to V-E Day. There are 185 such orders. In 56, or 30 per cent, the Commanding General expressed disapproval of the inadequate sentences imposed by courts-martial, or as modified by the reviewing authority.[60] These cases were all cases in which serious punishment had been imposed, necessitating confirmation under Article of War 48, and therefore do not truly represent the frequency of inadequate sentences of officers, since there were many cases involving officers in which the sentence did not require confirmation.

SECTION 9

AFTER TRIAL PROCEDURE

47. Reviews of the Staff Judge Advocate were prepared after the trial of every case by a general court-martial, whether the accused was convicted or acquitted.[61] Signed, triplicate copies were forwarded with each record of trial. It was required that they contain a careful statement of why serious errors and irregularities did not affect the substantial rights of the accused.[62]

a. Whenever it was possible staff judge advocates interviewed the accused before writing the review and making their recommendations.[63] The reviews were expected to contain information concerning the previous civil and military record (including combat) of the accused, his general character and standing in the Army, his military fitness and suitability and a summary of any psychiatrist's report.[64] Some staff judge advocates found it convenient and desirable to supplement the review by completed forms such as the one attached as Appendix 9.

48. The 48th Article of War.

a. Records of trial requiring confirmation under the 48th Article of War were forwarded to the Commanding General, European Theater of Operations. In those cases where he was the confirming authority (dismissal of an officer other than a general officer and death sentences of persons convicted of murder, rape, mutiny, desertion or as spies),[65] the record of trial was painstakingly reviewed by his Staff Judge Advocate. After the review, the Commanding General gave each case careful personal attention, even during the most crucial periods of the war, before acting upon it.[66] After his action, the record of trial was forwarded

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60. General Court-Martial Orders Nos. 3, 8, 9, 23, 26, 42, 47, 71, 74, 98, 117, 120, 121, 122, 123, 135, 144, 152, 154, 155, 179, 186, 189, 214, 222, 225, 246, 253, 260, 262, 263, 273, 275, 276, 282, 283, 291, 304, 320, 324, 327, 330, 342, 343, 349, 372, 375, 376, 377, 407, 412, 419 and 445, European Theater of Operations and U. S. Forces, European Theater, 1945.
61. MJ Cir 3, 11 Mar 1944.
62. MJ Cir 7, 1 Dec 1943.
63. MJ Cir 6, 1 Jul 1944.
64. MJ Cir 6, 11 Nov 1943; MJ Cir 3, 11 Mar 1944 and MJ Cir 1, 16 Apr 1945.
65. AW 48.
66. During hostilities the Commanding General usually devoted a considerable portion of each Sunday to courts-martial matters.

for review by a Board of Review in the Branch Office of The Judge Advocate General with the European Theater of Operations and by the Assistant Judge Advocate General, unless the confirming authority's action on the sentence made further review unnecessary. There the record was reviewed under Article of War 50½ (and it was held that in such cases the Board of Review had the power to weigh the evidence).[67] If it was found legally sufficient, the holding by the Board of Review was returned to the Commanding General, European Theater of Operations by first indorsement stating that fact and the further fact that he now had authority to order the sentence into execution; if found legally insufficient, the indorsement was appropriately worded. In the former case, Headquarters, European Theater of Operations published the general court-martial order.

b. Two phases of this procedure have been widely criticized: First, that a commanding general of a theater of operations does not have the power to confirm in all cases requiring such action. An attempt was made to avoid the complications inherent in this limitation of Article of War 48 with respect to cases involving Article of War 75, by acquainting all officers exercising general court-martial jurisdiction with the desire of the Commanding General, European Theater of Operations, that where evidence of misbehavior before the enemy established prima facie guilt of desertion, consideration be given to charging the offense as a violation of Article of War 58.[68] Second, that he is required to act (frequently in very grave tactical times) before the legal sufficiency of the record is determined pursuant to Article of War 50½. Further, in the second category, the exhaustive review of the Staff Judge Advocate of the European Theater of Operations was, in a large measure, duplicated by the opinion of a Board of Review.

49. Article of War 50½.

a. The function of the Branch Office of The Judge Advocate General with the European Theater of Operations is stated in CM ETO 1631, Pepper, 1944. Pertinent portions of the opinion are:

* * *

"'The Assistant Judge Advocate General is one of the assistants of The Judge Advocate General and as such is not under the control or supervision of the commander of the forces with which he is serving insofar as concerns the performance of his duties under Article of War 50½.

"'The appellate review and judicial powers incident thereto pertaining to the Assistant Judge Advocate General, the Board of Review and other elements of his Branch Office involve the judicial power generally of holding records of trial legally sufficient or legally insufficient to support findings of guilty and sentences. They include the power of passing upon the legal sufficiency of sentences approved or confirmed by the Commanding General, European Theater of Operations, or confirmed by any other

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67. CM ETO 1631, Pepper, 1944.
68. Appendix 5. See par 7 of this study.

confirming authority in cases in which the records of trial are properly referred to the Branch Office. These judicial powers cannot be appropriately performed in conformity with the governing statute (Article of War 50½) unless all elements of and separated from the command or commands which the Branch Office serves. The Assistant Judge Advocate General will not therefore perform the duties of staff judge advocate of any reviewing or confirming authority in any case which may reach his office for appellate review, except as he may give advice to a reviewing or confirming authority in his capacity as Assistant Judge Advocate General under Article of War 46 and paragraph 87b (page 75) of the Manual for Courts-Martial."

* * *

"It is manifest from the War Department's administrative interpretation of Article of War 50½ above quoted that the jurisdiction of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations and of the Board of Review in his office with respect to those cases wherein the sentences must be confirmed by the Commanding General, European Theater of Operations, under the provisions of the 48th Article of War, is restricted and limited and is not identical with that of The Judge Advocate General and the Board of Review in his office. Their authority upon appellate review of the records of such cases is the same as the authority of The Judge Advocate General and Board of Review in cases not requiring the confirmation of the President."

The original Board of Review in that office (composed of Judge Advocates Riter, Van Benschoten and Ide, who was shortly thereafter replaced by Lieutenant Colonel Sargent), faced with paucity of precedent, pioneered in reconciling law and the military exigencies in a theater of operations. On 8 May 1945, there were four such Boards of Review; they had decided 1416 cases between 1 January 1942 and that date. Although for a period of time there was considerable delay in their opinions, due to lack of personnel, their work has won the unstinted praise of judge advocates stationed in the United Kingdom and in Europe.

b. There is a marked trend of opinion that all general court-martial cases should be reviewed by a Board of Review under Article of War 50½; but a poll of judge advocates in the European Theater of Operations revealed that only about 28 per cent of those who expressed themselves on the subject favored such a change in the law. A few believed that the Boards of Review should have one or more civilian jurists as members; one believed that there should be a means of permissive appeal from the decisions of Boards of Review to the Supreme Court of the United States.

Many judge advocates say that the power conferred upon Boards of Review and the Assistant Judge Advocate General by paragraph five of Article of War 50½ should be the same as the authority granted by paragraph three of that Article.

50. Publicity of Sentences. The policy in the European Theater of Operations to give courts-martial sentences wider publicity than attended normal distribution in the interest of deterrent effect, was first published in Letter, Headquarters European Theater of Operations, United States Army, AG 250.4 P, Subject: "General and Special Court-Martial Orders," 8 April 1943. This letter was followed by paragraph 10, Section II, Circular 72, 9 September 1943; paragraph 10, Section II, Circular 101, 25 December 1943; paragraph 10, Section I, Circular 13, 7 February 1944; paragraph 11b, Section II, Standing Operating Procedure No. 35, 16 July 1944 and letter, file AG 250.4/1 OpJA, Subject: "Military Justice Practices," 6 January 1945, all Headquarters, European Theater of Operations. The directive of 7 February 1944 provided that "this should consist of a brief semi-monthly bulletin, digesting and describing in plain, non-technical language the significant* * *court-martial sentences* * *during the period" and it was not substantially changed by subsequent ones. Copies of general court-martial orders published by Headquarters, European Theater of Operations were distributed to each officer exercising general court-martial jurisdiction so that significant sentences published in those orders could be disseminated to the lower commands.[69] Brief factual accounts, without names, were published in "Stars and Stripes" after execution of each court-martial death sentence.[70]

a. Most commands attempted to comply with these provisions but frequently were unable to do so because of the large number of pending court-martial matters and the co-existing shortage of clerical help. Judge advocates in the European Theater of Operations are almost unanimous in expressing doubt that any benefit was derived from such or similar publicity; but most of them are also of the opinion that the practice should be continued and, even, that its scope should be enlarged.

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69. Letter, Hq ETOUSA, 28 Dec 1944, file AG 250.4 EdGA, Subject: "Distribution of General Court-Martial Orders."
70. Letter, Hq ETOUSA, 6 Jan 1945, file AG 250.4/1 OpJA, Subject: "Military Justice Publicity Practices."

CHAPTER 4

COURTS-MARTIAL

SECTION 10

SUMMARY COURTS-MARTIAL

51. Generally, judge advocates believe that summary courts-martial were effective in the European Theater of Operations. Except for the criticism aimed at "on-the-spot" courts,[1] the greatest objection to summary courts-martial is that they were composed of officers with too little training and experience. Some judge advocates suggest that summary courts-martial should be lawyers; almost all favor a legal officer at the regimental or equivalent level, to train and supervise inferior courts, including summary courts. Most judge advocates believe that the jurisdiction of summary courts-martial should include all enlisted men, subject to the right of non-commissioned officers to demand trial by special courts-martial and the further limitation that summary courts not be permitted to reduce non-commissioned officers of the first three grades. Opinion is strong that summary courts should not be given the power to fix greater punishment than it now may impose; this belief seems to be bottomed on a lack of confidence in the personnel of the courts as they were composed in the European Theater of Operations. No one suggests that there be a stenographic record of the proceedings, but many favor a summary of the evidence comparable to the one required for special court-martial records.

52. "Police courts" or "on-the-spot" summary courts-martial were widely used in the European Theater of Operations.[2] They were summary courts appointed by proper authority in urban communities where soldiers of different organizations gathered on pass, furlough or duty. The object was to impose swift and sure discipline upon minor offenders, at the place of the offense where witnesses were readily available. A typical (not necessarily model) plan of operating such courts is illustrated by the method employed in one base section, which is set out in Appendix 8.

a. Perhaps no one implement employed in the administration of military justice in the European Theater of Operations has evoked as much controversy as the "on-the-spot" courts. There has been severe criticism, typified by the statement of an air force service command judge advocate: "More bitterness toward, and disrespect of, military justice has been aroused by their (summary courts) use as police courts than any other single phase in the administration of military justice." But there was also praise of the system.[3] No one

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1. See par 52, this study.
2. See par 52, this study.
3. "The problem of administration of military justice throughout this command was one which demanded the continuing attention of the Army Group Judge Advocate's Office. Among other things, a system of summary courts-martial jurisdiction was set up in the various army corps or division areas for the trial of minor offenses such as speeding and drunkenness. Such immediate trial upon apprehension of the violator alleviated the difficulties attendant upon the searching out of necessary witnesses which would have resulted from reporting the incident to the offender's immediate commanding officer for later disciplinary action. The jurisdiction of such summary courts was based upon only two factors; i.e., the accused being a person subject to military law under Article of War 2, and the court-martial being appointed by an officer competent to appoint a summary court-martial. This plan contributed greatly to the enforcement of discipline within this command." (Final After Action Report, Headquarters 12 Army Group.)

criticized the fairness of these courts,[4] but many believe that punishment imposed by authority other than the soldier's own command has an unsalutary effect upon both discipline and morale. Actually, four-sevenths of the judge advocates who expressed themselves on the subject in the answers to the questionnaire favor the system, believing it either desirable or essential; and some of those who are opposed are in favor of it for traffic offenses and in metropolitan areas such as London and Paris.

b. Suggestions for the improvement of "on-the-spot" courts include (the one most repeated) limiting the power of such courts to the imposition of forfeitures and making it discretionary with the offender's own commanding officer whether the conviction should be entered on the soldier's service record. One communications zone section had three types of such courts, one each maintained by the army and the air corps by the invitation of the section and one maintained by the communications zone section. Personnel, when apprehended for minor offenses, were taken before the summary court of the force to which they belonged. The punishments imposed by the various courts were comparable, but they did not evoke criticism of the individual soldier of the air or ground forces to the same extent as did the same punishment when imposed by a summary court of the communications zone section.

SECTION 11

SPECIAL COURTS-MARTIAL

53. Records are not now available of the number of cases tried by special courts-martial in the European Theater of Operations, but a fairly complete total of the number tried in the air and service forces is 43,103.[5] A large majority of the judge advocates polled believe that these courts were effective instrumentalities in the administration of military justice; but there is an underlying current of feeling that they were haphazardly appointed and composed of inferior personnel, and that the review of the records of trial (both by the reviewing authority and the general court-martial authority) was too perfunctory.[6] The thought is shared by almost all that inadequate facilities for the confinement of garrison prisoners materially impeded the effect of these courts in the command. Many suggest that the jurisdiction of the court be enlarged so that it may impose sentences of confinement up to one year, but not a dishonorable discharge, and there are a few who would enable special courts-martial to impose total forfeitures for a fixed period not to exceed one year.[7]

a. The most recurring suggestion is that there should be a

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4. In the Paris "police courts," about 10% of the cases resulted in acquittals.
5. See par 4, this study, and Appendices 2 and 3.
6. The Assistant Judge Advocate General said that many of these records showed irregularities. MJ Cir 9, 14 Dec 1944. One judge advocate replied that special courts-martial were "effective" in that they executed the will of the commander, but that they could not be considered "effective" from the standpoint of distributive justice.
7. The argument made in support of this suggestion is that knowledge that allotments to dependents could be stopped would operate as a convincing deterrent.

lawyer either on the court or in a position of immediate supervision, such as a legal officer at the regimental level. A suggestion intended to expedite the disposition of cases is that the judge advocate (or legal officer) be authorized to accept pleas of guilty; then prepare a summary of the facts of the case and a brief of the law (when desirable) and submit it to the appointing authority, who would fix the punishment.

SECTION 12

GENERALLY

54. Personnel. Almost everyone charged with the administration of military justice experienced considerable difficulty in obtaining qualified personnel for general courts-martial courts. Subordinate commanders often tried (with success) to prevent the detail of their more able officers to a court, or persistently attempted to have them removed, once they had been named.

a. A very substantial number of judge advocates say that it should be jurisdictional that the law member be a member of the Judge Advocate General's Department; all the others agree that he should at least be a lawyer. Some state that his attendance at the trial should be compulsory in all cases and others contend that his rulings on all interlocutory matters should be final. A few would not have the law member vote on either the findings or sentence; they would separate him from the rest of the court as a judge is separated from the jury in civilian courts. Another trend of opinion is that the law member, regardless of his seniority, assume the duties now performed by the president of the court.

(1) Base sections in the European Theater of Operations were usually able to obtain competent law members by utilizing port judge advocates for that purpose. Other commands in the rear were frequently supplied law members by claims units who were uniformly cooperative and helpful in this respect.

b. Able and qualified trial judge advocates and defense counsel were as difficult to secure as law members, largely because so many trained and skilled lawyers in the army were not made available for these offices.

(1) Too frequently, defense counsel were not lawyers and the rights of the accused were insufficiently protected by improvident stipulations, inadequate or no cross-examination of the prosecution's witnesses, and failure to object to improper evidence.[8] Admonition by the Branch Office of The Judge Advocate General with the European Theater of Operations to obtain defense counsel of rank and ability equal to that of the trial judge advocate[9] was only partly effective.[10] A suggestion was made that the general calibre of the defense would be improved if the defense counsel were not

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8. Sec VI, MJ Cir 9, 14 Dec 1944.
9. Par 1, MJ Cir 5, 4 Oct 1943.
10. One staff judge advocate wrote The General Board: "Weak and inexperienced defense counsel are the weakest part today in the court-martial system."

members of the appointing authority's command.[11]

(2) Trial judge advocates, in the European Theater of Operations, usually were lawyers and, generally, performed their duties in a creditable manner. The burden of routine clerical and administrative work placed upon them in a theater of operations, where frequently both transportation and communications were wholly inadequate, caused some inattention to the purely legal phases of the trials of their cases. In commands with comparatively static personnel, such as infantry divisions, they became well trained in military law and practice. In other commands, where the personnel were more transient, records of trial reflected a lack of familiarity with military law and practice on the part of trial judge advocates.

c. The survey conducted by the Judge Advocate Section of The General Board disclosed that 56 percent of those expressing an opinion believed that qualified enlisted men should be detailed for duty as members of courts-martial;[12] a majority thought they should not be trial judge advocates but that they should be appointed defense counsel. Some who oppose having enlisted men as trial judge advocates or defense counsel favor their appointment as assistants. Prisoners interviewed at disciplinary training centers and guard houses almost unanimously said that they would have been better satisfied had enlisted men sat on the courts that tried them. Officers who favor this change doubt that it would improve the quality of the court or change the general trend of findings and sentences, but they argue that such a policy would increase the confidence of both enlisted men and the general public in the administration of military justice. Very few judge advocates believe that enlisted men should be on a court trying an officer, but those who do are decidedly emphatic in asserting their position.[13]

55. Command Control. Opinion of judge advocates who answered

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11. There were, of course, scores of able defense counsel who competently performed their duties.
12. There was no authority to detail either enlisted men or warrant officers as court members, trial personnel or investigating officers. An accused was free to select either as a special defense counsel, although this was discouraged. See TM-27-255, par 73, p. 56.
13. An informal sampling was made among the enlisted personnel of Headquarters Fifteenth US Army to determine the reaction of the enlisted men to the proposition of including enlisted men on courts-martial. The question put was: "Do you think enlisted men would have more confidence in courts-martial if enlisted personnel were included on the court?" About 25 per cent answered with an unqualified "yes." A very few answered in the negative. Some who answered "no" did so with the qualification that officers, carefully chosen, would be more satisfactory. The majority answered "yes" with the qualification that the enlisted men be carefully chosen. A similar survey was conducted at Headquarters, Seine Section, Theater Service Forces, European Theater. There, all enlisted men voted in the affirmative and the majority qualified their answers in the same manner as the majority at Headquarters Fifteenth US Army.

the questionnaire distributed by The General Board, or were personally interviewed, is emphatic that there was too much command interference by the appointing authority in the functioning of courts-martial in the European Theater of Operations. Control of courts-martial was attempted, and largely accomplished, by letters of non-concurrence, admonition and "instruction;" by personal discussions with the court; and by changes in the detail for the court. It was rare when, in time, courts did not reach results, particularly as to sentences, desired by the appointing authority.

a. This lack of confidence in the independence of the courts contributed to cause only 39 per cent of the judge advocates who voted on the question to favor allowing courts, under the present system, to fix sentences, and some of these would forbid comment of any kind on the findings or sentence by the appointing or other command authority. The majority of the negative 61 per cent on this question favor an independent sentencing body answerable directly and only to the theater commander or to the Assistant Judge Advocate General with the theater. About 18 per cent believe that general courts-martial should be completely separated from the command; others would have sentences fixed by the law member, whose command responsibility would be direct to the Assistant Judge Advocate General for the theater of operations instead of to the reviewing authority.

56. Permanent Courts. Some commands utilized relatively permanent courts when and where it was possible to do so and report that the procedure contributed to a better administration of military justice. The system is criticized by some, for it is said that such courts are inclined to become callous and impose unconscionable sentences. This was true in some cases. The sentences imposed by a court established in Western Base Section for trial of First U. S. Army and other combat troops shortly before D-Day (6 June 1944) were so severe that almost all of them were reduced at least 50 per cent by the reviewing authority. Relatively permanent courts appointed by the Commanding General, Seine Section, Communications Zone and sitting in Paris, France, imposed death penalties for desertion, none of which was executed, on 11 accused between 8 March 1945 and 27 April 1945.[14] Nevertheless, the great majority of judge advocates who expressed an opinion favor permanent courts. A few others approved partial permanency, to be attained by detail of a permanent president, law member, trial judge advocate and defense counsel. To circumvent the tendency towards harsh sentences, some propose that the permanent personnel shift and interchange, from court to court. The suggestion that general courts-martial move in circuits is not generally favored although it has strong support. One infantry division judge advocate favors abolishing courts within or for an organization and establishing them by arbitrary theater-wide geographical districts. All troops within the area would come under the jurisdiction of the courts of the district irrespective of their organizations.

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14. General Court-Martial Orders Nos 364, 395, 399, 427, 430, 442, 445, 449, 454, 455, and 456, Headquarters US Forces, European Theater, 1945.

CHAPTER 5

MILITARY COMMISSIONS

SECTION 13

AUTHORITY

57. Authority for the Military Commission. A military commission is a tribunal established to try persons not subject to our military law who are charged with violations of the laws of war or, in places subject to military government or martial rule, for offenses either of a civil nature or against the regulations of the military authorities.[1] It derives its original sanction as a necessary agent for the due prosecution of war and exists under authority of the laws of war.[2] Though not created by statute, it has been authorized by the Articles of War.[3]

58. Authority to Appoint Military Commissions. Paragraph 41 of Field Manual 27-5, "Military Government and Civil Affairs," 22 December 1943, provides: "Military commissions and provost courts may be appointed or convened by the officer in command in the theater of operations. He may delegate this power to subordinate commanders or civil affairs officers. . ." The Commanding General of the European Theater of Operations authorized Army Group commanders, Communications Zone section commanders, and the Commanding General, United States Strategic Air Forces in Europe, to appoint military commissions for the trial of persons subject to the jurisdiction of military commissions and charged with espionage or with such violations of the laws of war as threatened or impaired the security, effectiveness or ability of their forces or the members thereof.[4] The army group commanders were empowered to delegate such authority to subordinate commanders and the power was granted to the Commanding General, First United States Army on 1 September 1944[5] and to the other Armies at later dates.

SECTION 14

JURISDICTION AND PROCEDURE

59. Jurisdiction. The authority granted by the Commanding

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1. Fairman, Law of Martial Rule (2d Ed, 1943) pp 272, 262-278; pars 7, 356, FM 27-10, Rules of Land Warfare, W.D., 1 Oct 1940.
2. Winthrop, Military Law and Precedents (2d Ed, 1920 reprint, pp 831-846.
3. AW 15, 36, 48; Ex parte Quirin 317 U.S. 1; Military Commissions and Provost Courts with Particular Regard to Procedure Including Rules of Evidence, 25 Sep 43, by Lt Col Edwin Green, JAGD, JA Section, Hq ETOUSA; cf par 2, MCM, 1928.
4. ETOUSA Cable No. E-45664, 29 Aug 44, as amended by ETOUSA Cable No. E-45694, 30 Aug 44 to CG, 12 Army Gp; Ltr, Hq ETOUSA, 19 Nov 44, AG 334 OpGA, subj: "Authority to Appoint Military Commissions," to CGs, 6, 12 Army Gp; Ltr, Hq ETOUSA, 14 Jan 45, AG 250.4/1 OpGA, subj: "Authority to Appoint Military Commissions," to CG, US Strategic Air Forces in Europe; Ltr, Hq ETOUSA, 24 Dec 44, no file, subj: "Authority to Appoint Military Commissions," as amended, in the case of Com Z Section Commanders.
5. Ltr, Hq 12 Army Gp, 1 Sep 44, 250.52 (JA), subj: "Appointment of Military Commissions."

General, European Theater of Operations for the appointment of military commissions contained certain jurisdictional limitations and procedural requirements. These were supplemented by military commission regulations of 12 Army Group and 6 Army Group.[6] These regulations authorized the trial of persons generally subject to the jurisdiction of such commissions who were charged with espionage or with such violations of the laws of war as threatened or impaired the security of the United States forces or the effectiveness and ability of such forces or the members thereof. In order to avoid reprisals against Allied prisoners of war, war criminals not in those authorized categories were not tried during the hostilities. Further limitations on jurisdiction were contained in letters to Army commanders authorizing the appointment of military commissions, which withheld permission to exercise jurisdiction over offenses committed by nationals of and certain other civilians in France, Belgium, Luxembourg, and The Netherlands. Furthermore, they were not authorized to exercise jurisdiction over offenses committed in Germany unless they were committed in an area prior to the establishment of military government over that area and before proclamations, laws and ordinances of military government applicable to all persons in such area were issued.

60. Procedure.[7] The commissions were required by such regulation to be composed of not less than three commissioned officers of the United States Army, and a trial judge advocate and defense counsel. It had power to make rules of procedure deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for general courts-martial. Such evidence could be admitted as had, in the opinion of the president of the president of the commission, probative value to a reasonable man. The concurrence of at least two-thirds of the members of the commission present at the time of voting was required for a conviction or sentence. There were provisions for challenge for cause, an oath similar to that provided in Article of War 19, for the swearing of all witnesses; for fees and allowances of witnesses; and, if the accused desired, the right to have the proceedings of the commission interpreted into his own language. Subject to the limitations imposed by superior authority, military commissions could impose fines, imprisonment at hard labor and death. They were not limited to penalties authorized by the Manual for Courts-Martial, or the laws of the United States or the territory in which the offense was committed or the trial held. Provision was made for a record of trial and its examination by the staff judge advocate before action by the reviewing authority. In cases involving a sentences of death, confirmation by the Army Group commander, after examination of the record by his staff judge advocate, was required at first, but, later, Army commanders were authorized to execute death sentences upon approval of the sentence, except where confirmation was expressly required in particular cases by the Army Group commander or Theater

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6. Cir 14, Hq 12th Army Gp, 2 Oct 44, as amended by Cir 21, same hq, 28 Dec 44; Cir 9, same hq, 8 Mar 45; Cir 13, same hq, 29 Apr 45 and Cir 15, same hq, 11 Jun 45; GO No 11, Hq 6 Army Gp, 1 Dec 44; GO 2, Hq 6 Army Gp, 11 Jan 45; GO 14, Hq 6 Army Gp, 6 Mar 45; see also par 42, FM 27-5, WD, 22 Dec 1943; par 7, FM 27-10, WD, 1 Oct 1940; par 3 ltr, Hq 12 Army Group, file 383(G-1), subj: "War Criminals," 13 Feb 1945.
7. Par 44, FM 27-5, WD, 22 Dec 1943. For pictures of military commission trial see Final After-Action Report, Judge Advocate Section, Fifteenth US Army, 15 Sep 45, pp 20-21, Appendix M.

Commander. This authority to execute sentences without confirmation by Army Group commanders was given to Army commanders in December 1944, because of the necessity for expeditious trial and prompt execution of Germans guilty of battlefield offenses during the Ardennes Campaign.

61. Cases Tried. From September 1944 to the termination of hostilities, 13 cases involving 29 accused were tried by American military commissions.[8] All were charged as spies, except one, who was tried on 7 April 1945, for murder of two American prisoners of war. Of those tried as spies, 20 were also charged with wrongful use of the American uniform with intent to commit hostile acts, and one with attempting sabotage. Of those tried, three were acquitted,[9] 26 sentenced to death;[10] two of the death sentences were commuted to life imprisonment.[11] The others sentenced to death were executed by hanging or by shooting.

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8. 12 Army Group War Crimes Trial Report, 31 July 1945.
9. Rolf Jesch, Heinrich Pipitz, Karl Mueller.
10. Guenther Ohletz, Stefan Kotas, Joseph Wende, Hubert Albrecht, Hubert Rawe, Guenther Billing, Wilhelm Schmidt, Manfred Pernass, Charles William Wiesenfeld, Manfred Bronny, Hans Reich, Arno Krause, Guenther Schilz, Erhard Miegel, Horst Goerlich, Robert Pollack, Rolf Benjamin Meyer, Hans Wittsack, Otto Struller, Alfred Franz, Antoni J. Morzack, Richard Jakszyk, Erwin Brian, Joseph Muller, Guenther Shulz, Curt Bruns.
11. Erwin Brian, Joseph Muller.

CHAPTER 6

MISCELLANEOUS QUESTIONS, PROBLEMS AND POLICIES

SECTION 15

EXERCISE OF COURT-MARTIAL JURISDICTION ON MEMBERS OF ANOTHER COMMAND

62. In Fixed Areas.

a. Early in the history of the European Theater of Operations, large numbers of troops assigned to divers organizations flocked to London on leave, pass or furlough and on temporary duty. Maintenance of discipline among some of these soldiers, who felt the freedom incident to being away from their own commands and in the largest city of the world, was not an easy task. Paragraph 8, General Orders No. 50, Headquarters European Theater of Operations, 16 October 1942, was published to enable the Commanding Officer, London Base Command, to discipline all soldiers in the London area. It provided that he should have special and summary court-martial jurisdiction of all troops for offenses committed within the geographical limits of his command, with certain exceptions not important here. This authority was enlarged by General Orders No. 7, 2 February 1943, which extended the power of the Commanding Officer, London Base Command, to trial by general court-martial. This policy was continued by subsequent general orders (London Base Command later became Central Base Section) and was extended to Paris, France, area when Central Base Section was reactivated as Seine Section, Communications Zone.[1] At the cessation of hostilities in the European Theater of Operations, General Orders No. 130, Headquarters European Theater of Operations, 26 December 1944, was the applicable directive.

b. Large numbers of troops were tried under the provisions of these general orders, particularly by summary courts-martial in both areas,[2] and by general courts-martial in the Paris area, e.g., the black market cases. Many officers received punishment under Article of War 104. The survey conducted by the Judge Advocate Section of The General Board demonstrated that, although most judge advocates who were on duty in the European Theater of Operations opposed a general assumption of court-martial jurisdiction by one command over the troops of another (except by mutual agreement), the great majority believed that the exceptions made by these general orders were beneficial to the administration of military justice.

63. Immediately before D-Day (6 June 1944) many combat organizations were confronted with the problem of disposal of charges which warranted trials by general courts-martial. It was frequently impractical, if not impossible, for the accused's own organization to try him; office equipment, forms, stationery were packed and waterproofed; officers' time was urgently needed for other military duties incident to the impending invasion. In such cases it was

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1. See II, GO 104, Hq ETOUSA, 18 Oct 44. This Directive also gave the CG, Seine Section, Com Z, authority to administer punishment under AW 104 upon personnel committing offenses within the geographical limits of the Section, with certain inapplicable exceptions.
2. See par 52 of this study.

the practice, upon the request of the organization concerned, for the appropriate base section commander to assume jurisdiction and to try the accused. For only one example, the Commanding Officer of Western Base Section appointed a permanent general court-martial to sit at New port, England, to try cases arising in the Bristol-Newport area. During about 45 days, before and after D-Day, this court tried 63 offenders, most of whom were members of combat organizations, notably the First United States Army.[3] The results of this procedure were very satisfactory; trials were had promptly and at a minimum of inconvenience to the personnel of the ground forces.

64. After the invasion of Northern France and the quick move of the American forces near the German border, convenience dictated that cases involving civilians or civilian witnesses be tried near their place of residence.[4] Communications Zone Sections, particularly Advance Section, Loire Section, Brittany Base Section and Normandy Base Section, by mutual agreement among the appropriate commanders, tried many ground force soldiers for offenses of a civil nature committed within the geographical areas of the base sections and sections. The procedure was generally satisfactory in disposing of the offenses involving civilians; it was unsatisfactory to the extent that, because of the rapid movement of the ground forces and overburdened communications, it was frequently impossible to obtain records of the character of the accused's services and evidence of previous convictions. Another disadvantage of this manner of disposing of charges was that offenders who were also guilty of military offenses, such as absence without leave, sometimes escaped punishment for those offenses because of the inability of Communications Zone commanders to obtain documentary or other evidence to prove that part of the case.

SECTION 16

CONDONATION

65. Desertion Cases. There are three general classes of cases which arose in the European Theater of Operations involving claims of condonation in which the results have been criticized. In the first group was the desertion case where the accused was restored to duty by someone other than an authority competent to order trial for desertion, an officer authorized to appoint general courts-martial. In these instances, it was immaterial whether the soldier was actually restored to duty. Whether he acquitted himself creditably was also not in point. That the general court-martial appointing authority did not order the restoration was a complete rebuttal of the soldier's defense.[6]

a. In these cases, two other questions which have not been answered in the European Theater of Operations presented some difficulty. The first question arose in cases where administrative restoration had been made but, due to clerical inadvertance, had not been executed. The second question, inherent in every case where condonation of desertion was pleaded, was whether or not

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3. P 229, First US Army Report of Operations, 20 Oct 43 - 1 Aug 44, Annex No 20.
4. Sec II, par 6c , SOP No 35, Hq ETOUSA, 16 Jul 44.
5. Final After-Action Report, Hq 12 Army Gp.
6. Cf CM ETO 6524, Torgerson, 1945, CM ETO 4489 Ward, 1945 and CM ETO 6766 Annino, 1945.

condonation of the desertion constituted a bar to trial for the lesser included offense of absence without leave.

66. The second class of cases where condonation was claimed to bar trial is illustrated by the case of a crew member of a plane engaged in combat operational missions and based in the United Kingdom. Twice he refused to fly, falsely stating that he was ill. Thereafter he participated in various similar flying missions and received the Air Medal for his activities on those occasions. Subsequently he was brought to trial for his failure to fly the two times mentioned; he pleaded constructive condonation but was convicted of a violation of the 96th Article of War and sentenced to be confined for 25 years. Helpless under existing law, a board of review in the Branch Office of The Judge Advocate General with the European Theater of Operations, after holding the record of trial legally sufficient to sustain the sentence and that condonation did not result,[7] said that condonation in such a case could be the result only of "a direct mandate from Congress or a direction from higher authority."

67. The third class of cases where condonation was pleaded can be illustrated by another case. A soldier absented himself without leave in another theater of operations on 24 May 1943; he surrendered to military authority on 22 July 1943. The soldier was alternately confined, hospitalized and again confined until July 1944, but had been shipped to England in the meantime. He says that in July, 1944, he was given the choice of returning to duty or standing trial by court-martial. He says he elected duty; in any event, he went to the European continent in December, 1944, and joined an infantry division in Luxembourg the same month. Thereafter, from February to May, 1945, he saw action in Germany and went to Czechoslovakia with a field artillery battalion. He earned five battle stars, three of them after restoration to fighting status. He was placed in arrest in quarters on 1 June 1945, tried for desertion because of his absence in 1943, convicted of absence without leave and sentenced to confinement for 20 years. The sentence, including that portion of it adjudging dishonorable discharge was executed. The claimed offer of condonation was not indorsed in his service record; no rules, regulations or customs indicated that such an indorsement should or could be made.[8]

SECTION 17

MISCELLANEOUS

68. Interpreters. Due to the large number of American soldiers who speak German, procurement of interpreters was not an unsurmountable problem in Germany. However, in France and Belgium those charged with the administration of military justice had, to a large extent, to rely upon civilian interpreters. The rate of pay was so low[9] that the position was not attractive to skilled civilians, a situation that affected both investigations and trials deplorably.

69. The Ground Force Replacement System was established as a

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7. CM ETO 2212 Coldiron, 1944
8. Clemency petition on behalf of Pignatelli, from Delta Disciplinary Training Center.
9. See Annex J, Administrative Memo No 7, SHAEF, 25 Sep 44.

separate command early in 1944. Until that time the replacement depots (later called reinforcement depots) were under the commanders of the base sections in which they were located and, therefore, presented no peculiar administrative military justice problems. When the separate command was established, general court-martial jurisdiction remained in the base section commander; that was the only attribute of command that he had. Difficulties immediately arose over the entire administration of military justice at the depots. In most instances the permanent officer cadre at the depots was insufficient numerically to operate efficiently a general court-martial within the depot. Use of casual officers was found to be unsatisfactory, largely because of their transitory status. Depot commanders sometimes refused to nominate officers for courts other than their own; base section commanders were reluctant to appoint their own personnel to the depot courts. This lack of general command power in the appointing and reviewing authority resulted in poor pre-trial work and trials which did not reflect credit upon military justice. The basic problems were never solved although in a few instances intelligent cooperation between the commands produced outstanding exceptions to the average unsatisfactory level.

70. The trial of an accused deliberately intended to clear him of the charges is a tradition of the army, born of necessity where State and Federal courts have concurrent jurisdiction with military authority over soldiers. In the European Theater of Operations no foreign power could prosecute an American soldier except, in the United Kingdom, upon the request of the American ambassador.[10] Nevertheless, many officers exercising general court-martial jurisdiction in the European Theater of Operations referred numerous charges of "manslaughter" to general courts-martial, cases involving sentries or drivers of vehicles, where acquittals were virtually a certainty. The records of the Branch Office of The Judge Advocate General with the European Theater of Operations disclose that from 1 January 1942 to 8 May 1945, 167 accused were acquitted of involuntary manslaughter charges--statistics which reflect this unnecessary use of general courts-martial.

71. The Visiting Forces Act is the name commonly given to the United States of America (Visiting Forces) Act, 1942, and the agreements between the British Government and the government of the United States relating to jurisdiction over the military and naval forces of the United States. In brief, the British Government agreed that competent American army and naval authority would try their army and navy personnel for criminal offenses committed by them in the United Kingdom. The British exercised criminal jurisdiction only upon the request of the American Ambassador. It was invoked only twice during the entire time American military and naval personnel were in the United Kingdom.[11]

a. It was the established policy to notify local officials and others directly concerned, by letter, of the outcome of courts-martial trials for offenses against the peace and quiet of a civil community, or in violation of local law, or against persons not members of American military or naval commands.[12] These letters

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10. See Sec 1, Visiting Forces Act (6 Aug 42), and the exchange of notes between the United States and the United Kingdom, dated 27 Jul 42. The only known uses of this exception were in the cases of Sergeant Peters and Private Hulten. See par 71 of this study.
11. Cases of Sergeant Peters and Private Hulten.
12. Sec II, par 5a, Cir 72, Hq ETOUSA, 9 Sep 43.

contained an expression of regret and expressed the hope that there would not be a recurrence of such incidents. The execution of this policy was favorably received by the British public and decidedly helpful in maintaining friendly relations between residents of the United Kingdom and the American forces.[13] The principle of this procedure was retained and applied on the Continent after the invasion of northern France.[14]

b. The administration of the letter and spirit of the Visiting Forces Act was without unusual incident except that early in the war some questions arose whether merchant seamen[15] were excluded from the provisions of the Act, particularly where the offenses committed were customs violations instead of criminal offenses. British authorities contended that a violation of customs law was not a criminal act and that, therefore, they might lawfully punish such an offender. In one instance at least, the British position was accepted by American authorities.[16] The power of the army and navy to punish merchant seamen for admittedly criminal offenses when committed on shore was narrowly limited to cases where serious military considerations were involved.[17]

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13. P 58, Proceedings of the Military Justice Conference at BOTJAG, ETO, 13 Nov 43.
14. Sec II, par 6c , SOP No 35, ETOUSA, 16 Jul 44.
15. Disciplinary action over merchant seamen presented the only difficulties experienced in the European Theater of Operations in the application of the 2d Article of War to persons accompanying or serving with the armies of the United States in the field and outside the territorial jurisdiction of the United States.
16. Pp 55, 56, Proceedings of the Military Justice Conference at BOTJAG, ETO, 13 Nov 43.
17. Ltr, Hq ETOUSA, 7 Jun 44, file AG 250.4/1 OpJA, subj: "Disciplinary Jurisdiction to be exercised over merchant seamen," etc.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

SECTION 18

CONCLUSIONS

72. To the extent that the objectives of military justice were to facilitate accomplishment of the primary military mission and to insure security of the military forces, its administration in the European Theater of Operations was effective. To the extent that the objective was distributive justice--the award of proper punishment for offenses--it was below both the ideal and a standard believed to be practicable and attainable. Improvement of distributive justice would increase morale and materially augment the contribution of military justice to the attainment of the major military objective. This improvement can and should be achieved within the framework of a system of military justice composed of and administered by army personnel, without transferring its administration in whole or in any part to civilians or civilian agencies.

73. The army did not make appropriate or sufficient use of the large number of legally-trained personnel available to it. Military justice would have been more effectively administered if all phases of its administration had been conducted or directly supervised by legally-trained personnel.

74. Some commanders who exercised court-martial jurisdiction in the European Theater of Operations exerted an undesirable influence upon courts-martial appointed by them, particularly in connection with sentences.

75. The existing Articles of War and Manual for Courts-Martial are inadequate in many particulars for the administration of military justice in a theater of operations where there is a large, fluid army dispersed over a vast area and composed almost entirely of personnel with limited military training and experience.

SECTION 19

RECOMMENDATIONS

76. It is recommended that the Articles of War be revised, amended and changed in the following particulars:

a. Amend Article of War 43 in such a manner that it clearly and unambiguously states the number of votes necessary to convict.

b. Amend Article of War 70 to provide unequivocally that investigations are mandatory, initially, in all cases to be tried by general courts-martial and subsequently if charges or specifications are materially changed after the original investigation.

c. Repeal Articles of War 87, 88 and 91.

d. Amend Article of War 92 to provide that a person convicted of rape or murder shall suffer death or such punishment as a court-martial may direct.

e. Amend the enumeration in Article of War 110 to include Articles of War 24 and 121.

f. Amend the first sentence of Article of War 85 to include warrant officers.

g. Amend Article of War 104 to provide for increased forfeitures which may be imposed on officers, to extend its application (for forfeitures) to warrant officers, flight officers and officers of the field grade and to permit officers exercising general court-martial jurisdiction, irrespective of their rank, to impose such forfeitures.

h. Amend Article of War 69 to authorize restriction of persons charged with the commission of minor offenses, and to provide for punishment of breaches of such restriction.

i. Require that the presence of a law member and that he be of the Judge Advocate General's Department be jurisdictional in all cases tried by general courts-martial.

77. It is recommended that the Manual for Courts-Martial be revised, amended and changed in the following particulars:

a. Define fully the phrase "before the enemy" as used in Article of War 75.

b. Change the table of maximum punishments as it pertains to Articles of War 83, 84 and 94 to permit more severe punishment in time of war when the government property involved is a critical item, such as gasoline in a theater of operations.

c. Provide in the table of maximum punishment for more severe punishment for security and censorship violations in time of war.

d. Redraft Appendix 4 of the Manual for Courts-Martial; omit forms of specifications rarely used and include forms of specifications for offenses frequently committed.

e. Require that in respect to officers, convictions by courts-martial and punishments under the 104th Article of War be entered on the WD AGO Form No. 66-1.

f. Provide that in any case of a finding of guilty all previous convictions and, in the case of officers, previous punishment imposed under the 104th Article of War, be admissible in evidence after the findings.

g. Prescribe the proof necessary and the manner of presenting it to establish a prima facie case of guilty of absence without leave while en route from one station to another.

h. Include comprehensive and accurate discussions of voluntary and involuntary manslaughter.

78. It is recommended that a Board of Officers be constituted to consider other necessary changes in the Articles of War and the Manual for Courts-Martial:

a. The Board of Officers should consist of representatives of the Judge Advocate General's Department from the Air, Ground and

Service Forces and should include those who were with combat organizations in all theaters of operations during this war. A major percentage of them should come from the ground force divisions, its air equivalent and the base section level. The Board of Officers so appointed should study the administration of military justice and its effect in all theaters of operations and in the zone of interior and should thereafter recommend revision of the Articles of War and the Manual for Courts-Martial to the end that, among other things, the following objectives are achieved:

(1) Maintenance of trained personnel, including law members, trial judge advocates, defense counsel and investigating officers to be permanently assigned to their respective duties.

(2) Definition by statute and fixing of punishments for offenses not now specifically defined but repeatedly committed, such as statutory rape, security violations and wrongful dealings in currency.

(3) Liberalization of the rules governing the admissibility of documentary evidence.

(4) Placing, at the regimental or equivalent level, a legally-trained officer to supervise the administration of military justice within the command, or the placing of at least one officer so trained on each inferior court-martial.

b. The Board of Officers should fully consider the desirability of the following changes, among others, in military law, and thereafter make appropriate recommendations:

(1) Make the ruling of the law member final on all interlocutory questions except the sanity or insanity of the accused, challenges, motions for a finding of not guilty and rulings in cases involving military strategy or tactics or correct military action.

(2) Abolish summary courts-martial and extend the jurisdiction of special courts-martial to the extent that they may impose sentences of confinement for one year, with appropriate forfeitures but not to include dishonorable discharge. Enlarge the power to impose punishment upon enlisted men under the 104th Article of War to approximately the present jurisdiction of summary courts-martial, with proper safeguards to prevent abuse by inexperienced officers.

(3) Provide that the law member assume all duties now performed by him and the senior member of the court.

(4) In cases requiring confirmation in a theater of operations, empower the theater commander to confirm all cases but require review under Article of War 50½ before his action.

(5) Provide that the Judge Advocate General (and his assistants in a theater of operations) and the boards of review have the same powers under paragraph five of Article of War 50½ as they now have under paragraph three of that Article. Give them the power to modify, remit or suspend unexecuted portions of sentences at the time the case is reviewed by them, but not thereafter.

(6) Devise a practicable plan for the perpetuation of the testimony of witnesses in a theater of operations.

(7) Provide for the detailing of qualified enlisted men to courts-martial and as trial judge advocates, defense counsel and investigators to conduct investigations required by the 70th Article of War.

(8) Combine Articles of War 83 and 84.

(9) Include prisoners of war as persons subject to military law (Article of War 2).

(10) Fix a practical quantum of proof to establish a prima facie case of guilt in cases of alleged self-inflicted wounds.

(11) Limit the power of "on-the-spot" courts-martial, either of summary courts-martial if retained or if their present jurisdiction be placed under the present 104th Article of War, to punishment by fines, and permit the accused's own commander to determine whether a record of such punishment should be entered on the soldier's service record.

(12) Extend the doctrine of condonation to apply to all military offenses and provide that where any soldier is committed to actual combat, with knowledge of the pending charges, such act condones the offense and shall be forthwith entered in the service record.

(13) Provide for offenses intermediate between those now defined in Article of War 86 and those sentry cases now tried as violations of the 96th Article of War and prescribe appropriate punishment for these offenses.

(14) Establish an offense intermediate between the capital offense of willfull disobedience and the offense of failure to obey and fix a suitable punishment for it.

(15) Permit the use of depositions in capital cases in time of war.

APPENDIX 1

GENERAL COURT-MARTIAL CASES

IN EUROPEAN THEATER OF OPERATIONS, UNITED STATES ARMY

1. Notes.

a. Statistics marked with an asterisk are from Ltr, BOTJAG, file BOTJAG-E 250.481, 10 May 45, Subj: "Memo Partial History BOTJAG etc." All others are from BOTJAG "Form 20" ledgers.

b. Unless otherwise indicated period covered is from 18 July 1942 to 1 May 1945. Records received after 1 May 1945 not included.

c. Estimates as to average sentences were obtained from officer, Military Justice Section, BOTJAG. In the cases of rape and murder the sentences were actually mathematically derived from the letter referred to in 1a above.

d. Unless otherwise indicated, statistics as to offenses include all cases reported regardless of finding of court, plus cases in which some other offense was originally alleged but accused was found guilty, by substitution, of the subject offense. This, however, is not true of those statistics discussed in 1a above. They are just as copied from the subject report.

2. Figures.

Total number of general court-martial cases tried and reported to BOTJAG: *10,672 (Figures beneath are accused, not cases.)

Enlisted Men: 11,106

White: 8613
Colored: 2493

Enlisted Women: 1

White: 1
Colored:

*Officers: 1013

Male: 1005
White: 980
Colored: 25
Female: 8

Total number of GCM jurisdictions in ETO: 148

Number of GCM cases reported and approximate estimate of average sentences for following offenses:

*AWOL: 3857 cases under AW 61; 5834 absences
Average Sent: Before V-E Day - 15 years; after - 5

*Desertions:
AW 58: 1963
AW 28-58: No statistics available
Average Sent: Before V-E Day - 20 years: after - 10

*AW 75: 494
Average Sent: 35 years

*AW 86: Total of 935 "sentinel" cases
Average Sent: Before V-E Day - 7 years; after - 4

AW 64: 1424
*Wilful disobedience (including refusals to jump or fly): 1112
Average Sent: Combat - 15 years; non-combat - 5 years

Other AW 64 violations: 312
Striking Officer: (Jan 43) 120 (includes "attempts")
Drawing weapon against officer: (Nov 42) 97
Offering violence to officer: (Dec 43) 101
Attempt to or fail to restrain: (Sep 43) 2
Average Sent: 7 years

Refusals to jump or fly: no figures obtained
Average Sent: 5 years

Mutiny: 25 (Jan 43)
Average Sent: Maximum

Sedition: 2

Security violations: (Oct 42) 78
Disclosing classified matter: (Nov 42) 36
Violation of censorship: (Oct 42) 42

Fraternization: (Apr 45) 80
Average Sent: 6 months

*Rape: 169
Average Sent: 43 death; 14 life imprisonment; more 7 year sentences than others; average sentence 14 years.

*Murder: 290
Average Sent: 35 death; 48 life imprisonment; more 10 year sentences than others, average 8 years.

Voluntary Manslaughter: (Sep 42) 113
Average Sent: 7 years
Involuntary Manslaughter (Jul 42) 305
Convictions: 138
Average Sent: 2 years
Acquittals: 167

Robbery: (Oct 42) 116
Average Sent: 5 years

Housebreaking: (Oct 42) 159
Average Sent: 5 years

Larceny: 1191
Personal property:
Petit: (Jan 43) 494
Grand: (Aug 42) 427
Government property:
Petit: (Aug 42) 160

Grand: (Feb 43) 110 (includes 4 charges of attempt since June 44)
Average Sent: Maximum

Pillaging and Looting: 39

Currency violations: (Feb 45) 20
Average Sent: Maximum

Black market: (Statistics not obtained)
Average Sent: 5 years

Assaults (all except simple): 1608

Assault and Battery:	(Sep 42)	304
Indecent Assault :	(Oct 44)	43
Assault with intent to do bodily harm:	(Oct 42)	152
" " " " commit felony :	(Oct 44)	5
" " " " " murder :	(Aug 42)	76
" " " " " manslaughter:	(Aug 42)	14
" " " " " rape :	(Aug 42)	293
" " " " " robbery:	(Jan 43)	14
" " " " " sodomy :	(Jun 43)	20
" " dangerous weapon :	(Sep 42)	683
Attempt to assault with dangerous weapon	(Dec 42)	4

Offenses by P s: 2

*Acquittals on all charges and specifications: 1061
Officers: 187
Enlisted men: 874

Statutory Rape (attempts included): (Jan 43) 87
Average Sent : 6 months

APPENDIX 2

NUMBER OF CASES TRIED BY SUMMARY AND SPECIAL COURTS-MARTIAL

OF BASE SECTIONS UNDER COMMUNICATIONS ZONE,

EUROPEAN THEATER OF OPERATIONS, U. S. ARMY,
(LATER THEATER SERVICE FORCES, EUROPEAN THEATER) *

FROM FEBRUARY 1943 TO MAY 1945

Base Section	Summary	Special
Southern	6472	3740
Western	5966	3548
Eastern	2321	1585
London Base Command	204	93
Hq, SOS and Com Z, ETO	417	155
Central	1938	472
North Ireland	396	198
No. 1	2	1
Advance	6185	2716
No. 2	3	-
Normandy	6123	2882
Brittany	1177	487
United Kingdom	15647	9859
Seine	3275	741
Loire	941	230
Channel	2297	1242
Delta	4810	1301
Oise Intermediate	3641	2078
CONAD	1261	581
TOTAL ALL BASE SECTIONS	63075	31925

*Compiled from records at Hq Theater Service Forces, European Theater.

NUMBER OF TRIALS BY SUMMARY AND BY SPECIAL COURTS-MARTIAL

FOR VIOLATION OF SPECIFIC OFFENSES IN

COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, US ARMY
(LATER THEATER SERVICE FORCES, EUROPEAN THEATER)*

FROM

1 JULY 1942 TO MAY 1945

Offense	Summary	Special
Absence Without Leave	31,048	19,527
Failure to obey	-	2,672
"Sentinel"	-	602
	31,048	22,081

*Compiled from records at Hq Theater Service Forces, European Theater.

APPENDIX 3

HEADQUARTERS
UNITED STATES AIR FORCES
IN EUROPE

SIGNIFICANT OFFENSES TRIED BY SPECIAL COURTS-MARTIAL

1 JULY 1944 THRU 30 JUNE 1945

	AWOL	Unauth Use of Vehicles	Larceny	Sex Offenses	Drunk & Disorderly Conduct	Offenses by Sentinels
Hq, Eighth AF	37	18	14	1	11	2
1st Air Div.	197	60	36	0	62	15
2d Air Div.	179	33	8	5	49	6
3d Air Div.	175	51	51	1	42	10
VIII AFSC	64	32	15	1	24	2
VIII FC	43	24	11	0	22	9
VIII AFCC	47	12	6	2	12	1
Total Eighth AF	742	230	141	10	222	45
Hq, Ninth AF	43	18	1	0	17	4
IX AFSC	314	90	18	3	56	9
9th Air Div.	254	93	19	0	71	3
IX TAC	155	76	16	0	45	9
XII TAC	62	29	6	1	51	8
XIX TAC	85	38	12	0	29	10
XXIX TAC (Prov)	45	22	3	0	21	2
IX ADC	229	32	10	0	82	24
IX EC	174	18	5	1	47	14
Total Ninth AF	1361	416	90	5	419	83
ATSCE	73	34	10	0	25	2
BADA, ASC, USSTAF	684	108	70	3	91	8
IX TCC	311	104	25	2	32	23
Total USSTAF	3171	892	336	20	789	161
Total USSTAF (Col)	139	64	3	3	22	8
Total USSTAF (White)	3032	828	333	17	767	153

APPENDIX 3 (2)

HEADQUARTERS
UNITED STATES AIR FORCES
IN EUROPE

SIGNIFICANT OFFENSES TRIED BY SUMMARY COURTS-MARTIAL

1 JULY 1944 THRU 30 JUNE 1945

	AWOL	Unauth Use of Vehicles	Larceny	Sex Offenses	Drunk & Disorderly Conduct	Offenses by Sentinels
Hq, Eighth AF	43	3	2	2	13	2
1st Air Div.	401	36	3	0	131	7
2d Air Div.	488	51	0	0	97	22
3d Air Div.	360	26	2	0	159	23
VIII AFSC	141	14	0	0	12	3
VIII FC	112	12	3	0	54	13
VIII AFCC	62	5	1	0	11	5
Total Eighth AF	1607	147	11	2	477	75
Hq, Ninth AF	76	13	0	0	43	0
IX AFSC	321	60	8	1	98	14
9th Air Div.	218	15	3	0	41	8
IX TAC	147	11	3	0	24	4
XII TAC	113	32	2	0	65	6
XIX TAC	79	13	3	0	15	4
XXIX TAC (Prov)	37	7	1	0	8	2
IX ADC	325	30	2	0	109	23
IX EC	197	30	2	0	73	14
Total Ninth AF	1513	211	24	1	476	75
ATSCE	239	20	1	1	44	7
BADA, ASC, USSTAF	1243	41	19	3	118	51
IX TCC	238	48	10	0	37	6
Total USSTAF	4840	467	65	7	1152	214
Total USSTAF (Col)	240	39	1	4	35	16
Total USSTAF (White)	4600	428	64	3	1117	198

APPENDIX 3 (3)

HEADQUARTERS
AIR SERVICE COMMAND
UNITED STATES STRATEGIC AIR FORCES IN EUROPE

SIGNIFICANT OFFENSES TRIED BY SPECIAL COURT-MARTIAL

JANUARY 1, 1944 to JUNE 30, 1944

	AWOL	Unauth Use of Vehicles	Larceny	Sex Offenses	Drunk & Disorderly Conduct	Offenses by Sentinels
Hq, Eighth AF	109	18	13	0	35	1
VIII AFSC (old)*	130	19	10	2	17	4
VIII AFSC (new)#	68	15	6	0	11	6
VIII AFCC	72	12	8	1	34	2
VIII FC	49	14	12	0	36	6
1st Bomb Div#	71	13	9	0	30	0
2d Bomb Div#	73	21	18	0	12	2
3d Bomb Div#	37	20	17	1	10	2
Total Eighth AF	609	132	93	5	185	23
Hq, Ninth AF	153	11	6	0	11	0
IX BC&	95	30	22	0	19	2
IX FC%	19	3	2	0	5	1
IX AFSC	179	30	27	3	14	3
IX TCC	151	27	10	1	17	6
IX TAC@	110	19	20	0	18	13
XIX TAC@	46	9	2	0	5	5
Total Ninth AF	753	128	89	4	89	30
ASC, USSTAF#	9	5	0	0	2	0
BADA, ASC, USSTAF#	176	37	31	5	20	4
Total USSTAF	1546	302	213	14	296	57
(Colored)¢	27	7	3	2	7	3
(White)	1519	295	210	12	289	54

* Figures for January and February 1944.
\# Figures for March, April, May and June 1944.
& Figures for February, March, April, May and June 1944.
% Figures for January 1944.
@ Figures for February, March, April, May and June 1944. The IX Tactical Air Command and XIX Tactical Air Command existed under the names IX Air Support Command and XIX Air Support Command, respectively, during the months of February and March 1944.
¢ Colored figures include only months of March, April, May and June 1944.

APPENDIX 3 (4)

HEADQUARTERS
AIR SERVICE COMMAND
UNITED STATES STRATEGIC AIR FORCES IN EUROPE

SIGNIFICANT OFFENSES TRIED BY SUMMARY COURTS-MARTIAL

JANUARY 1, 1944 to JUNE 30, 1944

	AWOL	Unauth Use of Vehicles	Larceny	Sex Offenses	Drunk & Disorderly Conduct	Offenses by Sentinels
Hq, Eighth AF	195	5	2	0	141	2
VIII AFSC (old)*	298	9	2	0	65	8
VIII AFSC (new)#	66	4	1	0	11	0
VIII AFCC	88	9	0	0	12	10
VIII FC	125	5	2	0	35	4
1st Bomb Div#	126	5	0	0	27	1
2d Bomb Div#	235	157	3	3	90	17
3d Bomb Div#	87	0	0	0	14	0
Total Eighth AF	1220	194	10	3	395	42
Hq, Ninth AF	177	1	3	0	18	0
IX BC&	109	3	2	0	18	4
IX FC%	21	1	1	0	2	1
IX AFSC	214	11	9	2	17	3
IX TCC	118	14	1	0	8	4
IX TAC@	76	6	4	0	10	6
XIX TAC@	60	1	1	0	1	0
Total Ninth AF	775	37	21	2	74	18
ASC, USSTAF#	11	1	1	0	9	1
BADA, ASC, USSTAF#	379	32	3	0	51	17
Total USSTAF	2385	264	35	5	528	78
(Colored)¢	60	4	1	0	1	1
(White)	2325	260	34	5	528	77

* Figures for January and February 1944.
\# Figures for March, April, May and June 1944.
& Figures for February, March, April, May and June 1944.
% Figures for January 1944.
@ Figures for February, March, April, May and June 1944. The IX Tactical Air Command and XIX Tactical Air Command existed under the names IX Air Support Command and XIX Air Support Command, respectively, during the months of February and March 1944.
¢ Colored figures include only months of March, April, May and June 1944.

APPENDIX 4

JUDGE ADVOCATE SECTION
HQ USFET (REAR)

1 August 1945

DISPOSITION OF CASES INVOLVING DEATH SENTENCES
RECEIVED IN THIS OFFICE UNDER AW 48 TO DATE

OFFENSE	NO. CASES	NO. PERSONS		EXECUTED		AWAITING EXECUTION		CONFIRMED IN BOTJAG		COMMUTED		*OTHER DISP		UNDER REVIEW	
		W	C	W	C	W	C	W	C	W	C	W	C	W	C
RAPE	99[a]	53	88	4	25	0	1	0	3	25	37	10	8	14	14
MURDER	80[b]	33	54	9	24	1	1	2	5	8	7	3	1	10	16
AW 86	2	2	0	0	0	0	0	0	0	2	0	0	0	0	0
AW 75	28[c]	29	0	0	0	0	0	2[d]	0	21	0	5	0	1	0
AW 66	1[e]	0	7	0	0	0	0	0	0	0	0	0	0	0	7
AW 64	34[f]	27	8	0	0	0	0	1[d]	1[d]	24	4	1	1	1	2
AW 58	104	95	15	1	0	0	0	0	0	65	10	5	0	24	5
TOTALS	348	239	172	14	49	1	2	5	9	145	58	24	10	50	44
		411		63		3		14		203		34		94	

3 Officers (w); 1 WO (cld); 407 EM

* 17 Rehearing
10 Mitigated
1 Killed by enemy action
1 Revision
3 Disapproved
2 Legally insufficient

a 1 convicted of rape & AW 64, not included under AW 64.
1 convicted of rape & AW 58, not included under AW 58.
1 convicted of rape & AW 86, not included under AW 86.

b 16 convicted of murder & rape, not included under rape.
2 convicted of murder & AW 58 not included under AW 58.

c 3 convicted of AW 75 & AW 58, not included under AW 58.

1 convicted of AW 75 & AW 64, not included under AW 64.

d 4 forwarded to President for Action

e Convicted of AW 66 & AW 64. not included under AW 64

f 8 convicted of AW 64 & AW 58, not included under AW 58.

APPENDIX 5

HEADQUARTERS
EUROPEAN THEATER OF OPERATIONS
UNITED STATES ARMY

5 October 1944

SUBJECT: Desertion.

TO: All officers exercising general courts-martial jurisdiction.

1. Misbehavior before the enemy (AW 75), may constitute desertion (AW 58) with intent to avoid hazardous duty or shirk important service (AW 28).

2. Authority for the Theater Commander (AW 48) to order executed a sentence to death on conviction of desertion, after confirmation by him and compliance with AW 50½, places upon him the sole responsibility of the exercise of that authority for the purposes intended - of accomplishing the military mission entrusted him and of providing security for the forces under his command. To these ends he is obligated.

3. The Theater Commander directs that I acquaint you with his desire that, where the expected evidence in any case establishes prima facie guilt by any member of the forces under his command of such misbehavior before the enemy as constitutes desertion, consideration be given to charging the offense as a violation of AW 58.

/s/ Ed. C. Betts,
/t/ ED. C. BETTS,
Brigadier General, U.S.A.,
Theater Judge Advocate

APPENDIX 6

JUDGE ADVOCATE SECTION
HQ USFET

1 July 1945

DISPOSITION OF CASES INVOLVING DEATH SENTENCES
RECEIVED IN THIS OFFICE UNDER AW 48 TO DATE

OFFENSE	NO. CASES	NO. PERSONS		EXECUTED		AWAITING EXECUTION		CONFIRMED IN BOTJAG		COMMUTED		*OTHER DISP.		UNDER REVIEW	
		W	C	W	C	W	C	W	C	W	C	W	C	W	C
RAPE	88[a]	47	81	4	25	0	1	0	2	15	30	10	8	18	15
MURDER	72[b]	32	46	9	23	2	2	4	2	5	6	2	1	10	12
AW 86	2	2	0	0	0	0	0	0	0	2	0	0	0	0	0
AW 75	28[c]	29	0	0	0	0	0	3[d]	0	19	0	5	0	2	0
AW 66	1[e]	0	7	0	0	0	0	0	0	0	0	0	0	0	7
AW 64	33[f]	26	8	0	0	0	0	1[d]	1[d]	24	3	1	1	0	3
AW 58	89	82	13	1	0	0	0	0	0	43	7	5	0	33	6
TOTALS	313	218	155	14	48	2	3	8	5	108	46	23	10	63	43
		373		62		5		13		154		33		106	

3 Officers (w); 1 WO (cld); 369 EM.

* 17 Rehearing
9 Mitigated
1 Killed by enemy action
1 Revision
3 Disapproved
2 Legally insufficient

a 1 convicted of rape & AW 64, not included under AW 64.
1 convicted of rape & AW 58, not included under AW 58.
1 convicted of rape & AW 86, not included under AW 86.

b 15 convicted of murder & rape, not included under rape.
2 convicted of murder & AW 58, not included under AW 58.

c 3 convicted of AW 75 & AW 58, not included under AW 58.

1 convicted of AW 75 & AW 64, not included under AW 64.

d 5 forwarded to President for action

e 1 convicted of AW 66 & AW 64, not included under AW 64.

f 8 convicted of AW 64 & AW 58, not included under AW 58.

APPENDIX 7

(Office of)

(APO No.)

(Date)

SUBJECT: Report of Delinquency.

TO : (Commander, Division or Separate Organization of Offender, APO No.)

THRU :

This report is forwarded for your information and appropriate disciplinary action.

Offender: (Name) (Grade) (Serial No.) (Unit)

Offense and circumstances under which same occurred:

Date of offense: Time Occurred:

Place of offense:

Witnesses:

Action taken by Military Police:

Case Number:
TPM Form 2

APPENDIX 8

HEADQUARTERS
SEINE SECTION, COM Z
EUROPEAN THEATER OF OPERATIONS
UNITED STATES ARMY

(date)

SUBJECT: Trial by summary court-martial of

(ASN) (RANK) (ORGANIZATION)

TO: Commanding Officer,

1. Under the provisions of Section III, General Order No. 28, Hq, ETOUSA, dated 30 March 1944, the above named individual was arrested, tried and (convicted) (acquitted) for a violation of the Article (s) of War within the prescribed area on or about 19 . The offense in brief was:

2. The sentence of court before whom this man was tried was:

3. The reviewing authority's action was:

-1-

4. The man is being returned to your organization, not under guard. He has been given a written order to report immediately to you and has been given a copy of this report.

5. The record of trial will be forwarded to you for noting the data therein contained, and it is suggested that this report be kept until that record of the trial reaches you. It is requested that the necessary data as to pay, age, allotments and service be verified and, if in error, that it be corrected before returning the copy of the record of trial to Commanding General, Seine Section, Com Z, European Theater of Operations, United States Army, APO 887.

6. No record of the man as to his arrest or confinement has been made in the administrative records of any organization of the Seine Section, other than required by the Summary Court.

7. Appropriate entries will be made in the records of your unit regarding the action taken with regard to this man and the copies sent forward will be initialled properly to show that such entries have been made.

For the Commanding General:

/s/ David C. Mayers,
/t/ DAVID C. MAYERS,
Major, AGD,
Adjutant General

(Seine Section Form No.1.)
Rev. 7/9/44

APPENDIX 9

HEADQUARTERS
SEINE SECTION, COM. Z
EUROPEAN THEATER OF OPERATIONS
UNITED STATES ARMY

PERSONAL HISTORY

TO:

This form will be completed in duplicate by interview with the accused in each general court-martial case. Fill in all blanks--write "no" or "none" if such entry is applicable. If space for any item is inadequate, attach another sheet of paper. Include any additional information which in your opinion should be known to the Reviewing Authority. Give both copies to the Trial Judge Advocate to be forwarded with the record of trial.

(Name of Accused) (Serial Number) (Grade) (Organization)

1. Home address:

2. Age: 3. Education:

4. Religion: 5. Church Attendance:

6. Race:

7. Married: 8. How long: 9. Living with wife:

10. Wife's address:

11. Wife employed: 12. Her occupation:

13. Number, age and sex of children:

14. Father living: 15. Mother living: 16. Living together:

17. Where:

18. Father's occupation:

19. Mother's occupation:

20. Was father and/or mother strict:

21. Was accused punished at home:

22. Civilian occupation of accused:

23. How long did he hold job:

24. What jobs within 5 years immediately preceding entry in Army:

25. Civilian earnings of accused:

26. Did he have supervision of any men:

27. Civilian criminal record:

28. Previous offenses in the Army:

29. State of health of accused:

    a. In the Army: b. In civilian life:

30. Venereal disease history:

31. Any present physical complaints:

32. Accused's mental disorders:

33. Mental disorders in accused's family:

34. Is accused nervous:

35. Accused's hobbies:

36. Accused's recreation:

37. Accused's use of alcohol or drugs:

38. What does accused think of the Army:

    a. Of his non-commissioned officers:

    b. Of his officers:

39. Does accused think he is being fairly treated:

40. Is accused satisfied with his present assignment in the Army:

41. How long has accused been in the Army:

    a. To what units has he been assigned:

    b. What were the reasons for transfers:

42. Has accused been frank and truthful with you:

    a. Is he cooperative:

43. What reasons does accused give for committing offense:

44. Combat experience:

45. Rating by combat organization:

46. Has accused been wounded or hospitalized as a result of combat:

47. Nature of wounds or reasons for hospitalization:

48. Awards and decorations:

49. Number and duration of all periods of absence without leave:

50. Remarks:

(date) (Defense Counsel)

APPENDIX 10

COMMENT OF THE CHIEF OF SECTION

The foregoing study, "Military Justice Administration in Theater of Operations," was prepared by the Judge Advocate Section, The General Board of the United States Forces, European Theater.

Research was made in the records of the Branch Office of The Judge Advocate General with the European Theater and in the files of the Judge Advocate Sections of the United States Forces, European Theater, Theater Service Forces, European Theater, United States Air Forces in Europe, Headquarters 12th Army Group and Headquarters Seine Section; and by study of appropriate statutes, policies and legal decisions and implementing War Department and European Theater of Operations regulations, directives and circulars. Source material was also gathered from the answers to questionnaires which were submitted to all judge advocates serving in the European Theater of Operations during the campaign ending on 8 May 1945. Numerous persons who had experience in the European Theater of Operations in the various topics embraced within this study were interviewed. Problems were discussed with all members of the Judge Advocate Section of The General Board, each of whom likewise served in the European Theater of Operations and they have concurred in the conclusions and recommendations herein submitted.

In this particular study, Lieutenant Colonel Charles T. Shanner, JAGD, performed most of the research and writing. Prior to his assignment to this task, he successfully completed the prescribed courses in the Judge Advocate General's School and he served as Assistant Staff Judge Advocate in Communication Zone Sections in the European Theater of Operations from July 1943. He arrived in France in August 1944. Lieutenant Colonel Shanner was assisted by Captain John J. Adams, JAGD, Headquarters Seine Section, Theater Service Forces, who was on temporary duty with The General Board. Captain Adams graduated from the Judge Advocate General's Officer Candidate School and has served in the Staff Judge Advocate Section of Seine Section since the fall of 1944.

Lieutenant Colonel Burton S. Hill, JAGD, formerly Staff Judge Advocate of VIII Fighter Command of the Eighth Air Force, serving in England and Belgium, prepared the portions of the study devoted to refusals to fly and refusals to jump and he aided in other parts of the study by advice and compiling data pertaining to the air forces.

Lieutenant Colonel William M. Moroney, JAGD, formerly Assistant Judge Advocate of XVIII Corps (Airborne) and 12th Army Group, prepared the portion of the study dealing with military commissions.

Julien C. Hyer

JULIEN C. HYER,
Colonel, JAGD,
Chief, Judge Advocate Section.