PRETRIAL RESTRAINT:

A COMPARATIVE HISTORICAL ANALYSIS OF

AMERICAN, BRITISH, AND CANADIAN MILITARY LAW

A Thesis

Presented to

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

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SCOPE

A comparative historical study of American, British, and Canadian military law with respect to pretrial restraint or imprisonment, with particular emphasis accorded to the historical precedents of the imposition of time limitations for the serving of charges and the bringing to trial of an accused in confinement.

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I. INTRODUCTION.

In recent years, the Uniform Code of Military Justice of 1951,[1] the Military Justice Act of 1968,[2] and the revised Manual for Courts-Martial, 1969,[3] have profoundly changed American military law and have liberalized a military code whose origins can be traced to ancient Rome. These enactments made no major change, however, in that area which affects the majority of persons accused of a criminal or military offense and which has the greatest potential for abuse - pretrial restraint.[4]

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1. 64 Stat. 108 (1950); 10 U.S.C. secs. 801-940 (1964).
2. 82 Stat. 1335 (1968).
3. Manual for Courts-Martial United States, 1969 (Revised Edition), [hereinafter cited as MCM 1969 (Revised)].
4. In American military law, pretrial restraint may refer to either (1) arrest - the restraint of a person by an order, not imposed as punishment for an offense, directing him to remain within certain specified limits, or (2) confinement - the physical restraint of a person (See para. 18(a), MCM 1969 (Revised)). In British and Canadian military law, arrest includes both open as well as close custody confinement. "Close" arrest involves restraint under escort or guard whether in confinement or not. "Open" arrest involves curtailment of privileges but not restraint under escort or guard. See Army Act, 1955, sec. 225(1), 3 & 4 Eliz.II; See Also Article 105.01, Volune II, Queen's Regulations and Orders for the Canadian Forces (Ottawa 1965)

This study will trace the evolution of modern American, British, and Canadian military law with respect to courts-martial jurisdiction and the rights and protections accorded military personnel in pretrial imprisonment. The study will seek to show that although American courts-martial have increased jurisdiction over criminal offenses, safeguards restricting pretrial imprisonment are now more limited in scope that those applicable in American military law prior to World War I. Detailed study will be made of specific time limitations for the serving of charges and the bringing to trial of an accused in confinement. Outside the scope of the study will be comment on the applicability in military law of bail or the writ of habeas corpus.

II. EVOLUTION OF MILITARY LAW PRIOR TO THE AMERICAN REVOLUTION

Legal systems predicated upon military organizations are of ancient origin. The early Roman state was a militaristic society in which a state of war was the normal condition.[5] The Roman people were divided into categories and classes which formed a hierarchy based on social standing and property ownership. The Roman army was similarly stratified and discipline consisted essentially of the unrestrained discretion of the military commander.[6] The punishment of military offenses was immediate and, generally, without the formality of a trial.[7] The problem of pretrial arrest was thus not one of great concern when "justice" was dispatched quickly and on the spot.

The Goths, Huns, Franks, Vandals, and Lombards borrowed from the laws of the Roman Empire and carried them into Europe as an instrument of their military policy. By the 11th century, feudal law had been codified in Lombardy as the Libri Feudorum.[8] The well

5. See 2 Blackstone, Commentaries *45-46 (Cooley ed. 1899).
6. Id. at *44; See also C. Brand, Roman Military Law (1968).
7. Id. at *72.
8. M. Radin, Anglo-American Legal History 145 (1936).

developed continental feudal system was brought to England by William the Conqueror in 1066 and imposed on the simpler feudal system then existing in Britain.[9]

In time of war feudal levies of men were made in accordance with feudal law. As a greater part of the land of the British kingdom was then held by the barons, knights, and other tenants of the Crown, the King's own retainers constituted a self-supporting body of troops prepared to take the field against foreign or domestic foes.[10]

When troops were called into service in Britain they were governed in the field by "ordinances" (later to be called articles of war) issued by the Crown by virtue of the Royal Prerogative.[11] The Statute of Westminster of 1279 referred to the Royal Power to punish soldiers according to the laws and usages of the realm.[12] This power was exercised by the Court of

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9. Id. at 119,152.
10. E.S. Dudley, Military Law and the Procedures of Courts-Martial 1 (London 1908).
11. See An Act Declaring the King's Sole Right Over the Militia, 1661, 13 Charles II, c.6; Barwis v. Keppel, 2 Wilson's Rep. 314, 95 Eng. Rep. 831 (1766). This prerogative power was an incident of what Blackstone called the King's position "as the generalissimo, or the first in military command within the kingdom." 1 Blackstone, Commentaries *262 (Cooley ed. 1899).
12. 7 Edward I, c.1 (1279).

Chivalry (also known as the Court of the High Constable and Marshal of England) in accordance with the ordinances issued by the Crown.[13]

The first code specifically intended to enforce discipline among members of the military was issued by Richard I in 1190 A.D. in order to prevent disputes between soldiers and sailors during voyages to the Holy Land.[14] The earliest complete code was the "Statutes, Ordinances, and Customs" issued by Richard II in 1385.[15]

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13. See British War Office, Manual of Military Law 4-5 (London 1958); But see G. Squibb, The High Court of Chivalry 3-5 (London 1959) for the view that, while the High Constable and Marshal undoubtedly enforced articles of war, they did not do so while sitting as the Court of Chivalry. Although the Court of Chivalry exercised jurisdiction over certain crimes committed by Englishmen overseas, none of the surviving records of the court indicate that it had any disciplining powers over soldiers either in England or elsewhere.
14. W. Winthrop, Military Law and Precedents 903 (2nd ed. 1920 War Dep't. reprint) [hereinafter cited as Winthrop].
15. Id. at 904-906. Articles of war adopted in 1621 by King Gustavus Adolphus of Sweden influenced subsequent British articles of war. Large numbers of Englishmen had served as officers and soldiers in the Swedish armies and the Adolphus Code of 167 articles was subsequently published in London in 1639. More elaborate articles were published in London in 1639 for the regulation of the "Cavaliers" army; in 1642 for the regulation of the opposing "Roundhead" army in the Great Rebellion; by Charles II in 1666 and 1672; and by James II in 1686 and 1688. See 1 C. Clode, Military Forces of the Crown 429-446 (London 1869) [hereinafter cited as Clode, Military Forces]; See also Winthrop 19, 919-928.

These ordinances were issued only in times of actual warfare and remained in force only during the duration of actual fighting.[16]

British civil magistrates sought to restrict the jurisdiction of military courts over civil offenses. An act of 1389 attempted to effect a relationship between civil and military courts.[17] Acts of 1439,[18] 1490,[19] and 1548[20] specifically made desertion in peacetime punishable as a felony, enforceable only before civil and not before military tribunals. In peacetime, civil courts also retained jurisdiction in other matters. For example, if a soldier struck an officer, the only legal punishment was that imposed by a civil court for assault and battery. If a soldier refused to obey orders or slept on guard duty, there was no legal penalty.[21]

Civil actions could be brought against military superiors. One such case involved an action for assault and false imprisonment brought against the lieutenant-

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16. 2 Groose, Military Antiquities 58 (London 1786).
17. 18 Henry VI, c.19 (1389).
18. 18 Henry VI, c.19 (1439).
19. 7 Henry VII, c.1 (1490).
20. 2 Edward VI, c.2 (1548).
21. Dudley, op.cit.supra note 10, at 4; 2 Campbell, Lives of the Chief Justices 91 (1849).

governor of the island of Scilly by a private soldier who had, without trial, been imprisoned for disobedience. The lieutenant-governor alleged in his defense that the ancient custom of the castle allowed imprisonment of a soldier for a reasonable time for disobedience of his commander. He did not argue that the maintenance of discipline by such means was justifiable as a general right. The court gave judgement in favor of the soldier, negating the power claimed by the governor.[22]

Articles of war were issued only in time of actual war and remained in force only during periods of actual fighting.[23] Attempts by Charles I in 1625 and following years to execute military law in time of peace eventually gave rise to the Petition of Right in 1627 in which Parliament stated that soldiers had been tried by military commissions, proceeding under military law, for "murder, robbery, felony, mutiny or other outrage or misdemeanor" and prayed that the practice be halted "lest...your Majesty's subjects be destroyed, or put to death contrary to the laws and franchise of the land."[24]

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22. Dudley, op.cit.supra note 10 at 4.
23. 2 Groose, Military Antiquities 58 (London 1786).
24. Petition of Right, 1627, 3 Charles I, c.1; The petition is printed in C. Clode, Military and Martial Law 21-23 (London 1872) [hereinafter cited as Clode, Military Law].

In 1640 it was again declared that military law could not be executed in England but "when an enemy is really near to an army of the King."[25]

A few months after the restoration of Charles II to the throne in 1660,[26] a private army of over 5000 men was created and maintained by the King on his own authority and out of his own revenue.[27]

At the same time the militia was remodeled. Every man who possessed £ 500 a year derived from land, or £6000 of personal estate, was to provide, equip, and pay, at his own charge, one horseman. Every man who had £50 a year derived from land, or £600 of personal estate, was to provide in like manner one pikeman or musketeer. Smaller proprieters were joined together, and required to furnish, according to their collective

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25. Dudley, op.cit.supra note 10 at 5.
26. In 1641 civil war in England broke out between the Cavaliers and the Roundheads after CharlesI had attempted to rule without Parliament and had embroiled England in a conflict with both France and Spain. The civil war continued, except for a short truce, until January, 1649, when Charles I was executed. Parliament then set up a republic, the Commonwealth of England, keeping sovereign power in its own hands. In 1653, the Roundhead Army named Oliver Cromwell as Lord Protector of England. After his death in 1658, the monarchy was reestablished two years later by the restoration of Charles II. See British War Office, Manual of Military Law 5-6 (London 1939 reprint).
27. Dudley, op.cit.supra note 10, at 2.

means, a horse-soldier or a foot-soldier.[28] Justices of the peace were authorized to inflict slight penalties for breaches of discipline at meetings held for drill and inspection.[29]

In 1662 Charles II issued articles for the government of his guards and garrisons. Offenses involving the penalty of death, however, were expressly reserved for trial by the laws of the land.[30]

As the King's army consisted of volunteers on high pay, desertion was rare and most military offenses were sufficiently punished by dismissal from the army. Military punishments rendered under the authority of the 1662 articles were done sparingly and in such a manner so as not to attract public notice or produce an appeal to Parliament. The question as to the application of the articles in time of peace was finally presented to Sir John Holt, Recorder of London. "To the utter amazement of the King and courtiers this honourable, although shallow magistrate declared that, without an Act of Parliament, all laws were equally applicable to all His Majesty's subjects, whether wearing red

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28. Id.
29. 13 & 14 Charles II, c.9 (1660).
30. Clode, Military Forces of the Crown, op.cit.supra note 15, at 53.

coats or grey."[31]

After the replacement of the Chief Justice and the packing of the courts by the Crown with more servile judges, several deserters were brought to trial for quitting camp. "They were convicted in the face of the letter and spirit of the law. Some received sentence of death at the bar of the King's bench; some at the Old Bailey; and they were hanged in sight of the regiments to which they belonged."[32]

In 1685 James II succeeded Charles II and the King's private army was increased to 30,000 men.[33] James II subsequently declared that by virtue of the Royal Prerogative he was entitled at all times to put military law in force against military men, although it could only be put in force against civilians when there was actual war or rebellion. Accordingly, in 1685 and

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31. Dudley, op.cit.supra note 10, at 5.
32. 2 Campbell, Lives of the Chief Justices 91 (1849).
33. Dudley, op.cit.supra note 10, at 2. The maintenance of a large military force was not a purpose to which Parliament voted revenues to the Crown. One of the articles of the Bill of Rights of 1688 expressly declared that the practice of keeping a standing army in time of peace without the consent of Parliament was against the law. Because of the exigencies of the times, however, no attempt was made by Parliament to force the Crown to dissolve the army. See Bill of Rights, 1688, 1 William and Mary, c.2, printed in W. Durant, The Age of Louis XIV 298 (1963).

in 1688, he promulgated articles of war for the government of his troops. The articles of 1688 authorized punishment by courts-martial for the commission by soldiers of various crimes, such as robbery, theft,[34] or murder.[35] In time of peace, however, infliction of any punishment amounting to loss of life or limb was expressly prohibited.[36]

In 1688 James II took flight to France and in February, 1689, the Crown was conferred on William III and Mary of Holland.[37] As the kingdom was in a technical state of peace, William III had no power under the existing articles of war to legally punish mutiny or desertion of soldiers still loyal to James II. Because of the fear that the latter would attempt to regain the Crown, it was urged in Parliament on 1 March 1689 that enforceable legal sanctions be authorized for "a more exemplary and speedy Punishment than the usual forms of Law will allow" against soldiers who should mutiny, desert, or cause sedition.[38] On 13 March 1689, a

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34. Articles of War of James II, Article XVIII, printed in Winthrop. op.cit.supra note 11, at 922.
35. Id., Article XVII.
36. See Articles of War of James II, Article LXIV, printed in Winthrop. op.cit.supra note 11, at 928.
37. See Durant, op.cit.supra note 33, at 297.
38. British War Office, Manual of Military Law 10 (London 1939 reprint) [hereinafter cited as Manual of Military Law].

committee was appointed to prepare a bill to punish mutineers and deserters. As the bill was being prepared, 800 men originally enlisted in the army by James II were ordered to embark for Holland. The men mutinied and declared that they would live and die by James II.[39] The bill which was to become known as the first Mutiny Act was quickly passed by the House of Commons, the House of Lords, and received the Royal Assent on 3 April 1689.[40]

The act provided that "during this time of danger" the current army was to be continued and that any officer or soldier who should, after 12 April 1689, "excite, cause or join in a mutiny or sedition in the army, or should desert the service, shall be punished with death or such other penalty as a court-martial might adjudge." Authority was given for the summoning of courts-martial for the punishment of these offenses. In so doing, the Mutiny Act became the first statutory authority for the application of military law in time of peace as well as in time of war.[41]

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39. Id.
40. Mutiny Act, 1688, 1 William and Mary, c.5, printed in Winthrop, op.cit.supra note 14, at 929.
41. Owing to Parliament's fear of the army, the duration of the first Mutiny Act was limited in its operation only until 10 November 1689. The act was then renewed for a period of one year and, thereafter, subsequent mutiny acts were, with the exception of

The first Mutiny Act was concerned with mutiny and desertion primarily in order to secure the allegiance of the army in the conflict between James II and William III. The act did not supersede the existing articles of war, nor did it impair the prerogative of the Crown to make articles, or to authorize the death penalty for offenses committed abroad.

Although military jurisidction over common law crimes was not expressly defined in the first Mutiny Act, it was expressly stated that nothing in the act was to be construed as exempting "any officer or soldier from the ordinary processes of law." As a result no crime for which the common law or statutory law provided a punishment was cognizable before a courts-martial in England. The statutory act thus caused "no difference in principle, and little of practice, in the admini-

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certain short intervals, passed each year until 1878. The acts were of limited duration in order to deprive the Crown of any army by the limitation of not only appropriations but also the authority to define and punish military offenses. The prerogative of the Crown for the making of articles of war in time of war was superseded completely in 1803 when the Mutiny Act and the Statutory Articles of War were extended to military personnel in overseas locations. See Manual of Military Law, op.cit.supra note 38, at 10.

stration of justice by courts-martial before and after the Mutiny Act of 1689."[42]

By the Mutiny Act of 1712, Parliament authorized the Crown to adopt in time of peace as well as in war, articles of war applicable in the dominions or elsewhere outside England. The Crown was given the statutory power to establish courts-martial but penalties were limited to those "as might have been previously done by Her Majesty's authority beyond the seas in time of war."[43]

By 1716 it had been authoritatively ruled that no soldier could be tried by court-martial in England for murder or other common law felony. Article 18 of the 1717 articles ordered the commanding officer of every regiment to give to the civil magistrates for trial any accused persons charged with crimes punishable by the known laws of the land and not expressly mentioned in the articles of war.[44]

Article 44 of the 1720 articles, based on section 46 of the 1720 Mutiny Act provided that, in the absence of a civil complaint "within eight days," a court-mar-

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42. Clode, Military Law, op.cit.supra 24, at 69.
43. Mutiny Act, 1712, 12 Anne, c.13.
44. Clode, Military Forces, op.cit.supra note 15, at 519.

tial in such a case could legally find a soldier guilty of murder and sentence him to death.[46]

After the court-martial decision had been brought to the attention of Parliament, the "within eight days" provision of article 44 was omitted and article 18 was amended so that a commanding officer was to use his utmost endeavours to deliver over such accused persons to the civil magistrate. The 1720 act provided that within Great Britain and Ireland no person was to be sentenced to any punishment extending to life or limb except for crimes that were expressly punishable by the Acts themselves. Murder and other serious offenses were not made punishable by the Acts and thus were excluded from punishment by courts-martial in England.[47]

In overseas areas, "where there is no form of Our Civil Judicature in Force," courts-martial were authorized to try murder and other crimes not mentioned in the Mutiny Act. By 1749 the articles provided a list of offenses to which British soldiers were subject to punishment. The offenses included: "Willful Murder, Theft, Robbery, Rapes, Coining or Clipping the coin of Great Britain or of any Foreign Coin current in the

46. War Office Opinion 30/25/158 (19 Nov. 1720) printed Appendix I in F. Wiener, Civilians Under Military Justice 245-246 (1967).
47. Articles of War, 1722, art. 16; See also T. Simmons, The Constitution and Practice of Courts-Martial 36 (London 1875).

Country or Garrison." Courts-martial were authorized to try these and "all other Capital Crimes, or other Offenses" and to punish offenders "with Death, or otherwise as the Nature of their Crimes shall deserve."[48]

Courts-martial also had the power to punish all crimes not capital and all disorders and neglects that were "to the prejudice of good order and military discipline."[49] Courts-martial jurisdiction was, however, limited in the 1700's by the fact that all felonies committed in England, with the exception of petty larceny and maiming, were punishable by death.[50]

Military pretrial confinement for persons accused of military offenses was specifically limited by the articles of war. Article 40 of the 1717 articles of war limited pretrial confinement to "five days at farthest."[51]

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48. Articles of War, 1749, sec. XX, art. 2, quoted in Prichard, "The Army Act and Murder Abroad," 1954 Cambridge L. J. 232, 238 (1954).
49. British Articles of War, 1765, sec. XX, art. III; British Articles of War, 1774, sec. 20, art. 3; The "general" article as interpreted, did not confer general military criminal jurisdiction. If a crime was committed against a person wholly unconnected with a military service, and no military order or rule of discipline was violated in or by the act itself, such act did not constitute a military offense. See Winthrop, op.cit.supra note 14, at 723.
50. Report of the Select Committee on Capital Punishment 25 (1930), reprinted in Michael and Wechsler, Criminal Law and its Administration (1940).
51. Davis, A Treatise on the Military Law of the United States 581-601 (1901).

This limitation period was extended to eight days in the 1742 articles.[52] As will be seen in the following pages of this study, the eight day period was to be retained in subsequent British and American articles of war until the late nineteenth century.

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52. Clode, Military Law, op.cit.supra note 24, at 100.

III. AMERICAN ARTICLES OF WAR FROM 1775 TO 1875.

At the time of the writing of the American Constitution and the Bill of Rights, British military law provided that pretrial confinement of officers or soldiers was to be limited to not longer than eight days or until a court-martial could conveniently be assembled.[53] An accused was entitled to a copy of charges against him and the charges had to state clearly the nature of the offense.[54] The order of procedure in the civil criminal courts was to be followed except as the articles of war provided otherwise.[55] Protections against double jeopardy and self-incrimination applied to military tribunals[56] and coerced confessions were not admissible.[57] At a court-martial, the accused was allowed to confront and cross-examine witnesses against him.[58] When depositions or evidence were taken, it was required that the prosecutor and the accused be present.[59] Though the military courts had no jurisdiction to compel

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53. Articles of War, 1765, sec. XV, art. XVIII, printed in Winthrop, op.cit.supra note 14, at 944.
54. Adye, A Treatise on Courts-Martial 123-124 (3d. ed. 1785).
55. Id. at 66.
56. Id. at 97.
57. Id. at 153-154.
58. Id. at 172-201.
59. Id. at 199-200.

the attendance of civilian witnesses, it was usual for both the prosecution and the accused to be allowed to obtain a subpoena for this purpose from the appropriate civil courts.[60] Legal assistance was traditionally provided although the use of civilian lawyers by either side was frowned upon because it was believed that they were unfamiliar with military law.[61] After trial, an accused was entitled to receive, upon demand, a copy of the court-martial proceedings.[62] Any soldier who thought himself wronged by his superiors could have his grievance brought before a court-martial.[63]

The first articles of war for American troops were adopted on 5 April 1775 by the Provisional Congress of Massachusetts Bay.[64] Since many colonists had previously served with the American colonial troops of the British Royal Forces, the British articles of war were well known. It was natural, then, that the Massachusetts Articles were adaptations of the British articles.

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60. Id. at 180-181.
61. Tytler, An Essay on Military Law and the Practice of Courts-Martial 253-255 (1800).
62. Id. at 370-371; American Articles of War, 1776, sec. 18, art. 3, printed in Winthrop, op.cit.supra note 14, at 970.
63. British Articles of War, 1765, sec. XII, art. II, printed in Winthrop, op.cit.supra note 14, at 938.
64. The 1775 Massachusetts Articles are printed in Winthrop, op.cit.supra note 14, at 947-952.

Article 40 of the Massachusetts Articles provided for pretrial open or close arrest of officers and imprisonment of soldiers who "commit a crime deserving of punishment.[65] Article 41 of the Massachusetts Articles, however, limited any pretrial confinement. The article stated that: "No officer or Soldier who shall be put in arrest or imprisonment shall continue in his confinement more than eight days or till such time as a Court Martial can be conveniently assembled."[66]

Article 44 of the Massachusetts Articles required that a report be made in writing to the commanding officer within twenty-four hours of the pretrial confinement of an accused. Failure to do so was punishable by court-martial.[67]

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65. "To the end that offenders may be brought to justice, whenever any Officer or Soldier shall commit a crime deserving punishment, he shall, by his Commanding Officer, if an Officer, be put in arrest; if a Non-Commissioned Officer or Soldier, be imprisoned till he shall be either tried by a Court Martial or shall be lawfully discharged by proper authority." Article 40 is similar to both section XV, article XVII of the British 1765 articles and to section 15, article 16 of the British 1774 articles.
66. Article 41 is similar to both section XV, article XVIII of the British 1765 articles, and section 15, article 18 of the British 1774 articles.
67. Massachusetts Articlesoof War, 1775, art. 44, printed in Winthrop, op.cit. supra note 14, at 951. The Massachusetts Article was similar to section XVII, article XXI, of the British 1765 Articles of War, printed in Winthrop, op.cit.supra note 14, at 944.

On 16 June 1775, John Adams and four others were appointed to draft a commission for George Washington who had been elected Commander-in-Chief on the previous day.[68] Congress adopted the articles of war which the Washington committee had prepared on 30 June 1775. With the substitution of Roman numerals for Arabic numbers, they resembled the articles that had been enacted earlier in the year by the Massachusetts Provisional Congress.[69] On 7 November 1775, an additional sixteen arti-

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68. This commission was to enjoin Washington to cause "strict discipline and order to be observed in the Army...and...to regulate [his] conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall be receiving from this or a future Congress of these United Colonies, or Committee of Congress." 2 Journal Continental Congress 96 (1775).

69. Judge Advocate General Francis Lieber was to write at a later date that the American 1775 Articles corresponded more nearly to the British 1774 Articles than to the Massachusetts Articles. See Davis, op. cit.supra note 51, at 341. Colonel Winthrop, on the other hand, believed that the original of the American 1775 Articles was the British 1765 Code with many of the American articles, "with slight modiffication, copied directly from the intermediate [1775] Massachusetts Articles." See Winthrop,op.cit.supra note 14, at 22. Note, however, that the American 1775 Articles used Roman numerals and were not divided into sections. The American 1776 Articles are more similar in style to the British 1774 Articles. Both codes were divided into section headings and used Roman numerals. The British 1765 Articles were divided into sections and used Roman numerals. The Massachusetts 1775 Articles used Arabic numerals and were not divided into sections.

cles were added.[70]

The American Articles of 1775 provided for the arrest of officers who had committed crimes and for the imprisonment of non-commissioned officers and soldiers for similar offenses. Article XLI read:

"To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority."[71]

This article was a duplicate of the Massachusetts Article 40.

More importantly, note also that section XX, article III of the 1765 British articles read: "All Crimes not Capital and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion." The comparable 1774 British article substituted for the word "Court-martial" the phrase "General or Regimental Court-martial, according to the Nature and Degree of the Offense." This same wording appears in the Massachusetts 1775 articles (article 49), the American 1775 articles (article L), the American 1776 articles (section XVIII, article 5), and the 1806 American articles (article 99).
The British 1765 articles are printed in Winthrop, op.cit.supra note 14, at 931-946. The British 1774 articles are printed in Davis, op.cit.supra note 51, at 581-601. The 1775 American articles are printed in Winthrop at 953-960. The 1776 American articles are printed in Winthrop at 961-971.

70. American Articles of War, 1775, art. XLI, printed in Winthrop, op.cit.supra note 14, at 959-960.
71. American Articles of War, 1775, art. XLI, printed in Winthrop, op.cit.supra note 14, at 956.

Article XLII of the American Articles of 1775 read:

"No officer or soldier who shall be put in arrest, or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled."[72]

This article was a duplicate of Massachusetts Article 41.

Article XLV of the American articles of 1775 was similar to article 44 of the Massachusetts Articles. It provided that a written report was to be made to the commanding officer within twenty-four hours of the pre-trial confinement of an accused. Failure to do so was punishable by court-martial.[73]

In 1776 Washington informed the Congress that the American Articles needed revision. A committee composed of John Adams, Thomas Jefferson, and three others were directed to revise the articles. John Adams was later to write:

"It was a difficult and unpopular Subject: and I observed to Jefferson, that Whatever Alteration We should report with the least Energy in it, or the least tendency to a necessary discipline of the Army, would be opposed with as much Vehemence as if it were the most perfect: We might as well therefore report a complete System at once and let it meet its fate. Some thing might be gained. There was extant one System Articles of War, which had carried two Empires to the head of Mankind, the Roman and the British: for the British Articles of War were only a litteral translation of the Roman: it would be in vain for Us to seek, in our own inventions or the Records of Warlike nations for a

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72. Id.
73. American Articles of War, 1775, art. XLV, printed in Winthrop, op.cit.supra note 14, at 957.

more complete System of military discipline: It was an observation founded in undoubted facts that the Prosperity of Nations had been in proportion to the discipline of their forces by Sea and Land: I was therefore for reporting the British Articles of War, totidem verbis. Jefferson in those days never failed to agree with me, in every Thing of a political nature, and he very cordially concurred in this. The British Articles of War were accordingly reported and defended in Congress by Me, Assisted by some others, and finally carried."[74]

Adams was later to express surprise that the Congress could have passed the Articles without modification.[75]

The new articles were agreed to by Congress on 20 September 1776.[76] They were an enlargement with modifications of the Articles of 1775. The articles were assembled according to the form of arrangement of the British Articles of 1774, i.e., under separate "Sections" each of which related to a specific or general subject.

Section X, article 1 provided that a commanding officer was "to use his utmost endeavors to deliver over"

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74. 3 Works of John Adams 68 (C.F. Adams ed. 1851).
75. "So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and they have governed our armies with little variation to this day." 3 Works of John Adams 83 (C.F. Adams ed. 1851).
76. Rules and Articles for the Better Government of the Troops, 1776; printed in Winthrop, op.cit.supra note 14, at 961-971 [hereinafter cited as American Articles of War, 1776].

an accused person to the civil magistrate. Failure to do so was grounds for dismissal.[77]

No substantive changes were made to the pretrial confinement provisions of the American 1775 Articles. Section XIV, article 15, of the American 1776 Articles directed:

"...that whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by a proper authority."[78]

Section XIV, article 16, of the American 1776 Articles read:

"No officer or soldier who shall be put in arrest or imprisonment shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled."[79]

Section XIV, article 19, provided for a report to

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77. American Articles of War, 1776, sec. X, art. 1. This provision was similar to sec. XI, art. I, of the British 1765 Articles and sec. II, art. I, of the British 1774 Articles. Substantially the same provision was to appear as sec. 1, art. 59, of the 1806 Articles of War (Act of April 10, 1806, c.20, 2 Stat. 366).
78. This article was derived from the similar provisions of sec. 15, art. 17, of the 1774 British Articles, sec. XV, art. XVII, of the 1765 British Articles, and art. XLI of the American 1775 Articles.
79. This article was derived from the similar provisions of sec. 15, art. 18, of the 1774 British Articles, and art. XLII of the American 1775 Articles.

be made to the commanding officer within twenty-four hours after the confinement of an accused person. Failure to do so was to be punishable at the discretion of a court-martial.[80]

Section X, article 1, of the 1776 Articles provided that whenever any officer or soldier was accused of a capital crime, or of having used violence, or of having committed any offense against persons or property, and such were punishable by the known laws of the land, then the commanding officer of the accused was "to used his utmost endeavors to deliver over such accused person or persons to the civil magistrate" if an "application was duly made by or in behalf of the party or parties injured." If any officer willfully neglected or refused to deliver the accused to the civil magistrates then the officer "so offending shall be cashiered."[81] Although similar articles had appeared in previous British articles of war, the Massachusetts 1775 Articles and the American 1775 Articles had omitted the requirements - perhaps because, in the American colonies in 1775, the civil courts were still the "civil judicature" of the

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80. American Articles of War, 1776, sec. XIV, art. 19, printed in Winthrop, op.cit.supra note 14, at 964.
81. American Articles of War, 1776, sec. X, art. 1, printed in Winthrop, op.cit.supra note 14, at 964-965.

King of England.

On 31 May 1786, section XIV of the 1776 Articles was repealed and a complete new section entitled "Administration of Justice" was substituted in order to take care of crimes "committed by officers and soldiers serving with small detachments of the forces of the United States" where there were not sufficient number of officers to hold a general court-martial "in consequence of which criminals may escape punishment.to the great injury of the discipline of the troops and the public service."[82] The provisions of section XIV, article 15, of the 1776 Articles referring to pretrial confinement were changed and placed in two separate articles, articles 14 and 15. Section XIV, article 14, applying to officers read:

"Whenever any officer shall be charged with a crime, he shall be arrested and confined to his barracks, quarters or tent, and deprived of his sword by his commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior power, shall be cashiered for it."

Section XIV, article 15, applying to non-commissioned officers read:

"Non-commissioned officers and soldiers who shall be

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82. Articles of War, 1786, printed in Winthrop, op.cit. supra note 14, at 972-975.

charged with crimes shall be imprisoned until they shall be tried by a court-martial, or released by proper authority."

A subtle but significant change was made in the revised articles 14 and 15 in directing arrest of persons "charged with a crime." Previous articles of war had directed arrest "whenever any officer or soldier shall commit a crime deserving punishment." [emphasis supplied]. The wording of the 1786 amendment would suggest that Congress was concerned with the concept of presumption of innocence, not only in civil criminal charges, but also in military offenses triable by courts-martial.

Section XIV, article 16, of the 1776 Articles was also changed in the 1786 amendment. The word "conveniently" in the phrase "until such time as a court-martial can be conveniently assembled" was omitted in the amended article. The new article thus provided that: "No officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than 8 days, or until such time as a court-martial can be assembled."[83]

Article 19 of the 1786 Articles continued the re-

83. American Articles of War, 1786, art. 16, printed in Winthrop, op.cit.supra note 14, at 973.

quirement that a report was to be made to the commanding officer within twenty-four hours of the confinement of an accused.[84]

The 1776 Articles as amended continued in force until 10 April 1806 when they were repealed and new articles adopted. The 1806 Articles consisted of 101 articles consecutively numbered. Articles 77, 78, 79, and 82 replaced without substantive change articles 14, 15, 16, and 19 of section XIV of the 1786 Articles.[85]

The articles in force from 1776 to 1806 were aimed, for the most part, only at military offenses—desertion,[86] absence without leave in numerous aspects,[87] mutiny,[88] war offenses,[89] making false official statements or certificates.[90] These offenses were not criminal in common law and common-law felonies, except in so far as they were included within larceny or embezzlement of military stores,[91] rioting,[92] or in the general articles denoun-

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84. American Articles of War, 1786, art. 19, printed in Winthrop, op.cit.supra note 14, at 974.
85. The 1806 Articles of War are printed in Winthrop, op. cit.supra note 14, at 976-985.
86. Articles of War, 1776, sec. 6, arts. 1, 3.
87. Articles of War, 1776, sec. 6, art. 2, sec. 13, arts. 1-4.
88. Articles of War, 1776, sec. 2, arts. 3-4.
89. Articles of War, 1776, sec. 13, arts. 12-15, 17-22.
90. Articles of War, 1776, sec. 4, arts. 4-5, sec. 5,art.1.
91. Articles of War, 1776, sec. 12, arts. 1-4.
92. Articles of War, 1776, sec. 7, art. 4, sec. 13, art. 11.

cing "all crimes not capital" and all disorders and neglects "to the prejudice of good order,"[93] or unbecoming an officer,[94] were not mentioned. Since most crimes in the 18th century were capital offenses, military jurisdiction in peacetime was thus limited for the most part to those slight military offenses involving discipline. Also, if a crime was committed against a person wholly unconnected with the military service, and no military order or rule of discipline was violated in and by the act itself, such acts did not constitute a military offense.[95]

Pretrial confinement safeguards were probably adequate in this period of our nation's history when courts-martial had limited jurisdiction and when the relatively small army was composed of volunteers. With the beginning of the Civil War, however, American military law was to change both as to courts-martial jurisdiction and to pretrial confinement safeguards.

Soon after the battle of Ball's Bluff, Virginia, in October 1861, Brigadier General Charles P. Stone, U.S. Volunteers, the defeated Union commander of the district

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93. Articles of War, 1776, sec. 18, art. 5.
94. Articles of War, 1786, art. 20.
95. See Winthrop, op.cit.supra note 14, at 723-725.

in which the engagement took place, was arrested and placed in confinement at Fort Lafayette in New York Harbor. The cause of his arrest was not made known to him nor was a general court-martial convened for trial of his case. He had been held in pretrial arrest for a period of 158 days when the matter was finally brought to the attention of Congress.[96] By an amendment to an act passed on 17 July 1862 entitled "An Act to define the Pay and Emoluments of Certain Officers of the Army and for other Purposes," it was provided:

> "That whenever an officer shall be put under arrest, except at remote military posts or stations, it shall be the duty of the officer by whose orders he is arrested to see that a copy of the charges on which he has been arrested and is to be tried shall be served upon him within eight days thereafter, and that he shall be brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of the said ten days or the arrest shall cease: Provided, That if the copy of the charges be not served upon the arrested officer, as herein provided, the arrest shall cease; but officers released from arrest under the provisions of this section may be tried whenever the exigencies of the service will permit, within twelve months after such release from arrest;" [emphasis supplied][97]

After passage of the act, General Stone was held another thirty days, the limit allowed by the statute, and then

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96. Congressional Globe 414 (1861-1863).
97. "An Act to define the Pay and Emoluments of Certain Officers of the Army, and for other purposes," 37 Cong. 2d. Sess., 37 Stat. at Large 595 (17 July 1862).

released.[98]

Two years later Congress as part of a statute to enroll and call out the national forces, expressly authorized courts-martial in time of war or rebellion to try common-law felonies, regardless of whether the circumstances of their commission had prejudiced good order and military discipline.[99] Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to these courts for trial.[100] Another Civil War statute[101] limited continuances in courts-martial to a period of not more than 60 days. Prior to passage of the statute, the matter of continuances had been regulated by military custom.[102]

The three statutory provisions mentioned above were finally incorporated as articles of war on 22 June 1874 when the 1806 Articles were revised.[103] The provisions

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98. Winthrop, op.cit.supra note 14, at 119, footnote 51.
99. Act of 3 March 1863, c.75, sec. 30; Rev. Stat. sec. 1342, art. 58 (1875).
100. Coleman v. Tennessee, 97 U.S. 509,514 (1878); 6 Ops. Att'y. Gen. 413,419 *1854).
101. Act of 3 March 1863, 12 Stat. at Large 736 (1863).
102. Davis, op.cit.supra note 51, at 518.
103. Articles of War, 1874, Rev. Stat. sec. 1342 (1875); The revised articles were substantially the same as those in the previous codes, 87 of the 101 articles being completely unchanged and a considerable number of the remaining articles having little substantial change except for rearrangement and renumbering. The

of the 1806 Articles requiring delivery of military ofenders to the civil authorities were amended and that requirement was made inapplicable in time of war.[104] Thus, the 1874 Articles provided that in time of war courts-martial had priority in prosecuting for civil crimes an accused in military custody.

With the increase of courts-martial jurisdiction, however, the articles also codified the specific Civil War limitations on pretrial confinement of officers and the length of courts-martial continuances. Article 93 of the 1874 Articles limited continuances in courts-martial to a period of not more than 60 days. Article 71 of the 1874 Articles incorporated verbatim the wording of the 1862 statute concerning officers under arrest.

The provisions of article 71 limiting pretrial confinement were mandatory in that if charges were not served upon an officer within eight days after his arrest then the arrest "shall cease." If, having been duly served with charges, he was not brought to trial within ten days after the arrest, or if the exigencies of the service prevented a trial within thirty days

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1874 Articles are printed in Winthrop, op.cit.supra note 14, at 986-996.

104. Articles of War, 1875, art. 59; Rev. Stat. sec. 1342 (1875).

after the expiration of the first ten days, then the arrest "shall cease." This article was to apply in all cases involving officers except those occurring "at remote military posts or stations."

Although officers placed in arrest at remote military posts were excluded from the application of article 71, the Manual for Courts-Martial specifically provided that such did not authorize an abuse of the power of arrest in these cases.[105] In one case when an arrest was found to have been unreasonably protracted without trial, considering the facilities of communication in the department headquarters and other circumstances, it was held that the arrested officer was entitled to be released upon his making application for such release.[106]

For officers placed in arrest at remote military posts and especially for soldiers placed in arrest, the articles of 1874 provided that "No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled." This provision had previously appeared as article 79 of the 1806 Articles as well as in pre-

105. See Manual for Courts-Martial, 1917, para. 54.
106. See Digest of Opinions of the Judge Advocate General 1895, Articles of War 70, para. 2-4.

ceeding American and British articles of war. Violations of the 1806 article had been the reason for Congressional enactment of the pretrial confinement limitation expressed in article 71 of the 1874 Articles.

Although article 71 "entitled" a person to be released from arrest, an accused was not authorized to release himself. He was to apply through proper channels either to the authority by whose order the arrest was imposed or other proper superior authority.[107]

Article 68 of the 1874 Articles continued the requirement that a written report be made to the commanding officer within twenty-four hours of the pretrial confinement of an accused. This report was to contain the name of the prisoner, the crime charged against him, and the name of the officer committing him. Failure to make the report was punishable by court-martial.[108]

With the enactment of the 1874 Articles, common-law felonies were listed in the American articles of war as being punishable by court-martial when committed by a military person in time of war, insurrection, or rebellion. Those offenses listed were "larceny, robbery,

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107. See Digest of Opinions of the Judge Advocate General, 1912, Articles of War para. LXXI(D)(16 Feb. 1905)
108. Articles of War, 1874, art. 68.

burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape."[109] These offenses had previously been made punishable by the Congressional enactment of 3 March 1863.[110]

The Articles of War, 1874, were to remain in effect until the early part of the 20th century. Then, once again, Congress began to question how to improve American military law.

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109. Articles of War, 1874, art. 58.
110. 12 Stat. at Large 736 (1863).

IV. AMERICAN MILITARY LAW 1912-1969.

Between 1912 and 1916 Congressional hearings were held on revision of the 1874 articles of war.[111] In a Senate hearing in 1916, Brigadier General Enoch H. Crowder, the then Judge Advocate General of the U.S. Army, urged that article 71 of the 1874 Code be made equally applicable to both officers and enlisted men. He informed the committee that military law on pretrial confinement:

"...operates unequally upon the commissioned officer and the enlisted man. As to the enlisted man, the guaranty is against arrest for 'more than eight days or until a court-martial can be assembled,' a guaranty which is dependent upon and may be defeated by the uncertainties attending upon the assembling of the officers necessary and proper to compose a court for his trial, the collecting of witnesses at the time of trial, the movements of the Army in peace and in war, or other incidents of the service. As to the officer, unless he be stationed at a remote post or station, the guaranty may not be defeated by such uncertainties, but is limited by the article absolutely and under all circumstances to certain periods."[112]

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111. See "Hearing Before the Committee on Military Affairs," House of Representatives, 62d. Cong., 2d. Sess, in H.R. 23628 (22 April 1912); "Establishment of Military Justice and to Reform the Entire Articles of War," Hearings Before the Military Affairs Committee, Senate Report 229, 63d. Cong., 2d. Sess. (6 Feb. 1914).
112. "Revision of the Articles of War: Hearing before the Subcommittee of Committee on Military Affairs," House of Representatives 30, 64th Cong., 1st Sess. (29-30 June 1916).

General Crowder proposed that article 71 be amended so as to be applicable to both officers and soldiers. He also recommended that the article contain definite time limits upon action taken by courts-martial investigating officers.[113] If an accused person remained in pretrial

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113. General Crowder's 1916 proposed amended article 71 read: "The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. [In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall tender to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who wilfully or negligently fails to do so promptly, and] any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct; Provided, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him." See "Revision of the Articles of War," op.cit.supra note 116, at 58-59.

custody more than twenty days then special reports explaining the necessity for further delay were to be made to superior authority.[114] An officer who willfully or negligently failed to promptly make an investigation or render a report or unreasonably or unnecessarily delayed a case was to be punished as a court-martial might direct.

In a report to the Senate committee, the War College Division of the General Staff recommended omission in the above proposed article of that quoted language enclosed in brackets in footnote 113. The General Staff argued that the eight day report deadline would be difficult to meet.[115] In view of the General Staff's objection, General Crowder proposed that the eight day reports be limited to times of peace. This was acceptable to the General Staff.[116]

By an enactment dated 29 August 1916, effective 1 March 1917, the American Articles of War were revised.[117] Four important changes were made in the rules applicable to jurisdiction over civil crimes committed in peace-

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114. The proposed requirement for the making of eight day reports was based on the similar eight day reporting requirements of the 1914 British articles of war. See art. 45(1) Army Act, 1914.
115. "Revision of the Articles of War," op.cit.supra note 112, at 58.
116. Id. at 59.
117. Act of 29 August 1916, 39 Stat. 650-670 (1916).

time within the United States. First, court-martial jurisdiction was extended to specified non-capital civil offenses (such as larceny, robbery, and assault), whether or not committed in time of war.[118] General Crowder explained to a Senate Subcommittee on Military Affairs that this extension was designed to eliminate the confusion in pleading which had resulted from the requirement that civil crimes be charged under the general article in peacetime and under the specific article in wartime.[119]

Second, the general article was altered by omitting the qualification that "crimes not capital" be to the prejudice of good order and military discipline.[120] General Crowder stated that the amendment of the general article was intended to sweep within court-martial jurisdiction all non-capital civil crimes, not elsewhere expressly denounced by the articles.[121] Although recognizing that there had been "some argument" about the construction of the prior general article, General Crowder did not bring to the subcommittee's attention the traditional view that only non-capital crimes prejudicing

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118. Articles of War, 1916, art. 93.
119. See Senate Report No. 130, 64th Cong., 1st Sess. 89 (1916).
120. Articles of War, 1916, art. 96.
121. Senate Report No. 130, 64th Cong., 1st Sess.91 (1916).

good order and military discipline could be prosecuted under the prior general article.[122]

Third, the 1916 Articles expressly provided that murder or rape committed outside the United States could be tried by court-martial in time of peace.[123] Previously, courts-martial had had no peacetime jurisdiction over any civil capital offense.

Fourth, the 1916 Articles eliminated the requirement of delivering offenders to civil authorities in cases where the serviceman was being held by the army for a crime punishable under the articles of war.[124] In effect, therefore, the 1916 Articles gave to the army priority of prosecution with respect to soldiers who were in its custody awaiting trial by court-martial for any peacetime civil offense except murder or rape committed within the United States.

Article 70 of the 1916 Articles replaced article 71 of the 1874 Articles. The new article 70 retained the language of its predecessor but incorporated the proposed amendments of General Crowder and was made applicable to both officers and soldiers.[125] In addition to

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122. See Winthrop, op.cit.supra note 14, at 723.
123. Articles of War, 1916, art. 92.
124. Articles of War, 1916, art. 74.
125. Although article 70 by its wording was applicable to both officers and enlisted men, para. 70, Manual

the protections offered by the comparable 1874 article, it was provided that "in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."[126]

The provisions of article 93 of the 1874 Articles had limited courts-martial continuances to no more than 60 days. A person in confinement could thus be certain that his court-martial could not be "continued" indefi-

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for Courts-Martial (1916) referred only to the release of officers and not enlisted men. This paragraph was later corrected in the Manual for Courts-Martial (1918) corrected to 1 August 1918. In the meantime the Judge Advocate General of the Army was asked to render an opinion as to what extent Article 70 was mandatory and to what extent it was discretionary in application to enlisted personnel. The case in which a speciric opinion was requested involved a private who had been apprehended on 23 October 1917 and placed in confinement the following day. On 28 January 1918 he requested in writing that he be released from confinement. The opinion of the Judge Advocate General referred to an earlier case involving an officer who had been arrested on 12 December 1917. When charges had not been served on him as required under the provisions of article 70, it was held that the arrest ceased to be operative by law eight days later. The Judge Advocate General's opinion held that the same result applied in the case of an enlisted man. See Digest of Opinions of the Judge Advocate 1918, Article of War 70, para. 31.

126. Articles of War, 1916, art. 70.

nitely. The 1916 Articles omitted this limitation dating back to the Civil War and, instead, provided that a court-martial could, "for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just."[127] The number of continuances were limited only in that reasonable cause had to be shown for extended delays.

The 1916 Articles were in effect during World War I. After the end of the war in 1919, a number of people complained that American military justice was unfair in its application to members of the military. General Samuel T. Ansell, the Acting Judge Advocate General of the Army, vigorously requested that the Articles be completely changed. In 1919, he was asked to prepare a revision of the 1916 Articles of War and to submit his proposals to the Secretary of War. General Ansell did submit a proposed revision but no reply was every made by the War Deaprtment.[128] The Ansell Articles were then introduced in the U. S. Senate by Senator George E. Chamberlain of

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127. Articles of War, 1916, art. 20.
128. For a detailed account of the controversy over revision of the 1916 Articles of War, see T. W. Brown, "The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell," 35 Mil. L. Rev. 1 (1967).

Oregon and in the House by Congressman Royal Johnson of South Dakota and became known as the Chamberlain/Johnson Bill. As submitted to the U. S. Senate, the Chamberlain/Johnson Bill proposed two major changes in the area of pretrial confinement. First, an officer holding an accused was to be required, under penalty, to release him upon expiration of the prescribed 40 day period of article 70; and, second, that the accused once so released was not thereafter to be liable for trial for the offense for which he had been arrested or confined.[129]

In a report prepared in July, 1919, a Special War Department Board on "Courts-Martial and Their Procedure" critisized the proposed Ansell articles.[130] The Board, headed by Major General F. J. Kernan, submitted their own revision. The Kernan Board agreed with General Ansell that if a court-martial could not, for good and sufficient reasons, be begun within a period of 30 days from the date of arrest or confinement, then the immediate commanding officer should release the accused unless ordered to do otherwise by superior authority.

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129. See "Hearings on S. 64 on the Establishment of Military Justice Before Subcommittee of the Senate Committee on Military Affairs," 66th Cong., 1st. Sess. (1919).
130. See "Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure," (Washington 17 July 1919).

It recommended, however, that any accused so released be liable for trial within 12 months after his release from arrest or confinement.[131]

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131. "Arrest and confinement pending trial by court-martial: When any person subject to military law is arrested or confined for the purpose of trial the officer by whose order this is done shall see that a copy of the charges on which the arrest or confinement is based is served upon the accused party within eight days after his arrest or confinement, and it is the duty of the officer ordering such arrest or confinement to expedite, in so far as in him lies, the speedy trial of the case. It is the like duty of all other officers having to do with the trial of the case to expedite it in every practicable way. If the trial can not, for good and sufficient reasons, be begun within a period of 30 days from the date of arrest or confinement the immediate commanding officer, unless otherwise ordered by superior authority, shall release the accused from arrest or confinement. But persons released from arrest or confinement under the provision of this article may be tried, whenever the exigencies of the service shall permit, within 12 months after such release from arrest: Provided further, That the trial judge advocate shall serve or cause to be served upon the accused a copy of the charges upon which trial is to be had and a statement of such service shall be entered upon the record of the case showing the date thereof." The Board stated that the 1917 Article required local commanders to do the impossible and that the changes proposed would "make the laws conform to good practice which has never been possible under old article 70. See Kernan Report, op.cit.supra note 130, at 34.

After extensive hearings and 1395 pages of testimony, the Senate Subcommittee Hearings on the Chamberlain/Johnson/Ansell Articles concluded in the latter part of November, 1919, with the understanding that the subcommittee would make a study of the testimony and, after 6 December 1919, report a bill for the revision of the articles of war.[132] After the close of the hearings, General Crowder submitted to the subcommittee another proposed revision of the articles of war.[133]

No new bill was reported by the subcommittee until Senator Chamberlain gave notice in the open session of the Senate that, if a bill was not reported by the subcommittee, he would offer his own proposals to the full Senate. The Senate subcommittee thereupon "hastily assembled" and, in a session of an hour and a quarter, a revision of the articles was presented to the full committee and indorsed favorably as an "amendment" to Senate Bill 64.[134] In reality, the reported bill was the Crow-

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132. See testimony of General Crowder at "Hearing before a Special Subcommittee of the Committee on Military Affairs," House of Representatives, 66th Cong., 2d. Sess., 4 May 1920.
133. Id. at 3. This new revision was substantially in the same form as was to later appear in House Report 940 of 7 May 1920, on House Bill 13942.
134. See Rigby, "Military Penal Law: A Brief Survey of the 1920 Revisions of the Articles of War," 12 Journal of Criminal Law and Criminology 84 (1921).

der Revision which completely changed the Chamberlain/ Johnson Bill. The reported revision then became an amendment to House of Representatives Bill 12775 relating to the reorganization of the Army.[135]

On 4 May 1920 four persons testified before a House of Representative subcommittee on the articles of war as proposed in Bill 12775.[136] The four persons who testified were: General Crowder; his assistants, Brig. General E. A. Kreger and Lt. Colonel W. C. Rigby; and Congressman T. W. Miller of Delaware. All of the witnesses spoke in support of the bill. No mention was made of the fact that the proposed revisions relating to pretrial confinement would change drastically military law that had been in effect for nearly 60 years and which had been expanded by Congressional action only four years earlier. Congressman Miller said that "the legislation you have under consideration today is the Chamberlain/ Johnson Bill in practically the form in which it was introduced" and that such "approaches nearest to the ideas of the American Legion and we heartily indorse that bill..."[136a] In fact, as noted above, the bill before the

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135. 41 Stat. 787.
136. See "Hearing before a Special Subcommittee of the Committee on Military Affairs," House of Representatives, 66th Cong., 2d. Sess., 4 May 1920.
136a. Id. at 19.

subcommittee was not the Chamberlain/Johnson/Ansell legislation but was the completely different legislation proposed by General Crowder.

By enactment of 4 June 1920, effective 4 February 1921, the articles of war were revised.[137] No change was made relating to jurisdiction over civil crimes.[138]

Article 69 of the 1920 Articles replaced the former article 70 of the 1916 Articles. The former article had provided that a person charged with a minor offense "may be placed in arrest." The new article provided that such a person "shall not ordinarily be placed in confinement."

The completely new article 70 of the 1920 Articles replaced the former article 71 of the 1916 Articles. The new article read:

> Art. 7. CHARGES; ACTION UPON. a Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief. a
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> bNo charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline.b cAt such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to pre-

137. Act of 4 June 1920, 41 Stat. 787.
138. 41 Stat. 803,805.

sent anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.c

dBefore directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.d

eWhen any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him.e fAny officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial might direct.f gWhen a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay.g h The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had,h [and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided] i In time of peace no persons shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.i 139

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139. Nearly all of the wording of article 70 of the 1920 Articles now appears in either the articles of the Uniform Code of Military Justice (1951) or the Manual for Courts-Martial United States 1969(revised). The wording enclosed by the letters a is now article 30(a) UCMJ. The wording enclosed by the letters b is now article 32(a) UCMJ. The wording enclosed by c is now article 32(b) UCMJ. The wording enclosed by d is now article 34(a) UCMJ, and that enclosed by e is now article 10, UCMJ. The sentence enclosed by f now appears in article 98, UCMJ, and that wording enclosed by g is similar to that which now appears in article 33, UCMJ. The

The new article 70 retained the prohibition against courts-martial in peacetime occurring within five days of service of charges on an accused and unless the latter had agreed to trial. This limitation was originally enacted during the Civil War and was incorporated in article 74 of the 1874 Articles and article 70 of the 1916 Articles.

Expunged, however, were the eight, ten, thirty, and forty day time limitation provisions. In their place the requirement was inserted that "when a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same was not practicable, he was to report to superior authority the reasons for delay. Any officer who was responsible for unnecessary delay in investigating or carrying the case to a final conclusion was to be punished as a court-martial might direct.

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wording enclosed by the letters h and i now appears in article 35, UCMJ. Similar wording to that contained in brackets now appears in paragraph 58, of the Manual for Courts-Martial United States 1969 (Revised).

The provisions of the 1920 Articles were to remain in effect throughout World War II.[140] On 24 June 1948 the Articles were amended, effective 1 February 1949.[141] They were again amended on 5 May 1950, effective 31 May 1951, and became applicable to all three services as the Uniform Code of Military Justice. Although the 1951 Code[142] was hailed as a significant advance in the administration of military justice,[143] it did eliminate the one remaining limitation on court-martial jurisdiction over civil crimes - the trial of murder and rape committed in peacetime within the United States.[144] No change was made, however, in provisions limiting pretrial confinement.

In 1968 the Uniform Code of Military Justice was

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140. A new Manual for Courts Martial (1921) was issued to replace the manual printed in 1918. The 1921 manual was in turn superseded by the Manual for Courts Martial of 29 November 1927, effective 1 April 1928. During World War II a new edition of the 1928 Manual was issued, corrected to 20 April 1943.
141. Act of 24 June 1948, c.625, 62 Stat. 604.
142. UCMJ, 10 U.S.C. secs. 801-940 (1964).
143. See Landman, "One Year of the Uniform Code of Military Justice: A Report of Progress," 4 Stan. L. Rev. 491 (1952); White, "Has the Uniform Code of Military Justice Improved the Court-Martial System?" 28 St. John's L. Rev. 19 (1953).
144. UCMJ, arts. 118,120; 10 U.S.C. secs. 712,714 (1964).

amended by the Military Justice Act of 1968, effective 1 August 1969.[145] No changes were made either to courts-martial jurisdiction or to limitation of pretrial confinement.

However, on 7 October 1968, the Department of Defense issued an instruction, applicable to all services, directing that pretrial confinement of all persons in excess of thirty days was to be permitted only when approved in each instance by the officer exercising general court-martial jurisdiction over the command which ordered the investigation of the alleged offense.[146] Current United States military law limiting pretrial confinement is thus now similar to that originally proposed in 1919 by the Kernan War Department Board in hearings on the revision of the 1916 Articles of War.[147] The new change was not the result of Congressional enactment but of departmental action undoubtedly influenced

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145. 82 Stat. 1335 (1968).
146. D.O.D. Instruction 1325-4, 7 October 1968 JAGJ 1969/7990, 28 Feb. 1969; U.S. Dep't. of Army, Pamphlet No. 27-69-6, Judge Advocate Legal Service, sec. V, para. 1. The limitation in pretrial confinement is to be set forth as an amendment to Army Regulation 633-5, "Apprehension and Confinement, Prisoner - General Provisions."
147. See discussion, supra, at pages 44-45.

by decisions of the U. S. Court of Military Appeals and the U. S. Supreme Court relating to "prompt and speedy" trials.[148] It is believed that the principle of stare decisis in judicial decisions will ensure that American military law will continue to prohibit extended confinement without trial.

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148. See United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959).

V. BRITISH MILITARY LAW.

A. Military Law of England 1774-1969.

After the passage of the British articles of war of 1774 and the Mutiny Act of that year, subsequent Mutiny Acts extending the life of the articles continued to be passed annually until 1878.[149] Before 1803 the Mutiny Act and the articles of war made thereunder applied only to members of the army within Great Britain during time of peace. Similar but separate articles were issued under the Royal Prerogative for governing of the army in oversea areas.[150] In 1803 the Crown was granted statutory authority to promulgate articles of war applicable in peacetime to troops stationed in England as well as abroad.[151] The prerogative power of making articles of war in time of war or for overseas areas was finally superseded in 1813 when statutory articles were made applicable in time of war in England and elsewhere.[152] The British army was then governed, both in time of peace and war, by the Mutiny Act and the

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149. See Manual of Military Law, op.cit.supra note 38, at 4.
150. Id.
151. Mutiny Act, 1803, 43 Geo. III, c.20.
152. Mutiny Act, 1813, 53 Geo. III, c.17, sec.146.

statutory articles.

The inconvenience of having a military code contained partly in an Act of Parliament and partly in articles of war made under and deriving validity from that Act led in 1879 to the consolidation of the provisions of both into one statute - the Army Discipline and Regulation Act, 1879.[153] Two years later this latter act was repealed and reenacted with some amendment by the Army Act of 1881.[154] The Army Act had of itself no force but was required to be brought into operation annually by another Parliamentary act. This act was known as the "Army (Annual) Act" and maintained the principle of Parliamentary control over the discipline of a standing army while retaining in one statutory act all provisions of the military code.[155] The annual act could amend the Army Act and such amendments usually came into being as of the day the Army Act was continued.[156] Army Acts were to be passed annually until 1955.

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153. Manual of Military Law, op.cit.supra note 38, at 14; . By 1879 codified British military law consisted of 110 sections of the Mutiny Act and 187 articles of war.
154. 44 & 45 Vict., c.58.
155. Id. at para. 2.
156. Manual of Military Law, op.cit.supra note 38, at 11.

In 1955 Parliament extended the statutory authorization for the Army Act from one year to five years and provided that, within the five year term, the necessary bringing into force could be effected by Orders in Council.[157] The Army and Air Force Act, 1961,[158] extended the authorization of the Army Act, 1955, through the end of 1966 when a similar extension was made pursuant to the Armed Forces Act of 1966.[159]

Although American courts-martial jurisdiction has expanded,[160] British courts-martial jurisdiction has remained limited as to civil offenses. The Army Act of 1955 provides that civil courts are to have exclusive jurisdiction over murder, manslaughter, treason - felony, and rape offenses committed in the United Kingdom.[161]

Just as British courts-martial jurisdiction has remained restricted, protections in British military law against prolonged pretrial confinement have remained limited. The 1774 British Articles provided in section 15, article 18 that no officer or soldier was to be kept

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157. Army Act, 1955, 3 & 4 Eliz.II, ch.18, sec. 226.
158. 9 & 10 Eliz.II, c.52 (1961).
159. 14 & 15 Eliz.II, c.45 (1966).
160. See discussion, supra, at page 40.
161. Army Act,1955, sec. 70(4); 9 & 10 Eliz.II, ch. 52 (1961).

in pretrial confinement for more than eight days or until a court-martial could be conveniently assembled. The eight day provision was continued in force until 1866 when it was omitted. Instead, article 18 of the 1866 Articles of War read that:

"Whenever any person subject to the Mutiny Act shall be charged with committing an offense, he shall, if an officer, be put in arrest, and, if a soldier, be put in confinement, and shall, within a reasonable time, either be brought to trial before a court-martial or be discharged from the said arrest or confinement."[162]

The Queen's Regulations provided, moreover, that:

"Prisoners are not to be detained in custody for a longer period than forty-eight hours - exclusive of Sundays - without having their cases enquired into, and either summarily disposed of, or reported to superior authority."[163]

In the 1914 Army Act, article 45(1) provided that:

"Every person subject to military law when so charged may be taken into military custody: Provided, that in every case where any officer or soldier not in active service remains in such military custody for a longer period that eight days without a court-martial for his trial being ordered to assemble, a special report of the necessity for further delay shall be made by his commanding officer in the manner prescribed; and a similar report shall be forwarded every eight days until a court-martial is assembled, or the officer or soldier is released from custody."

This article was the basis for a proposal by General Crowder that American military law contain a similar

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162. Quoted in Simmons, op.cit.supra note 47, at 147.
163. Queen's Regulation 6 quoted in Simmons, op.cit. supra note 47, at 147.

reporting requirement.[164]

The 1939 Army Act was in effect during World War II. Article 45(1) of the Army Act continued in force except that during the war the special eight day reports were not required for persons in custody who were "in active service."[165]

In a Report of the Army and Air Force Court-Martial Committee in 1946, it was recommended that, if an accused remained in close arrest for more than 28 days without a court-martial having been assembled, then he should have the right to petition the Judge Advocate General of the British Army for release from continued detention. It was further recommended that it should be made illegal for an accused to be retained in close arrest without trial for more than 90 days. These recommendations were not incorporated into the the British Army Act.[166]

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164. See "Revision of the Articles of War," Hearing before a Subcommittee on Military Affairs, House of Representatives, 64th Cong. 1st Sess. 29-30 June 1916).
165. A British soldier "in active service" is attached to a force which is engaged in operations against an enemy or is engaged in military operations in a country or place whollly or partly occupied by an enemy, or is in military occupation of any foreign country. See Article 224(1), Army Act, 1955.
166. "Report of the Army and Air Force Court-Martial Committee," War Dep't. CMD 7806 (London 1946), cited

In 1949, a British soldier who had been kept in custody more than 70 days without a court-martial assembling petitioned the English court for his release on bail. The court ruled against the petitioner stating that whether or not there had been excessive delay depended upon the circumstances of each particular case. In the case before it, the court was satisfied that the delay had neither been excessive or oppressive. The court stated that violations of the Rules of Procedure would not, by themselves, entitle a military applicant to release under habeas corpus. The court implied, however, that if excessive delay had been found it would have released the prisoner on bail.[167]

As a result of the case, the Queen's Rules of Procedure were changed. Rule of Procedure 6 now provides that an accused person will not be held either in open or close arrest for longer than 72 days without a court-martial being convened, unless the convening officer

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in 12 Mod. L. Rev. 223 (1947). Although not put into effect in English military law the recommendations were incorporated into Canadian military law in 1952. See sec. 132 of the Canadian National Defense Act of 1952,Revised Stat. Canada 1952, c.184.

167. R.V.O.C. Depot Battalion R.A.S.C. Colchester, ex parte Elliot (1949) 1 All E.R. 373; See also Richard Blake's Case, 2 Maule & Sel 428 (King's Bench 1814).

has directed in writing the reasons why the accused should be held for a longer period.[168] If a soldier has been held in arrest awaiting trial for an unreasonable length of time, a Divisional Court of Queen's Bench is authorized to order his release and admit him to bail.[169]

In 1954, a committee recommended revision of the entire Army Act.[170] Its recommendations were enacted as the Army Act of 1955.[171] The former Article 45(1) of the 1939 Army Act regarding pretrial delay now appears as Article 75 of the Army Act.[172]

The military law of England with regard to pretrial confinement has been influenced by the decisions of the the civil courts. Excessive delay, if proved, will be grounds for the release of an accused in pretrial confinement. An accused, however, could

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168. British War Department, Manual of Military Law 10 (London 1961).
169. Id. at 10.
170. Report From the Select Committee on the Army Act and Air Force Act 1953-1954 (London 1954).
171. Army Act, 1955, 3 & 4 Eliz.II, c.18. The provisions of the 1955 Army Act were amended and extended for another five years by the Army and Air Force Act of 1961, effective 1 January 1962 (Army and Air Force Act, 1961, 9 & 10 Eliz.II, c.52 (1961)). The Army Act was again amended and extended for another five years by the Armed Forces Act of 1966, 14 & 15 Eliz.II, c.45 (January 1967).
172. Army Act, 1955, sec. 75.

probably not prove excessive delay unless he had been in pretrial confinement for more than 70 days. Since English military law requires the submission to superior authority of eight day reports stating the reasons for further delay, the government would be able to present to a civil court a well-documented case as to its efforts in bringing the accused to trial.

B. Military Law of Canada 1867-1969.

In 1867 Canada became a Dominion of Great Britain and the Parliament of Canada was established. In the following year the Canadian Army was organized under the Militia Act of 1868.[173] The Acts stated that officers and men of the Canadian Militia were subject "to the Rules and Articles of War and to the [Mutiny] Act for punishing mutiny and desertion, and all other laws then applicable to Her Majesty's troops in Canada, and not inconsistent with this Act..."[174] The Militia Act provided that statutes enacted by the Parliament were to be able (1) to incorporate, by reference, into Canadian military law English statutes and regulations with whatever limitations or under whatever conditions the Parliament imposed; (2) to enact military law by direct legislation; (3) to delegate power to a Governor-in-Council, or some specified administrative body, to implement legislation by orders-in-council or regulations. Such regulations were to have the same force in law as legislation.[175]

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173. An Act respecting the Militia and Defense of the Dominion of Canada, Stat. Canada c.40 (1868).
174. Id. at sec. 64.
175. The regulations promulgated by the Governor-in-Council are now published in three volumes and are known as the Queen's Regulations and Orders for the Canadian Forces 55 (Ottawa 1965) [hereinafter cited as QR & O].

In 1927 the Canadian Militia Act specifically adopted the Army Act for the time being in force in England and made it applicable to the Canadian Militia.[176] Until 1950 Canadian military law regarding pretrial confinement was thus essentially the same as British military law.

In 1950 the Canadian Parliament passed the National Defense Act and enacted into one statute all legislation relating to the Canadian Forces.[177] The Act effected three major changes in Canadian military law. They were that: (1) Canada's armed forces are now governed entirely by Canadian military law and not in part by British military law; (2) the same Code of Service Discipline applies to all members of the Canadian Army, Air Force and Navy; (3) the Administration of military law is subject to review by a civilian court of appeal[178] and, in certain circumstances, by the Supreme Court of Canada.[179]

The Act provides that all civil offenses are made

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176. Revised Stat. Canada 1927, c.132, sec. 69.
177. National Defense Act, Revised Stat. 1952, c.184.
178. National Defense Act, Revised Stat. 1954, c.184, sec. 190.
179. National Defense Act, Revised Stat. 1952, c.184, sec. 196.

service offenses and may be tried by service courts. Punishments prescribed for offenses are similar to punishments prescribed by the Canadian Criminal Code for similar civil offenses.[180]

A Canadian serviceman may be held in military custody prior to trial only when arrested for a charge under the Code of Service Discipline. He is not to be held in military custody on a civil charge. Upon return to his service, he is to be returned to duty unless subsequently placed in service custody on a charge under the Code of Service Discipline.[181]

An accused is to be held in close arrest only if: (1) the offense is of a serious nature; or (2) it is likely that he would otherwise continue the offense or commit another offense; or (3) close custody is considered necessary for his protection or safety.[182] The

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180. National Defense Act, sec. 119. Nothing in the Code of Service Discipline, however, is to affect the jurisdiction of any civil court to try persons for any offense triable by that court, not withstanding that such persons may have already been tried by a military court for the same offense. See National Defense Act, Revised Stat. 1952, c.184, sec. 62.
181. QR & O, art. 105.22.
182. QR & O, art. 105.13.

charges are to be immediately investigated.[183]

A report concerning the commital of the accused is to be made by the person in charge to his superior as soon as practicable and, in any case, within twenty-four hours thereafter.[184] If the man in custody belongs to another unit of the Canadian Forces, his unit is to be notified within forty-eight hours.[185]

An accused in confinement may request to be informed of the rank and name of the person who committed him and the reasons why he is to be held in custody.[186] It is the duty of the "officer, man, or other person who commits a person into custody to deliver at the time of such committal, or as soon as practical and in any case within twenty-four hours thereafter, to the officer or man into whose custody that person is committed, an account in writing, signed by himself, in which is stated the reason why the person so committed is to be held in custody."[187] If an account in writing is not delivered within twenty-four hours, then the accu-

183. QR & O, art. 105.14.
184. QR & O, art. 105.20.
185. QR & O, art. 105.22.
186. QR & O, art. 105.17.
187. QR & O, art. 105.18.

sed is, as soon as practicable, to be discharged from custody.[188]

As noted previously, a British report of the Army and Air Force Courts-Martial Committee recommended that the British Army Act be amended so that if an accused remained in arrest for more than twenty-eight days without a court-martial having been convened, he should have the right to petition the Judge Advocate General of the British Army against continued detention. It was further recommended that it should be made illegal for an accused to be retained in close arrest without trial for more than 90 days.[189] This recommendation was not incorporated into British military law.

When the Canadian Parliament passed the National Defense Act of 1950 it adopted the recommendations made by the 1946 committee in order to "eliminate the delays in trial that had caused some criticisms of the administration of service justice in the past."[190]

Section 132[191] of the Act now provides that if an accused has been placed under arrest for a service of-

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188. QR & O, art. 105.19.
189. Report of the Army and Air Force Courts-Martial Committee, (C.M.D. 7806 London 1946).
190. Larson, "Canadian Military Law," 29 Can. B.R.252 (1951).
191. National Defense Act, Revised Stat. 1952,c.184, sec. 132; QR & O, art. 132.

fense and has remained in custody for eight days without a court-martial having been ordered to assemble then a report is to be made by the commanding officer to superior authority stating the necessity for further delay. A similar report is to be made every eight days until a court-martial has been ordered to assemble. If the accused is held for a total of 28 days without trial he is entitled to direct a petition to the Minister of Defense requesting release from custody or disposition of the case. In any event, after a period of ninety days custody, the accused is to be freed unless the minister has directed otherwise or unless a summary trial has been held or a court-martial ordered to be assembled. The Act further provides that a person who has been freed from custody by order of the Minister shall not be subject to rearrest for the originally charged offense except on the written order of an authority having power to convene a court-martial for his trial.[192]

192. Section 132 of the National Defense Act provides:
"1. Where a person triable under the Code of Service Discipline has been placed under arrest for a service offense and remains in custody for eight days without a summary trial having been held or a court-martial for his trial having been ordered to assemble, a report stating the necessity for further delay shall be made by his commanding officer to the authority who is empowered to convene a court-martial for the trial of that person, and a similar report shall be forwarded in the same

The passage of the National Defense Act made Canadian military law different from that of England in that it now has jurisdiction over all civil offenses. At the same time, Canadian military law provides greater protections against prolonged pretrial confinement. With the granting of jurisdiction over more serious crimes, especially in peacetime, the Canadian Parliament has sought also to limit pretrial confinement.

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manner every eigth day until a summary trial has been held or a court-martial has been ordered to assemble.

2. Every person held in custody in the circumstances mentioned in subsection (1) is, after he has been so held for a total of twenty-eight days without a summary trial having been held, or a court-martial having been ordered to assemble, entitled to direct to the Minister, or to such authority as the Minister may prescribe or appoint for that purpose, a petition to be freed from custody or for a disposition of the case, and in any event that person shall be so freed when he has been so held for a total of ninety days from the time of this arrest unless the Minister otherwise directs or unless a summary trial has been held or a court-martial has been ordered to assemble.

3. A person who has been freed from custody pursuant to subsection (2) shall not be subject to rearrest for the offense with which he was originally charged except on the written order of an authority having power to convene a court-martial for his trial."

The report referred to in section (1) of the article may be in letter, memorandum, or note form. See QR & O, art. 105.34.

VI. CONCLUSIONS.

From the first British articles of war made in the 15th century for the regimentation of feudal forces in time of war, military law has conflicted with civil law both as to the jurisdiction of courts-martial and as to the safeguards against prolonged pretrial confinement. In England in the 17th and 18th centuries, civil courts had jurisdiction over all military and civil offenses in time of peace. All criminal and military offenses, except for the most minor, were tried by civilian courts. Protections against prolonged pretrial imprisonment were therefore the same for all citizens - "whether wearing red coats or grey." In time of war, or if there was no civil judicature, protections against excessive military pretrial confinement for military offenses were accorded by articles of war.

The English Mutiny Act of 1689 was the first statutory authority for the punishment of military offenses by courts-martial in time of peace. Military pretrial confinement remained limited since articles of war enacted prior to the American Revolution were concerned, for the most part, only with military offenses - desertion, absence without leave, mutiny, or war offenses.

These offenses were not crimes at common law and common-law felonies were not mentioned except in so far as they were included within larceny or embezzlement of military stores, rioting, or in general articles denouncing all crimes "not capital" and all disorders and neglects "to the prejudice of good order" or unbecoming to an officer. Since most crimes in the 18th century were capital offenses, the general articles limited military courts-martial jurisdiction to military offenses, i.e., those which referred to military discipline rather than penal punishment.

At the time of the American Revolution, both the British and American articles of war gave precedence to the civil judicature for the trial of offenses committed by members of the army. The general rule was that "No crime for which the common or statute laws of the county have provided a punishment is cognizable beofre a court-martial."[193] Discipline of the army was maintained by the rule that "upon proof being brought of his conviction of a crime before the civil court which renders him unfit for, or unworthy of, the honor-

193. Tytler, Military Law and the Practice of Courts-Martial 154 (3d ed. 1814).

able professions of a soldier, he may on that ground be cashiered."[194]

The British and American articles of war attempted to prevent military abuse of pretrial imprisonment by providing that no soldier was to be retained in confinement more than eight days or until a court-martial could be conveniently assembled. The article of war provision was perhaps satisfactory in a small country like England which had a well-developed civil court system and a relatively good communication and transportation system. This was especially so when armies were relatively small and consisted entirely of volunteers.

In North America, however, military law operated in a new environment. First, the vastness of the new undeveloped areas complicated communication and transportation. In addition, unlike England, the several colonies had no established uniform civilian court system to which crimes could be referred. The lack of a judiciary power was one of the most glaring defects of the Articles of Confederation.[195] It was only na-

194. Id. at 156.
195. A. Hamilton, The Federalist No. XXII 108 (E. Rhys ed. 1934).

tural therefore, that American commanders sought to exercise jurisdiction over all offenses committed by their men.

The scope of offenses triable by courts-martial in the United States gradually broadened. In 1863, common-law felonies, including capital ones, were expressly made punishable in time of war. Civil War enactments, however, also increased the protections accorded an accused in confinement. The service of charges on an officer was to be made within eight days of his arrest and trial was to take place within ten days thereafter unless military exigencies prevented it. In any event, the officer was to be brought to trial within 48 days after his initial confinement or else the arrest was to cease and he was to be released. Another Civil War statute limited continuances in courts-martial to a period of not more than 60 days.

The jurisdiction of British military courts-martial also expanded in the 19th century only to a limited extent. Pretrial confinement protections remained limited to the eight day rule of the articles of war. In the 20th century, British military law expanded courts-martial jurisdiction and allowed military jurisdiction over all criminal civil offenses except treason, murder,

manslaughter, treason-felony, and rape. Prolonged military pretrial confinement is now protected against by the requirement that special reports are to be made to superior authority every eight days until an accused in confinement is released or a court-martial assembled. British courts have also indicated that if oppressive delay is found in bringing a man to trial, then the courts will release him on bail.

Canadian military law provides courts-martial jurisdiction over all civil offenses committed by a serviceman. Protections against prolonged pretrial confinement are more liberal than those of England. Canadian law provides for reports to be made every eight days to superior authority concerning the necessity for further delay in the confinement of an accused. In addition, after a period of 28 days in confinement without trial, an accused is authorized to petition for his release from custody or for immediate disposition of his case. In any event, after a period of ninety days an accused is to be released from custody unless the Canadian Minister of Defense has directed otherwise, or unless a summary trial has been held, or a court-martial ordered to assemble.

The jurisdiction of American courts-martial was

again broadened by the 1916 revision of the articles of war. The articles also provided, however, that all American servicemen were to enjoy the pretrial confinement protections formerly accorded only to officers.

After World War I, limitations as to the period of time of pretrial confinement were removed in the 1920 revision of the articles of war. No further changes concerning pretrial confinement were to be made in American military law until October, 1968, when the Department of Defense issued an instruction to all services directing that no accused was to remain in pretrial confinement for more than 30 days unless approved in each instance by the officer exercising general court-martial jurisdiction over the command which ordered investigation of the alleged offense. The new directive is similar to a 1919 War Department Board recommendation that was made to Congress in the course of hearings on revision of the 1916 Articles of War. At the time, the recommendations would have limited a more liberal safeguard against prolonged pretrial confinement contained in the 1916 Articles of War.

The new Department of Defense directive has expanded pretrial confinement protections accorded American servicemen. As such, it will aid not only accused per-

sonnel but also the effectiveness of the United States Armed Forces. As a Congressional Committee on Military Affairs was once informed:

> "Nothing can be more damaging to discipline than the detention in custody of a man for a long period who is entitled to be released from custody, and nothing is so prejudicial to discipline as failure to secure to an accused person, be he guilty or innocent, a prompt trial."[196]

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196. Testimony at Hearings on the "Revision of the Articles of War," op.cit.supra note 164, at 59.

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