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COMPARATIVE STUDIES

Committee on a Uniform

Code of Military Justice

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OFFICE OF THE SECRETARY OF DEFENSE
COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

COMPARATIVE STUDIES NOTEBOOK

June 16

The studies contained in this notebook were prepared by the staff of the Committee on a Uniform Code of Military Justice and evolved as a handy reference and working basis to acquaint those concerned with the drafting of the Code with the problems and differences existing in the practices of the Services. The studies were not intended for publication, have not been edited for that purpose, and as included herein are in their original form.

Each study is based on an Article of War and numbered accordingly.

Part I of each study reflects the present Articles of War, the articles of War as amended by the Selective Service Act (Public Law 759 - 80th Congress, 2nd Session, 1948), and the interpretations of the articles as shown in the Manual for Courts-Martial or in other sources when necessary for purposes of clarity.

Part II of each study includes the present comparable or similar Articles for the Government of the Navy, interpretations of those Articles as shown in Naval Courts and Boards and elsewhere, and any pertinent provision of the proposed Navy Bill (S. 1338, 80th Congress, 1st Session, 1947).

Part III compares the differences which exist between Army and Navy practices with particular emphasis on the differences between the provisions of the Articles of War as amended and those of the proposed Navy Bill.

Part IV lists recommendations and criticisms drawn principally from the many studies and reports on military justice and, in some cases, from the hearings before the House Armed Services Committee.

FELIX E. LARKIN
Executive Secretary

January 6, 1949

Gift of Prof. E. M. Morgan

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Uniform Code of Military Justice
Subject: Definitions - A.W. 1

I. Army Provisions

1. Articles of War

"ART. 1. Definitions.--The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(a) The word "officer" shall be construed to refer to a commissioned officer;

(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

(c) The word "company" shall be understood as including a troop or battery; and

(d) The word "battalion" shall be understood as including a squadron.

2. Public Law 759--80th Congress, Chapter 625-2d Session

"Article 1 is amended to read as follows:

"(a) The word 'officer' shall be construed to refer to a commissioned officer.

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man or woman.

"(c) The word 'company' shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.

"(d) The word 'battalion' shall be construed as including a squadron or corresponding unit of the ground or air forces.

"(e) The word 'cadet' shall be construed to refer to a cadet of the United States Military Academy."

II Navy Provisions

1. Articles for the Government of the United States Navy

"B.73. Meaning of 'officers' and 'superior officers' as used in the Articles for the Government of the Navy.-- Within the meaning of the Articles for the Government of the Navy, unless there be something in the context or subject matter repugnant to or inconsistent with such construction, o f f i c e r s shall mean commissioned and warrant officers; s u p e r i o r o f f i c e r s shall be held to include petty officers of the Navy and noncommissioned officers of the Marine Corps in addition to the officers enumerated."

2. Proposed Navy Bill

"5(e) Whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal."

"ART. 48. The following words when used in these Articles shall be construed in the sense indicated in this article, unless the context indicates that a different sense is intended.

"(a) The word 'officer' shall be construed to refer to commissioned officer and warrant officer, male or female.

"(b) The words 'commanding officer' and 'officer in command' shall be construed to mean only an officer regularly ordered, detailed, or designated to command duty.

"(c) The words 'officer in charge' shall be construed to mean only an officer regularly ordered, detailed, or designated as officer in charge.

"(d) The words 'commissioned officer' shall be construed to include commissioned warrant officers, in addition to commissioned officers.

"(e) The words 'superior officer' shall be construed to include superior petty officers and superior non-commissioned officers of the naval service, in addition to superior officers of the naval service.

"(f) The words 'enlist', 'enlisted', 'enlistment', and 'enlisted person' shall be construed to include induct, inducted, induction, and inducted person, respectively, in addition to enlist, enlisted, enlistment, and enlisted person, respectively.

"(g) The words 'term of enlistment' shall be construed to include term of induction, in addition to term of enlistment.

"(h) Words used in the masculine gender shall be construed to include females as well as males."

III. Differences

Article of War 1 now in force defines the words "officer", "soldier", "company", and "battalion", and Public Law 759 enlarges two of these definitions and defines the word "cadet".

The present Articles for the Government of the Navy define the words "officers" and "superior officers."

Under a proposed revision, A. G. N. No. 48 would define the words "officer", "commanding officer", "officer in charge", "commissioned officer", "superior officer," "enlisted person" and allied terms, "term of enlistment," and provide that masculine terms shall include females.

The proposed naval bill also defines the word "principal" which is not defined in Articles of War.

The differences between the Articles of War, as amended, and the suggested amendment of the Articles for the Government of the Navy are these:

A. W. defines "officer" as a commissioned officer. The A. G. N. definition includes commissioned officers, warrant officers and females. Under established Army practice warrant officers are

not commissioned officers, and the Army has no counterpart for the Navy's commissioned warrant officer.

A. G. N. does and A. W. does not define the term "commanding officer", "officer in charge" and "superior officer." (But note that A. W. 46 provides for action by the "officer commanding for the time being").

A. W. defines "soldier" as including noncommissioned officers, privates and all other enlisted men or women. A. G. N. defines "enlisted" and allied terms as including inductees.

A. W. defines "company" as including a troop, battery, or corresponding unit. A. G. N. contains no such definition.

A. W. defines the word "cadet" (U. S. M. A.). A. G. N. contains no comparable definition.

As pointed out above, A. G. N. does and A. W. does not define the word "principal".

IV. Recommended Provision

The Army considers that the definitions contained in A. W. 1 serve a useful purpose and the proposal to include definitions in A. G. N. seems to recognize their value.

Modern penal codes seek to set forth clearly and concisely who are offenders and what are offenses without resort to judicial interpretation. Inclusion of needed definitions of terms would conform to this trend.

Unless warrant officers are given similar status in the Army, Navy, and Air Force, it will be necessary to treat them separately in formulating uniform definitions.

No great difficulty should be encountered in preparing a uniform definition of "commanding officer" and allied terms.

It seems obvious that the Navy proposal to include inductees in the definition of "enlisted men" is both appropriate and desirable.

Because of differences in organization some difficulty may be encountered in preparing a uniform definition applicable to all units, e.g. "company".

A definition of the word "cadet" for the Army and Air Force would seem to be practicable, but the corresponding Navy term is "midshipman".

No valid objection appears to a uniform definition of the word "principal".

V. Further Comment

Article of War 1, as now in force, provides that: "The following words when used in these articles shall be construed in the sense indicated in this Article unless the context shows that a different sense is intended, namely,:"

Then follow sub-paragraphs (a), (b), (c), (d), which define certain terms.

H. R. 2575, as reported to the House of Representatives by the House Committee on Armed Services, retains the introductory paragraph in A. W. 1, as quoted above (Report No. 1034, H. R. 80th Congress, 1st Session, page 14).

Apparently through an administrative oversight H. R. 2575, as passed by the House of Representatives on 15 January 1948, omitted

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the introductory paragraph in A. W. 1, as now in force and quoted above, and P.L. 759, 80th Congress, Title II perpetuates this omission. Therefore the effect of P. L. 759 is to eliminate the introductory paragraph from the present A. W. 1.

The Department of the Army believes that this language should be retained.

Uniform Code of Military Justice

Subject: Persons Subject to Military or Naval Law.
A. W. 2

I. Army Provisions

1. Articles of War.

a. "ART. 2. Persons Subject to Military Law.-- The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law', or 'persons subject to military law', whenever used in these articles: Provided, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

"(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

"Patients in the Army and Navy General Hospital, Hot Springs, Ark. (act of March 3, 1909; 35 Stat. 748.)*

"Personnel of the Coast and Geodetic Survey transferred to the service of the War Department. (Sec. 16, act of May 22, 1917: 40 Stat. 88.)

"Personnel of the Lighthouse Service transferred to the service of the War Department. (Act of August 29, 1916: 39 Stat. 602.)

"Inmates of the National Home for Disabled Volunteer Soldiers. (R. S. 4835.)**

"Personnel of the Public Health Service detailed in time of war for duty with the Army. (J. R. No. 9, July 9, 1917: 40 Stat. 242.)

"Inmates of the Soldiers' Home. (R. S. 4824.)***

"Civilian employees, Dig. J. A. G., February, 1918, p. 7; Dig. J. A. G. 1918, pp. 79, 195; Dig. J. A. G. 1919, pp. 13, 339.

"Members of Red Cross, Dig. J. A. G. April-December, 1917, p. 98; Dig. J. A. G. 1919, p. 96." (M.C.M., U.S. Army, 1928, p. 204.)

*For further legislative references see 24 U.S.C. 20.

**R. S. 4835 has been repealed; see 24 U.S.C. 137.

***This category of persons is covered by A.W. 2 (f); see 24 U.S.C. 54.

b. Additional statutory references influencing the jurisdiction over persons:

- (1) Inductees: Sec. 11, Selective Training and Service Act of 1940, 50 U.S.C., App. §311, construed in *Billings v. Truesdell*, 321 U.S. 542, 559, 1944; and Sec. 12, Selective Service Act of 1948 (P.L. 759 of 24 June 1948.)
- (2) Personnel of the Medical Department of the Navy serving with a body of Marines detached for service with the Army by order of the President: Act of 29 Aug. 1916, ch. 417, 39 Stat. 573, 34 U.S.C. 716; cf. sec. 8, M.C.M., U.S. Army, 1928, p. 8.
- (3) Lighthouse Service: Transferred to the Coast Guard by Reorganization Plan No. II, Sec. 2, 53 Stat. 1432, effective 1 July 1939, set out under 5 U.S.C. 133t; cf. also Act of 5 Aug. 1939, ch. 477, 53 Stat. 1216-12-17, and Act of 11 July 1941, ch. 290, 55 Stat. 585. Cf. 33 U.S.C. 757-758.
- (4) Commissioned corps of the Public Health Service when constituting a branch of the Army in time of war: Act of 1 July 1944, ch. 373, title II, Sec. 216, 58 Stat. 690, 42 U.S.C. 217.

- (5) Persons triable under law of war by military tribunals, including, but not limited to, spies: A.W. 12, cf. also A.W. 15 and 82.
- (6) Persons who, while in the Army, committed an offense against A.W. 94, and were then separated from the Army: A.W. 94.
- (7) Officers dismissed in time of war by order of the President and requesting trial by court martial: Sec. 1230 R.S., 10 U.S.C. 573. Cf. Military Laws of the United States, 8th ed., 1939, Sec. 227, p. 111.
- (8) Prisoners of war in Army custody: The law of war and the Geneva Convention of 27 July 1929 relative to the Treatment of Prisoners of War, Treaty Series No. 846, 47 Stat. 2021. Cf. Enemy Prisoners of War, War Department Technical Manual TM 19-500.
- (9) Persons in contempt of court: A.W. 32.

2. Public Law 759--80th Congress, Chapter 625--2D Session.

Title II, Sec. 202:

"SEC. 202. Article 2, subparagraph (a), is amended to read as follows:

"(a) All officers, warrant officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;"

II. Navy Provisions

1. Articles for the Government of the Navy.

There is no statutory provision closely comparable to A.W. 2, except the following:

a. Retired officers of the regular Navy:

Sec. 1457 R. S., 34 U.S.C. 389.

b. Midshipmen:

Acts of

23 June 1874, ch. 453, 18 Stat. 203,
2 March 1895, ch. 186, 28 Stat. 838,
1 July 1902, ch. 1368, 32 Stat. 686,

3 March 1903, ch. 1010, 32 Stat. 1198,
 9 April 1906, ch. 1370, 34 Stat. 104-105,
 11 Dec. 1945, ch. 562, 59 Stat. 605,
 34 U.S.C. 1061 et seq.;
 see also Act of 14 July 1941, ch. 292, 55
 Stat. 589, (34 USC 1036-1), as amended
 by P.L. 564 of 1 June 1948; and P.L. 752
 of 24 June 1948.

c. Members of Naval Reserve and Marine Corps Reserve when employed on active duty, etc.: Sec. 301, Naval Reserve Act of 1938, 52 Stat. 1180, ch. 690, title III, 34 USC 855; cf. also Sec. 2 of the Naval Reserve Act of 1938, 52 Stat. 1175, ch. 690, title I, 34 USC 853a.

Limited Service Marine Corps Reserve, Act of 20 Jan. 1942, ch. 12, 56 Stat. 10, 34 USC 853 a-1.

d. Members of the Fleet Reserve and Fleet Marine Corps Reserve; and officers and enlisted men transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay: Sec. 6, Naval Reserve Act of 1938, 52 Stat. 1176, ch. 690, title I, 34 USC 853 d; cf. also Sec. 2, Naval Reserve Act of 1938, 52 Stat. 1175, ch. 690, title I, 34 USC 853 a.

e. The Marine Corps (except members of the Marine Corps when detached for duty with the Army by order of the President): Sec. 1621 R. S., 34 USC 715.

f. The Coast Guard while serving as a part of the Navy in time of war: Act of 29 Aug. 1916, ch. 417, 39 Stat. 600, 14 USC 3.

(By Act of 29 Aug. 1916, 39 Stat. 602, ch. 417, also personnel of the Lighthouse Service when transferred in national emergency to the Navy; but the Lighthouse Service has been consolidated with the Coast Guard by Reorganization Plan No. II, sec. 2, 53 Stat. 1432, effective 1 July 1939, (cf. 5 USC 133t) and Act of 5 Aug. 1939, ch. 477, 53 Stat. 1216-1217; cf. also Act of 11 July 1941, ch. 290, 55 Stat. 585; cf. 33 USC 757-758.)

g. The Coast and Geodetic Survey when transferred in national emergency to the Navy: Act of 22 May 1917, ch. 20, §16, 40 Stat. 87, 33 USC 855.

h. The Public Health Service when a branch of the naval forces in time of war or emergency: Act of 1 July 1944, ch. 373, title II, § 216, 58 Stat. 690, 42 USC 217.

i. All persons

(1) who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or

(2) who (a) bring or deliver any seducing letter or message from an enemy or rebel, or (2) endeavor to corrupt any person in the Navy to betray his trust: AGN 5 (Sec. 1624, art. 5, R. S., 34 USC 1200, art. 5).

j. Any person who committed, while in the naval service, any of the offenses described in AGN 14 and then received his discharge or was dismissed from the service: AGN 14, last paragraph.

k. Any officer, dismissed, in time of war, by order of the President and applying for trial: AGN 37.

l. Any enlisted person whose term of enlistment ended and who deserted prior thereto in time of peace: AGN 62.

m. Prisoners of war in naval custody: The law of war and the Geneva Convention of 27 July 1929, relative to the Treatment of Prisoners of War, 47 Stat. 2021.

n. All persons other than persons in the military service

(1) outside the continental limits of the United states in time of war or national emergency accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including officers, members of crews, and passengers on board merchant ships of the United States, and including those employed by the Government, or by contractors and subcontractors engaged on naval projects;

(2) within an area leased to the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, in time of war or national emergency;

Act of 22 March 1943, ch. 18, 57 Stat. 41, 34 USC 1201. Cf. Sec. 333 NC&B, 1937, as amended.

o. Enlisted persons awaiting discharge after expiration of their enlistment: Sec. 1422 R. S., as amended by Act of 3 March 1875, ch. 155, 18 Stat. 484, 34 USC 201.

2. Proposed Navy Bill.

"ART. 5 (a) The following persons shall be subject to the articles for the Government of the Navy:

"First. Except as provided in articles 6 and 7, all persons on active duty in the naval service, including those, not unlawfully detained, awaiting discharge after expiration of their terms of enlistment, and any such person alleged to have committed any offense

against these Articles during a prior period of service: Provided, That any person who deserted and subsequently reentered and was discharged from the naval service shall continue to be subject to the Articles for any offense committed during the period of service from which he deserted.

"Second. All reserve personnel of the naval service when employed on authorized training or drill duty, with or without pay, or other equivalent instruction or duty, or when employed in authorized travel to or from such duty, or appropriate duty, drill or instruction, or during such time as they may by law be required to perform active duty, or while wearing a uniform prescribed for reserve personnel of the naval service: Provided, That release from such duty status shall not terminate jurisdiction for offenses theretofore committed; and in such cases, reserve personnel of the naval service may be retained on or returned to a duty status without their consent, but not for a longer period of time than may be required therefor.

"Third. All retired naval personnel entitled to receive pay.

"Fourth. All persons discharged from the naval service subsequently charged with having fraudulently obtained said discharge: Provided, That upon conviction of this offense, said discharge shall be null and void ab initio.

"Fifth. All persons in naval custody serving a sentence adjudged by a court martial.

"Sixth. All former officers of the naval service dismissed by order of the President who make written application for trial, setting forth under oath that they have been wrongfully dismissed.

"Seventh. Personnel of the Coast Guard, Coast and Geodetic Survey, Public Health Service, and other organizations, when actively serving under the Navy Department, pursuant to law, as a part of the naval forces of the United States.

"In time of war or national emergency, in addition to the foregoing, the following persons shall be subject to the Articles for the Government of the Navy:

"Eighth. Prisoners of war in naval custody.

"Ninth. All persons alleged to be spies or saboteurs, or to have brought or delivered, or to have attempted to bring or deliver, any seducing letter or message from an enemy or rebel, or to have endeavored to corrupt any person subject to these Articles to betray his trust.

"Tenth. All persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy: Provided, That the jurisdiction herein conferred shall not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, except the Islands of Palmyra, Midway, Johnston, and that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west."

III. Differences

1. The Regular Forces.

- a. There is a difference in arrangement between AW on the one hand and proposed naval legislation and AGAS draft on the other. AW 2 enumerates the regular forces (including retired personnel as well as personnel on active duty without making a distinction between the two groups expressly) and then reserve forces etc. The proposed naval legislation and the AGAS draft distinguish between personnel on active duty (including regular and reserve forces), reserve personnel on training duty etc., and retired personnel entitled to receive pay. It seems to be a disadvantage of the proposed naval legislation and the AGAS draft that "active duty" is not defined. Is a deserter on active duty? Is a person on active duty during authorized leave?
- b. In view of the distinction in naval law between retired personnel entitled to pay and retired personnel not entitled to pay, the Army method of omitting any reference to retired personnel at all may not be advisable.
- c. There are some groups of persons who - for varying reasons - do not appear specifically in any enumeration of persons subject to military or naval law existing or proposed:
 - (1) De facto enlisted persons, minors, etc. are not enumerated expressly because it is recognized and seems to be settled that a

"de facto enlisted man is subject to the jurisdiction of a court martial. A fraudulent enlistment is still an enlistment, and a man so enlisting may be tried by court martial. But where the man at the time of his enlistment was under an absolute disability to enlist, that is to say, was under

the age of fourteen years, or was insane or intoxicated, he can not be legally tried for desertion, nor for fraudulent enlistment if he received no pay or allowance." (Sec. 333 NC&B)

The subject matter is discussed in MCM, U.S. Army 1928, pp. 197-201; NC&B, pp. 482-483; 1 NLM, Tentative Draft No. 1, pp. 439-458; with further references. Cf. also Dig. Op. JAG Army 1912-1940, sec. 359(3), p. 163. The above quotation, however,

"A fraudulent enlistment is still an enlistment, and a man so enlisting may be tried by court martial."

is subject to a modification just in regard to trial for the offense of fraudulent enlistment; cf. A.W. 54 and AGN 22(b).

(2) Neither Army nor Navy legislation, existing or proposed, extends to persons discharged or otherwise separated from the service (except in case of AW 94 and AGN 14, the Navy proposing to abandon this exceptional jurisdiction). Cf. General Hoover's comments in Subcommittee Hearings on H.R. 2575 (No. 125), pp. 2131-2133; also 18 USC 652; and (1947) 35 Geo. L. J. 303-27.

2. Cadets and Midshipmen.

- a. It might be advisable to add cadets and midshipmen to the catalogue of persons subject to military and naval law in the AGAS draft. It is not too clear whether they would fall under "persons on active duty in the armed services."
- b. The USNA Regulations do not seem to clarify that midshipmen are subject to the Articles for the Government of the Navy; it may be that the new edition of the USNA Regulations contains pertinent provisions.

3. Army and Navy Nurse Corps.

- a. Under Sec. 109 of the Army-Navy Nurses Act of 1947 (P.L. 36)

"except as otherwise specifically provided, all laws now or hereafter applicable to male commissioned officers of the Regular Army * * * shall in like cases be applicable * * * to commissioned officers of any of the corps established by this Act * * *."

Sec. 115 of the Army-Navy Nurses Act contains a similar provision in regard to reserve nurses.

Cf. also Sec. 28 of Army Regulations No. 40-20 of 22 April 1948.

- b. Title II of the Army-Navy Nurses Act deals with the Navy Nurse Corps, which is established as a Staff Corps of the United States Navy. Sec. 210 of the Army-Navy Nurses Act adds a Title VI to the Naval Reserve Act of 1938 dealing with the Nurse Corps Reserve.
4. The reserve forces on active duty, etc.
- a. The AGAS grouping of the several reserve categories seems to be preferable.
- b. Sec. 12 of the Selective Service Act of 1948 and AW 2 (a) seem to differ as to the time a selectee becomes amenable to military law. Under AW 2 (a), a selectee would be amenable; but under Sec. 12, he has to be an inductee before he is amenable to military law. The proposed naval legislation and the AGAS draft do not cover this item expressly.
5. Jurisdiction over spies and other persons guilty of a violation of the law of war:
- a. The Army jurisdiction is much broader as AW 12 gives courts martial concurrent jurisdiction with military tribunals to try any person for violating the law of war. The naval legislation, existing and proposed, does not go so far.
- b. Army and naval laws define the offense of spying. It has been doubted whether such definition could establish a deviation prevailing over the international-law definition. 31 Op. Atty. Gen. 356, 1918, modified by 40 Op. Atty. Gen. No. 54. Cf. U.S. ex rel. Wessels v. McDonald, D. C. N.Y., 1920, 265 F. 754.
6. Discharged persons remaining amenable to court-martial proceedings for frauds against the government committed while in the service:
- a. Note General Hoover's statement: "The Federal district courts would not generally have jurisdiction, as I understand it, unless the offense were committed in the district, or on the high seas or on our ships in harbor." (p. 2031, Subcommittee Hearings on H.R. 2575 (No. 125)).
- b. Cf. Flannery case, 69 F. Supp. 661, denying constitutionality of this court-martial jurisdiction.
- c. Navy bill deletes court-martial jurisdiction over such persons after separation from the service as unnecessary in view of jurisdiction of federal courts; cf. 28 USC, 1946 ed., 102, re-enacted as Title 18, USC, § 3238 (P.L. 772). Federal venue might be amended if insufficient. In regard to the underlying offenses, 18 USC, 1946 ed., 80-88 (Title 18, USC, §§ 281 et seq., 371 et seq., 641 et seq., and 1001 et seq.) contain ample provisions.

7. Officers dismissed in time of war by order of the President:

- a. The Army does not seem to favor a right of such person to demand court-martial trial. Army and naval laws omit to provide for any period within which the officer would have to file his request by pain of losing his right to trial at all.
- b. The AGAS draft may offer the best solution (also uniform method in regard to officers so dismissed and officers dropped from the rolls).
- c. The statutory provisions forbidding reappointment of dropped officers etc. should be reconsidered. The further naval recommendations propose

(1) to delete the second proviso of Sec. 27, Art. 40, page 21, lines 24-25, of the Bill, which proviso would reenact the second proviso of existing AGN 36 as amended by Act of 2 April 1918, ch. 39, 40 Stat. 501, 34 USC 1200, art. 36;

(2) to repeal Sec. 1441 R. S., 34 USC 227; page 25 of the List of Proposed Amendments to H. R. 3687 and S. 1338 of 17 May 1948.

Corresponding Army provisions may be found in Military Laws of the United States, 8th ed., 1939, p. 143, no. 311.

8. Civilians

- a. Accompanying the Army or naval forces: The naval legislation, existing and proposed, controls only civilians overseas while the Army legislation controls civilians, in time of war, when accompanying the armies in the field, within and without the territorial jurisdiction of the United States.
 - b. Within an overseas area leased to the United States and being under the control of the Secretary of the Navy: The Army has no corresponding provision. But AW 12 may, in effect, subject such persons to court-martial jurisdiction.
9. Persons in contempt of court: AGN 42 has not been interpreted to allow punishment of civilians by court martial; but AW 32 has been so interpreted.

IV. Recommended Provisions

- 1. The AGN draft of 17 May 1948, Art. 5 (a), Second, proposes to add the following categories of naval reserve personnel to the reserve categories now subject to court-martial jurisdiction:
 - (a) "when in possession, custody, or control of any classified material;

- (b) "when having received knowledge or control of any classified information;
- (c) "when charged with a violation of any law, order, regulation, or custom concerning classified material, * * *."
2. Army jurisdiction shall extend not only to personnel of the Medical Department of the Navy serving with Marines detached for duty with the Army by order of the President but also to any other naval personnel serving with Marines so detached: AGN draft of 17 May 1948, Art. 7. There is no legislation, existing or proposed by bill, which would give convening authorities of naval courts martial corresponding jurisdiction over Army personnel detached for duty with naval units.
 3. Extending 18 USC 97a (Title 18, U. S. C. § 1383, effective 1 Sept. 1948) to naval areas and zones and providing for court-martial jurisdiction over persons who violate the provision so extended outside the continental limits of the United States. (Under consideration.)
 4. The Coast Guard bill (H. R. 6360, 80th Congress, 2d Session, to revise, codify, and enact into law, Title 14, U. S. Code) proposes to continue the existing principle (i.e., subjecting Coast Guard personnel to naval law when operating as a service in the Navy (§ 4 (f); as to details, cf. § 571); but § 3 of the bill expands the conditions under which the Coast Guard may be made a service in the Navy by providing: "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, * * *." (Cf., as to existing law, 14 USC 1 and 3.)

J.E.C.

Uniform Code of Military Justice

Subject: Types of Courts-Martial

I. Army Provisions

1. Articles of War.

"ART. 3. Courts-Martial Classified.-- Courts-martial shall be of three kinds, namely:

"First, general courts-martial:

"Second, special courts-martial; and

"Third, summary courts-martial."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. The A.G.N. contain no Article corresponding to A.W. 3. The three types of Navy courts-martial are referred to in A.G.N. 38, General, A.G.N. 26, Summary Courts-Martial, and A.G.N. 64, Deck Courts. Various other Articles scattered through the Code prescribe membership, jurisdiction, etc.

2. The proposed amendments to the A.G.N. define General Courts-Martial in A.G.N. 24 (a), Summary Courts-Martial in A.G.N. 18 (a), and Deck Courts in A.G.N. 16 (a).

III. Differences

A. W. 3 classifies three types of courts-martial, i.e., "General", "Special", and "Summary" A.G.N. 38, 26 and 64, as proposed, provide courts-martial of substantially equivalent jurisdiction, but the courts are titled, "General", "Summary", and "Deck Courts", respectively.

IV. Recommendation

No good reason appears why A.W. 3 should not be combined with A.W. 5, 6, and 7, which prescribe the composition of the three types of courts.

Uniform Code of Military Justice

Subject: Who May Serve on Courts-Martial. A.W. 4

I. Army Provisions

1. Articles of War-

"ART. 4. Who May Serve on Courts-Martial.--All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof."

2. Public Law 759 (80th Congress)-

"Amendment to ART. 4. Who May Serve on Courts-Martial.--All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

"All warrant officers in the active military service of the United States and warrant officers in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general

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and special courts martial for the trial of warrant officers and enlisted persons, and persons in this category, shall be detailed for such service when deemed proper by the appointing authority.

"Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court.

"When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution."

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II. Navy Provisions

1. Articles for the Government of the Navy:

"Article 39.--A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers as members; and as many officers, not exceeding 13, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank."

2. Naval Courts and Boards:

"Sec. 346. Personnel of court.--Except in cases where officers of the rank of lieutenant in the Navy and captain in the Marine Corps, or above, are not available, the circumstances of which shall be reported to the department by the convening authority, no officer shall be ordered as a member of a general court martial who is below the rank of lieutenant in the Navy or captain in the Marine Corps. In case an officer is to be tried, the 39th A. G. N. requires that, except where it can not be avoided without injury to the service, at least one-half of the members be senior to the accused. As a matter of policy in such a case all should be senior. The convening authority is justified in departing from this rule only under the most unusual circumstances. It is the policy of the Navy Department to require the president to be a line officer.

In detailing officers for the trial of a staff or marine officer it is proper, if the exigencies of the service permit, that at least one-third of the court be composed of officers of the same corps as and senior to the person to be tried....."

3. Proposed Navy Bill

(Adds no personal qualification of members.)

III. Differences in Provisions

1. The Differences

(a) Training, Experience, Service

The amended Articles of War set up qualifications of age, training, experience, and judicial temperament and two years' service. By the necessity of actual practice, these qualifications are merely directory.

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The Navy regulations set up standards for general courts-martial and deck courts in terms of rank, the implication being that such officers have greater experience and training and are more mature.

(b) Enlisted men and warrant officers

Under the amended Articles of War enlisted men are allowed to sit on general and special courts-martial in the trial of an enlisted man if the accused so requests in writing prior to the convening of the court. If so requested, at least one-third of the court must consist of enlisted persons. However, no enlisted man is permitted to be a member of a courts-martial trying an enlisted man in the same company or similar unit.

The Navy Articles and regulations do not allow enlisted men to sit as members of courts-martial.

The amended Articles of War also allow warrant officers to be members of general and special courts-martial for the trial of warrant officers and enlisted men when deemed proper by the appointing authority.

The Navy regulations allow commissioned warrant officers to sit on summary courts-martial only.

(The Army has no "commissioned" warrant officers. Status of Flight O.'s in Air Force?)

2. Discussion

(a) Training, Experience, Service

The Keefe Report (dealing with Naval General Courts-martial) states that the only present requirement for eligibility to sit on a general court martial is that the members be commissioned officers and of the rank of lieutenant or higher if available.

(PAR. 2. p. 47-48). "Sitting as a member of a court martial is one of the most serious and solemn duties which an officer can be called upon to perform. It is the tradition of the service that only those officers who are best qualified by reason of age, training, experience, and judicial temperament should be detailed to courts martial. It was almost inevitable, however, that during wartime many inexperienced

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officers should have been appointed to courts. An officer who comes to a court with a limited naval background, no knowledge of the law, and little experience in human affairs cannot be expected to make a good court member. Neither can it be expected that officers passed over for promotion and about to be retired will make good court members. It is doubtful whether this situation has been greatly alleviated by the termination of hostilities. The post-war Navy is still large; it still includes large numbers of officers without specific training in law and with limited experience in administering discipline."

(PAR. 2 & 3, p. 49). (c) Service: "Another step which should be considered would be a requirement that the members, or a certain proportion of them, have a minimum period of service. Present naval law does not contain such a requirement in peacetime, not by express provision, but by virtue of the rule that court members be of the rank of lieutenant or higher. In practice this meant, in the Regular Navy in time of peace, that officers had had at least ten years' commissioned service before they were eligible to sit on courts. Meanwhile they had been getting court martial experience by acting as defense counsel and as judge advocate. But during the war, when temporary promotions were relatively rapid and many officers had received direct commissions as lieutenants, this rule did not operate as it had in peacetime. Consequently, many officers sat on courts who had had very little service and no previous court martial experience. A service requirement was introduced in the Army system by the 1920 amendments to the Articles of War. Article 4, as amended, provided that "officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof." It must be admitted that the requirement was frequently not met during the war, apparently because enough officers with the required period of service could not be found."

(PAR. 1, p. 53). "As previously indicated no officer below the rank of lieutenant is permitted to sit on a naval court martial. The complete exclusion of lieutenants junior grade and of ensigns seems hardly necessary. The important consideration is that whatever policies of this nature are adopted be so framed as to insure that members of rank, judgment, and experience sit on courts martial."

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The Board recommended:

- (1) All naval officers be required to take a course in naval law.
- (2) A minimum of 2 years' service for members of courts-martial, in time of war as well as in peace.
- (3) Prospective members be required to attend a prescribed number of trials for purposes of instruction.
- (4) Further study of the present provision making lieutenants junior grade and ensigns ineligible to sit on general courts-martial.

It is also pointed out that none of these recommendations require statutory implementation but could be put into effect administratively.

In regard to summary courts-martial (Army), the Vanderbilt Committee recommended that summary court officers should be selected from captain or officers of field grade, if available, and that selection of junior officers and inexperienced officers for this purpose should be avoided. This accords with the present Navy practice in selecting deck court officers.

Thus the Keefe Board recommended qualifications for Navy special and general courts-martial similar to those of the Army, while the Vanderbilt Committee made recommendations for selecting Army summary court officers, similar to the qualifications practiced in selecting Navy deck court officers.

(b) Enlisted members.

The Vanderbilt Committee (War Department Advisory Committee on Military Justice) made the following finding as regards enlisted members of courts-martials:

(PAR. 3 p. 12 Vanderbilt Committee)--"Qualified enlisted men should be eligible to serve as members of general and special courts-martial and should be appointed thereon to the extent that in the discretion of the appointing authority, it seems desirable to do so. We realize that there is a sharp division of opinion on the subject. The generals and commissioned officers generally are divided as to the desirability of the proposal, while a preponderant majority of the enlisted men favor it.

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Those opposed to it contend that since the movement of qualified men in the Army is upward, the appointment of enlisted men will lower the quality of the courts and give rise to personal antagonism and recrimination in Army units when enlisted men participate in the conviction and sentence of their fellows. We think, however, that some improvement of the morale of the enlisted men may follow from increasing their knowledge of the functioning of the Army system of justice, their confidence in its operation and their feeling of responsibility for the enforcement of Army discipline."

The Keefe Board (Navy) found:

(PAR. 2, 3, & 4, p. 53-4). "Enlisted men as Court Members:— This is probably the most controversial question which has arisen in connection with proposed reforms of the court martial system. It is not necessarily the most important. It must be admitted that, on the average, enlisted men, both in the Army and in the Navy, have less experience, education, and training than commissioned officers.

"But the question cannot be lightly dismissed. It appears that many enlisted men, at least in the Army, feel that it is unfair for them to be tried before courts composed of officers. A great deal of publicity has been given to this matter, and it is probable that a large section of the public shares this view. Of course, a good deal of this criticism has come from enlisted men drafted into the service during the war. With the return of the peacetime Navy to a volunteer basis, it can be expected that criticism from this source will cease.

"The proposal is not a new one. In 1819, in England, an anonymous pamphleteer suggested that a jury be introduced, consisting of twelve officers in the case of officers being tried and of twelve non-commissioned officers in the case of other ranks. Almost the same recommendation was made in the minority report of the Bar Association Committee which investigated the Army court martial system after the last war."

(PAR. 2 p. 56).—"The House Committee on Military Affairs in its recent report on the administration of military justice by the Army has recommended that the Articles of War be amended to provide that, at the election of the accused, one-third of the court members shall be enlisted men. The Army has

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expressed itself as not opposed to this change, if satisfied that the public and enlisted men generally really desire it." (This recommendation has been adopted in the amended Articles of War, P. L. 759, sec. 203).

(PAR. 3, p. 58, p. 59, PAR. 2, p. 60)—"In fact, it is possible that enlisted men sitting on courts judge their fellow soldiers more severely than officers do now. Such a fear has been expressed by at least one writer, speaking of the proposal to introduce into the British system a jury of twelve non-commissioned officers for the trial of an enlisted man:

"As for the men, a worse suggestion could hardly be made. N.C.O.'s are the backbone of the Army, but on points of discipline they are far less likely to lean in the accused's favor than a court of officers is. This is not to say they would ever be deliberately unfair; but an unconscious bias in favor of discipline would be almost inevitable."

"There is must merit in this point of view. Certainly few enlisted men would voluntarily choose to be tried by a court composed entirely of first sergeants or chief petty officers.

"There are other important considerations here. In the Navy far more than in the Army enlisted men are thrown together for long periods of time. Serving together on a vessel they develop a feeling of comradeship which, to say the least, is hardly compatible with their sitting on courts for the trial of each other. The situation is entirely different from that of the civilian criminal trial, where the defendant is unknown to the juror and they to him. Furthermore, it is the officer who gives orders and enforces discipline. It is the commanding officer who administers disciplinary punishment at mast. If this relationship is to be maintained, and of course it must be in any Army or Navy, the presence of enlisted men on courts martial presents certain real difficulties and anomalies.

"The whole question deserves far more careful and thoughtful consideration than it has thus far received. It must be considered in the list of the post-war organization of the Navy and the changes, if any, which may be made in the officer-enlisted man relationship in response to criticism

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of the so-called "caste system." It must be weighed in the light of the power which the court martial is to exercise, its sentencing power for example, and the final solution must be sought in the demands of true justice, and not on grounds of expedience.

"If, despite these views, enlisted men are to be allowed to serve on courts martial, they should of course have certain minimum requirements, such as a high school education or its equivalent, and at least two years of service. Furthermore, it should be optional with an accused enlisted man to ask that a full minority of his court be composed of enlisted men. On this basis the opinion is ventured that few enlisted men would request it."

The Keefe Board Recommended:

"Because the Board believes it is against their own best interests, enlisted men should not be allowed to sit on naval courts martial but the problem should be studied further by the Advisory Council in the light of the recommendation of the House Committee and the attitude of the Army. However, if it should be decided not to interpose any objection to enlisted men' serving as a full minority of the court if they wish to do so, it should be insisted:

- (a) That such enlisted men have certain minimum qualifications, such as a high school education or its equivalent, and at least two years of service, and
- (b) That the presence of enlisted men on the court should be optional with the accused enlisted man and should not be in excess of a full minority of the court."

The Chamberlin Bill (Senate Bill 64, 66th Congress, 1st Session, 1919), provided in trial of enlisted men, three members of general courts-martial be enlisted men and one, a member of a special court-martial. The American Bar Association opposed this provision on the ground that enlisted men considered their officers as "trusties of the law" and on the whole trusted and respected them.

The Keefe report points out that few enlisted men would voluntarily choose to be tried by a court composed entirely of first sergeants or chief petty officers. The amended Articles of War bar an enlisted man from sitting on a court trying an enlisted man from the same company or similar unit.

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It also has been objected that naval personnel, serving together on a vessel develop a feeling of comradeship which is hardly compatible with their sitting trial upon one another.

Some witnesses before the Vanderbilt Committee stated that enlisted men on courts-martial would be subject to domination.

Neither the first nor second Ballantine Report nor the McGuire Report considered enlisted men as members of courts-martial.

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In hearings before a subcommittee of the House Armed Services Committee, the VFW, Judge Advocates Association, AVC, and AMVETS approved the portion of the proposed bill making enlisted men competent to sit on general and special courts-martial, although some thought it should be mandatory instead of promissive.

The Committee report stated (H.R. Report 1034):

"Should enlisted men be authorized to sit as members of a court martial in the trial of other enlisted men?"

"The War Department agrees that they should, at the option of the appointing authority. Our committee agrees that they should, at the option of the defendant and has amended (Article 4) accordingly. We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice."

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ADDENDA

Uniform Code of Military Justice

Subject: Who May Serve on Courts--Marines etc.
AGN 45.

I. Army Provisions

See C.S., A. W. 4.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 65. Courts martial; officers of auxiliary naval forces.--
When actively serving under the Navy Department in time of war
or during the existence of an emergency, pursuant to law, as
a part of the naval forces of the United States, commissioned
officers of the Naval Reserve, Marine Corps Reserve, Naval
Militia, Coast Guard, Lighthouse Service, Coast and Geodetic
Survey, and Public Health Service are empowered to serve on
naval courts martial and deck courts under such regulations
necessary for the proper administration of justice and in the
interests of the services involved, as may be prescribed by
the Secretary of the Navy (Oct. 6, 1917, c. 93, 40 Stat. 393;
July 1, 1918, c. 114, 40 Stat. 708; Feb. 28, 1925, c. 374,
Secs. 1, 28, 43 Stat. 1080, 1088)."

2. Proposed Navy Bill.

"ART. 45.

"When actively serving under the Navy Department, pursuant
to law, as a part of the naval forces of the United States,
commissioned officers of the Naval Reserve, Marine Corps Reserve,
Coast Guard, Coast and Geodetic Survey, and Public Health
Service, and other organizations serving as a part of the naval
forces of the United States, shall be eligible to serve on
naval courts martial and fact-finding bodies."

III. Differences

See C.S., A. W. 4.

IV. Recommendations

None.

Uniform Code of Military Justice
Subject: Number of Members A.W. 5-7

I. Army Provisions

1. Articles of War

"ART. 5. General Courts-Martial.--General courts-martial may consist of any number of officers not less than five."

"ART. 6. Special Courts-Martial.--Special courts-martial may consist of any number of officers not less than three."

"ART. 7. Summary Courts-Martial.--A Summary court-martial shall consist of one officer."

2. Public Law 759--80th Congress, Chapter 625--2D Session

SEC. 204. Article 5 is amended to read as follows:

"ART. 5. GENERAL COURTS-MARTIAL.--General courts-martial may consist of any number of members not less than five."

SEC. 205 Article 6 is amended to read as follows:

"ART. 6 SPECIAL COURTS-MARTIAL.--Special courts-martial may consist of any number of members not less than three."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 39. A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers as members; and as many officers, not exceeding 13, as can be convened without injury to the service, shall be summoned on every such court."....

"ART. 27 A summary court-martial shall consist of three officers not below the rank of ensign as members,"....

"ART. 64 (b). Deck courts shall consist of one commissioned officer only,"....

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2. Proposed Navy Bill

SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

"ART. 24 (a) A general court martial shall consist of not less than five commissioned officers as members."....

SEC. 19. Article 27 is renumbered as article 18 and amended to read as follows:

"ART. 18 (a) A summary court martial shall consist of three commissioned officers."....

SEC. 47.

"ART. 16 (a) Deck courts martial shall consist of one commissioned officer only,"....

III. Differences

Proposed Navy bill and P.L. 759 resolve differences except than an Army special court martial may have more than three members while a Navy summary is limited to three.

IV. Recommended Provision

ART.---. Number of Members

(a) General Courts-Martial.--General courts-martial may consist of any number of members not less than five.

(b) Special Courts-Martial*--Special courts-martial may consist of any number of members not less than three.

(c) Summary Courts-Martial**--A summary court-martial shall consist of one commissioned officer.

* Army special or Navy summary courts-martial.

** Army summary court-martial or Navy deck court.

APPENDIX

Uniform Code of Military Justice

Subject: Reduction of General Court Below
Five Members. AGN 27.

I. Army Provisions

No similar provision.

II. Navy Provisions

1. Articles for the Government of the Navy.

No similar provision.

2. Proposed Navy Bill.

"ART 27 Whenever a general court martial is reduced below five members the reduced court may, with the consent of the accused, proceed to a final determination of the case being tried: Provided, That if the accused does not give his consent the convening authority may appoint new members sufficient in number to provide not less than five members, such new members to be subject to challenge: And provided further, That upon the new members taking their seats, the trial may proceed after the recorded testimony of each witness previously examined has been read to the witness in open court and verified by him and after such further examination of the witness thereon as any new member may require."

III. Differences

The Articles of War contain no similar provision and if an Army general court-martial is reduced below five members, additional members must be appointed.

IV. Recommendations

See C.S., A. W. 5-7.

ARTICLE OF WAR 6

SEE C.S., A. W. - 5.

ARTICLE OF WAR 7

SEE C.S., A. W. - 5.

Uniform Code Military Justice

Subject: General Courts-Martial - By Whom Appointed - Law Member
Appointed A. W. 8

I. Army Provisions

1. Articles of War

"ART. 8. General Courts-Martial.--The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations proscribe."

2. Manual Courts-Martial

(PAR. 5, p. 4, 5, & 6.). COURTS-MARTIAL--Appointing Authorities.--a. "General courts-martial.--The President of the United States, the superintendent of the Military Academy (except for the trial of an officer, A. W. 12), and the other commanding officers designated in A. W. 8 may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority. (A. W. 8.)

Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined

by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 (Accuser) in this connection. Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases.

As A. W. 8 expressly designates those who have authority to appoint general courts-martial, it follows that no one else has any such authority, and that anyone having such authority can not delegate or transfer it to another. The authority of a commanding officer to appoint general courts-martial is independent of his rank and is retained by him as long as he continues to be such commanding officer. The rules as to the devolution of command in case of the death, disability, or temporary absence of a permanent commander are stated in AR 600-20.

An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; but he can not control the exercise by the court of powers vested in it by law. He may withdraw any specification or charge at any time unless the court has reached a finding thereon."

3. Public Law 759--80th Congress, Chapter 625--2D Session

SEC. 206. Article 8 is amended to read as follows:

"ART. 8. GENERAL COURTS-MARTIAL.--The President of the United States, the commanding officer of a Territorial department, the Superintendent of the Military Academy, the commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Department is assigned as staff

judge advocate, as prescribed in article 47, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable.

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court, or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in article 31 hereof and such other duties as the President may by regulations prescribe."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 38. Convening authority.--General courts-martial may be convened:

"First. By the President, the Secretary of the Navy, the commander in chief of a fleet, and the commanding officer of a naval station or a larger shore activity beyond the continental limits of the United States; and

Second. When empowered by the Secretary of the Navy, by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commanding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station." (R.S., sec. 1624, art. 38; Feb. 16, 1909, c. 131, sec. 10, 35 Stat. 621; Aug. 29, 1916, c. 417, 39 Stat. 586; Feb. 12, 1946, c. 5, 60 Stat. 4.)"

2. Naval Courts and Boards

SEC. 329. Conditions Necessary to Show Jurisdiction: Convened by an officer empowered to do so.--"The officers who are empowered to convene a general court martial are named in the articles for the government of the Navy and subsequent statutes. Where an officer is not authorized by law, but specially authorized by the Secretary of the Navy (under arts. 26, 38, and 64, A. G. N.) to convene a court martial, the precept must cite the authorization in order to show affirmatively the jurisdiction of the court. No one other than the Secretary of the Navy can give such authority."

3. Proposed Navy Bill

SEC. 28. Article 38 is renumbered as article 22.

SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

"ART. 24. (b) For every general court martial, the convening authority shall appoint: (1) a prosecutor and a defense counsel, who shall be certified by the Judge Advocate General as persons qualified to perform such duties, but the appointment of such defense counsel shall not affect the right of the person accused to counsel of his own choice; and (2) a judge advocate, whose duties it shall be (1) to advise the court on all matters of law arising during the trial of the case; (2) to rule on interlocutory questions, except challenges; (3) in open court, to instruct the court upon the law of the case; and (4) to perform such other duties as the Secretary of the Navy may prescribe: Provided, That the judge advocate may be overruled by a majority vote of the court, in which case the reasons therefor shall be spread upon the record: Provided, further, That the judge advocate shall be an officer certified by the Judge Advocate General as qualified to perform the duties herein prescribed and who shall be responsible to the Judge Advocate General for the performance thereof: And provided further, That the judge advocate shall be subject to challenge."

III. Differences

1. Differences in Army and Navy Provisions

a. Who may appoint

The primary difference between the appointing authority of Army general courts-martial and the convening authority of Navy general courts-martial is due to the differences in names of units.

The President may appoint in both cases.

The Secretary of the Navy may appoint general courts-martial, while the Secretaries of Defense, Army, and Air Force do not have such power.

The amended Articles of War also authorize commanding officers who have a member of the Judge Advocate General's Department assigned as a staff judge advocate, to appoint general courts-martials; while the Navy does not. (Query: Do naval command staffs have judge advocates?)

Under the amended Articles of War, additional commanding officers may be empowered to appoint by the President, while under the Navy articles, additional commanding officers may be empowered to appoint by the Secretary of the Navy.

Under the amended Articles of War, a general courts-martial may in any case be appointed by superior competent authority, instead of the designated appointing authority, when such superior authority deems it advisable. The naval articles and regulations contain no such provision.

b. Appointing authority, accuser, or prosecutor

When the Army appointing officer is the accuser or prosecutor, the court shall be appointed by superior competent authority. The Navy articles and regulations contain no such provision.

c. Law Member or Proposed "Judge Advocate" (Navy)

Under the amended Articles of War, the appointing authority shall appoint as one member of general courts-martial

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a member of the JAGD or an officer who is a member of the bar and certified by the JAGD to be qualified for such duty, as a "law member."

The present A.G.N. contain no such provision, but the proposed Navy bill provides for a "Judge Advocate". (To avoid confusion, this paper will refer to this proposed officer as the "law member"). The proposed Navy "law member" is not a member of the court but is to perform functions similar to those of a judge sitting with a jury. (Duties of law members will be discussed in connection with A.W. 31.) The other differences between these "law members" is that the proposed Navy bill provides only that this officer be certified by the Navy JAG as qualified and that he is to be responsible to the JAG for the performance of his duties.

Therefore, the questions as to the "law member" as far as this article is concerned, are (1) Whether or not he should be a member of the court and (2) What should be his qualifications.

P.L. 759 also provides that the law member may be present at all times, while the proposed Navy articles do not so provide.

- d. These differences in general apply also to special courts-martial and summary courts-martial (Navy) included under A.W. 9 and 10.

Attached is Memorandum from Colonel Curry.

2. Discussion

- a. Who may appoint

Keefe Report (SEC. IV par. 1., p. 43-46):

1. Convening Authorities:

"Prior to and during the war the power to convene general courts-martial was vested in the President, the Secretary of the Navy, the commander in chief of a fleet or squadron, the commanding officer of an overseas naval station, and, when empowered by the Secretary of the Navy, the commanding officer of certain other forces afloat and certain marine or shore

commands serving beyond the continental limits. In time of war the commandant of any navy yard or naval station and certain other marine or shore commands could be empowered by the Secretary of the Navy to convene general courts martial."

"In January 1942 the Secretary of the Navy empowered all flag officers commanding a division, squadron, flotilla, or larger naval force afloat to convene general courts martial. In July 1943 the Secretary empowered the commandants of the various Naval Districts within the continental United States to convene general courts martial. Similar authority has been conferred from time to time upon the commanding generals of the Marine Divisions and of other Marine commands."

"The effect of these orders was to decentralize greatly the administration of naval justice, which before the war was centralized in the Department. This centralization had imposed a heavy administrative burden upon the Department and has resulted in considerable delay in the processing of charges. Accordingly, in July 1943, the Ballantine Committee recommended that the commandants of the naval districts in the United States be empowered to convene general courts martial, and it was this recommendation which led to the above mentioned orders of 24 July 1943. The vast majority of sentences reviewed by this Board were imposed by courts appointed by commandants of the various naval districts."

"It was pointed out in the first Ballantine Report, dated September 1943, that the power of the Secretary to authorize command within the United States to convene general courts existed only in time of war. Under the law, as it then existed, the authority of commandants of naval districts to appoint general courts martial would have ceased upon the legal end of the war. This would have resulted once again in a heavy administrative burden on the Department, with attendant delay. The Ballantine Report accordingly recommended that the law be amended to permit the Secretary to empower such commandants or similar local commanders to appoint courts in peacetime."

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"On February 12, 1946, by Public Law No. 297, 79th Congress, 2d Sess., Article 38 was amended to read as follows:

"ART. 38. Convening Authority - General courts-martial may be convened:

'First. By the President, the Secretary of the Navy, the commander in chief of a fleet, and the commanding officer of a naval station or larger shore activity beyond the continental limits of the United States; and

'Second. When empowered by the Secretary of the Navy, by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commanding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station."

"The proposed articles drafted by the McGuire Committee, which were prepared before the passage of Public Law 297, included the following provisions:

"(a) Convening authority - The President, the Secretary of the Navy, the Commander in chief of a fleet, and when empowered by the Secretary of the Navy, any commandant or commanding officer of the naval service, or of an organization serving as a part of the Navy, may convene general courts-martial for the trial of offenses committed by any person subject to the Articles for the Government of the Navy."

Colonel Snedeker in his Notes to the McGuire Articles explained the provisions of the proposed amendment and argued its superiority over Public Law 297, which was then pending as Senate Bill 1545.

"The Judge Advocate General and Commodore White had proposed a substantially similar amendment, with slightly difference wording, viz:

"(a) Convening authority - The President, the Secretary of the Navy, or any officer in command, when empowered by the Secretary of the Navy, may convene general courts-martial for the trial of offenses committed by any person subject to the Articles for the Government of the Navy."

"RECOMMENDATION:

"In view of the enactment of Public Law 297 the necessity of amending Article 38 has been removed. If, however, the Articles are to be revised in toto, consideration might well be given to adopting the language either of the McGuire proposed article, or of the White and Judge Advocate General proposed articles, which in each case is simpler and more direct than the wording of Public Law 297."

Keoffe Report (SEC. IV. par. 3., p. 61,62,63)

"Selection of Court Members:

"Under the present law the selection of members for courts-martial is entirely within the control of the convening authority, who appoints members by name from officers under his command. In practice, however, the convening authority usually appoints to a court officers who are proposed by the command-officer of the vessel on which the trial is to take place and who are personally unknown to him. In case of the permanent or semi-permanent courts which sit in the various naval districts, the convening authority appoints officers whose names are furnished by the Bureau of Naval Personnel and who are detailed for that purpose."

"The convening authority may remove, replace, or add members at any time, although he normally does so only when necessary to replace vacancies. He may even replace officers during the course of a trial, although the practice is condemned and the power is rarely exercised."

"A similar system of appointment to courts martial prevails in the Army. In each case this derives directly from the concept of the court martial as the agency of the convening authority. While this is a practice which is consistent with the basic theory of military and naval organization, certain objections can be, and have been made to it. For example, it has been asserted that: (a) a court so appointed is a mere creature of the convening authority, appointed to do his bidding, and that (b) courts so appointed are transitory and impermanent, and consequently lack the stability, experience, and wisdom of civilian courts, which are permanent institutions."

"With respect to the first of these contentions, the Board cannot accept the extreme views of those who say that courts martial thus appointed have no independence whatever and are mere creatures of the convening authority. Certainly this is not true of the general court martial, and it is with the general court martial that the Board has been chiefly concerned."

Keaffe Report (1st par. p. 64-1st par. p. 66)

"The other criticism that since courts martial are transitory and impermanent they lack the professional competence of civilian courts also has some validity. This, Rheinstein says:

"In addition to numerous minor differences, there is one aspect which may seem the strangest of all: while an ordinary criminal court is a standing institution, established once and for all to hear all cases which may arise within its jurisdiction and staffed with a permanent personnel, a court-martial is no standing institution at all. Whenever a case occurs which, in the opinion of a military commander, ought to be tried by a military court, he will convene a court martial to hear this one particular case. There is no court martial in existence before the individual officers ordered to hear that particular case have convened, and the court goes out of existence as soon as that particular case has been closed. (Footnote: A commanding officer, may of course, convene a panel of officers to hear a whole series of cases. In the larger Army camps a panel is ordinarily convened to hear all cases which may come up within that camp, and traveling panels have been established in the various service commands to hear the more serious cases. These panels have a certain permanent character. Changes in personnel are not made until a member of the panel is ordered away from the camp or service command. Legally, however, the panel does not constitute a court until it has been specifically ordered and sworn in to hear an individual case.)"

"Before the war general courts martial which were more or less permanent in character had been appointed at a number of naval bases within the United States, and to a large extent during the war the Navy has used a system of permanent courts. Thus, the general courts martial established for each of the naval districts within the United States were composed of more or less permanent personnel."

"A few proposals have been put forward to remedy this situation. For example, the Chamberlin Bill provided that the convening authority, instead of selecting a court by direct appointment, should designate a panel of qualified court members, and that for each trial the judge advocate, who was to be independent of the convening authority, should select the members of the court from this panel. This proposal was not adopted in the 1920 Articles of War."

"No provision which would change the present method of selecting court members is proposed in the McGuire, White, or Judge Advocate General drafts of amended articles, except with respect to the designation of the judge advocate."

"The Report of the General Board, United States Forces, European Theater, on "Military Justice Administration in Theaters of Operations," did not discuss the question of convening officers selecting personnel for courts, but did make the following comments on permanent courts:

Permanent courts. Some commands utilized relatively permanent courts when and where it was possible to do so and report that the procedure contributed to a better administration of military justice. The system is criticized by some, for it is said that such courts are inclined to become callous and impose unconscionable sentences. This was true in some cases. The sentences imposed by a court established in Western Base Section for trial of First U. S. Army and other combat troops shortly before D-Day (6 June 1944) were so severe that almost all of them were reduced at least 50 percent by the reviewing authority. Relatively permanent courts appointed by the Commanding General, Seine Section,

Communications Zone and sitting in Paris, France, imposed death penalties for desertion, none of which were executed, on 11 accused between 8 March 1945 and 27 April 1945. Nevertheless, the great majority of judge advocates who expressed an opinion favor permanent courts. A few others approved partial permanency, to be attained by detail of a permanent president, law member, trial judge advocate and defense counsel. To circumvent the tendency towards harsh sentences, some propose that the permanent personnel shift and interchange, from court to court. The suggestion that general courts-martial move in circuits is not generally favored although it has strong power. One infantry division judge advocate favors abolishing courts within or for an organization and establishing them by arbitrary theater-wide geographical districts. All troops within the area would come under the jurisdiction of the courts of the district irrespective of their organizations."

RECOMMENDATION: (p. 68-69)

"It is apparent from the practices of other nations that there is nothing of inherent necessity in the present American method of selecting names members ad hoc for the trial of each case or series of cases. The system is difficult to reconcile with established ideals of independent and responsible courts. The following suggestions are submitted for consideration by the Advisory Council:

"(a) Whether the present system of appointing relatively permanent courts, which prevails in the various naval districts in the United States cannot be strengthened and extended, so that general courts martial convened by the Secretary of the Navy and by the commandants of the various naval districts would be organized as permanent tribunals, with members detailed for definite periods of time, subject to transfer out of the district or detail to other duties of paramount military importance."

"(b) Whether, as far as compatible with military and naval operations, courts convened at sea, in overseas commands, marine divisions, and so on should be on a similar permanent basis."

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"(c) Whether the provisions for appointing courts should be changed or that convening authorities would not detail named officers to specific courts for particular trials, but would detail qualified personnel within their commands to court martial panels from which members of a court would be taken from time to time to fill vacancies and to replace relieved members on some impersonal method. If this could be done, it would tend to obviate the objection that members of courts martial can be handpicked, an objection which was of course not met by the proposal of the Chamberlain Bill that court members be selected from the approved panel by the judge advocate."

"(d) Whether the appointment of a new member to a court after the arraignment of an accused should be prohibited, except where necessary to complete the minimum membership."

Vanderbilt Report (Army) (Par. 6, p. 9-10)

"The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or

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smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose."

"We realize that the officers of a division or command may have a special understanding of local conditions and be best qualified to try local offenders and also that officers must not be appointed to courts martial duties if, in the opinion of the commander, they are unavailable. These requirements may be met by the establishment of a panel of available officers by the commander, subject to change from time to time, from which the selection of members of the court may be made. The determination of the commander as to availability must, of course, be final. It is not meant that the selection of the members of the courts-martial shall be confined to the division or command in which the offenses occur."

"We have no fear that this arrangement will impair the proper authority or influence of the commander. The absolute right to refer the charge for speedy trial and to control the prosecution will satisfy the demands of discipline. Further than that, the command should not go. The present Articles of War do not contemplate that the commander shall control the action of the courts. The members of the court take an oath under Article of War 19 to well and truly try and determine, according to the evidence, the matters submitted to them without partiality, favor, or affection, according to the rules and articles for the government of the armies of the United States. The right to fix the penalty in case of conviction is specifically lodged in the court and the surrender of this power to the commander is an act which the court has no legal right to perform, and the commander no legal jurisdiction to require."

"The need for the prompt appointment of a court and a speedy trial when the command refers to a charge for trial must be recognized. Moreover, the deterrent effect of punishment must not be overlooked and the

need for severe sentences under conditions prevailing in an Army in a state of war cannot be denied. But there is no reason to think that the members of the Judge Advocate General's Department will not be keenly alive to all these necessities. They will be army men selected and trained by army men. In time of war they will be in the field in close association with the command and cognizant of all the considerations of safety and success which influence the command itself. The time is past when a court-martial might be deemed merely as an advisory council to the commander. The court-martial, as conceived by the Articles of War is an independent tribunal; and if the commander controls the prosecution, the appointment and functioning of the court may be safely left to the legal department of the Army."

The two Ballantine Reports and the McGuire Report make no additional comment on this point.

In Hearings (No. 125) before a subcommittee of the Committee on Armed Services of the House of Representatives the following recommendations were made:

- (1) The V.F.W., New York County Lawyers' Association, War Veterans Bar Association, Judge Advocates' Association, A.V.C. and MVETS all recommended that the power of command be limited to the power to refer persons for trial, and control of prosecution.
- (2) The same organizations that courts, defense counsels, and law member be chosen by the Judge Advocate General's Department or by higher echelon.
- (3) All opposed the power to choose prosecutor, court, and law member being vested in the same person.

The Army representatives were in favor of the present provisions on the grounds that it is a function of command to control discipline and that the trial of military personnel should not be in the hands of persons who disassociated from the immediate circumstances of the accused.

The House Committee made the following statement in its report (#1034):

"Under present law "command" has an abnormal and unjustified influence over military justice. In opposing our decision the War Department stresses the necessity for preserving proper discipline and for giving line commanders authority which is commensurate with their responsibility. We fully agree that discipline is of the utmost importance and must be preserved, however, we feel equally certain that in the administration of military justice there is a point beyond which the considerations of justice are paramount to discipline. Under present law and under this bill, as amended, "command" has abundant authority to enforce discipline. It refers the charges for trial, convenes the court, appoints the trial judge advocate, law member, and defense counsel who must now be qualified personnel of the Judge Advocate General's Department and, after the trial reviews the case with full authority to approve or disapprove the whole or any part of the sentence."

"We contend that "command" should ask for nothing more in the furtherance of discipline. At the conclusion of a trial, under the present system, the same officers who conducted the case return to the command of a line officer who has full authority over their efficiency ratings, promotion recommendations, leaves, and duty assignments. These officers, many of whom have families and have chosen the Army for a career, would be less than human if they ignored the possibilities of such influence. We contend that those who are charged with the impartial administration of military justice must have sufficient freedom of judicial determination to meet the responsibility."

The question whether the convening authorities should be detailed in the statute or left to be designated by the Secretaries of the Services or by the President is an administrative question. The Navy view being that designation by the various Departments gives greater flexibility.

b. Appointing authority accuser or prosecutor

The Keefe Report (Navy) states:

"The protection afforded to an accused by the Army rule that the person who prefers the charges may not appoint the court is more apparent than real. Although charges are initiated by the subordinate commander, the appointing authority frequently re-drafts them or directs the preferring of different charges, in accordance with the facts disclosed by the report of investigation. Frequently appointing authorities, cognizant of certain facts which in their opinion indicate the advisability of trial, direct subordinates to prefer appropriate charges."

The Vanderbilt Report (Army) makes no recommendation to change this provision.

The two Ballantine Reports and the McGuire Reports do not comment on this point.

c. Law Member

Keefe Report (Par. 5, p. 71-1st. par. p. 78)

"The Judge Advocate:

"The present Naval court martial system does not provide for any official whose primary obligation is to rule on questions of law arising during a trial and to instruct the members of the court in the applicable law. The judge advocate presently has the duty of advising the members of the court on legal questions, but since his principal duty is to prosecute, this an additional duty imposed upon him subordinate to, and to a certain extent inconsistent with, his obligation to prosecute."

"Prior to 1920 the Army system was the same. Since 1920, however, the Articles of War have provided that for each general court martial there shall be a "law member", designated by the appointing authority. He is preferably a member of the Judge Advocate General's Department, when one is available, otherwise he is an officer who is deemed by the appointing

authority to be specifically qualified to act as law member. He is a member of the court, with the same right and duty to vote on the findings and sentences as any other member. In addition, it is his duty to rule upon all interlocutory questions, other than challenges, arising during a trial. His rulings on admissibility or exclusion of evidence are final; on other questions he may be overruled by a majority of the court. He customarily advises the court, during its closed sessions, on the law applicable to the case, instructs the court on the meaning of reasonable doubt, comments on the evidence, and answers any questions on the law or facts put to him by other members. These instructions and comments are not, however, binding on the other members, nor do they become part of the record. The law member does not issue any formal instructions, comparable to a civilian judge's charge to the jury."

"It is generally agreed that a similar official should be provided for Naval courts martial. Most of the current proposals, however, do not contemplate a "law member", but a "judge advocate" as found in the British Army and Navy court martial systems, who instructs the court on the applicable law, but is not a member of the court and does not vote on the findings and sentence."

"Thus, the McGuire Committee proposes:

"(4). For every general court martial, the convening authority shall, in addition, appoint a judge advocate, who shall be an officer certified by the Judge Advocate General as qualified to perform the duties of such office. The judge advocate shall, under such rules of practice, pleading and procedure as the Secretary of the Navy may prescribe, (1) summon all witnesses; (2) rule with finality on all questions of admissibility of evidence; (3) give impartial advice on matters of law and procedure to the prosecutor, to the accused and his counsel, and to the court; (4) question such witnesses as may, in his discretion, be necessary to full exposition of the facts; (5) instruct the court, prior to its deliberation on findings, upon the law of the case; and (6) keep, with the assistance of a duly designated clerk, the record of proceedings."

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"The McGuire Articles further provide that in reaching its findings the court

"shall accept and be bound by the instructions of the judge advocate as to the law of the case, and it shall determine the guilt or innocence of the accused in accordance therewith."

"The McGuire Articles provide that the convening authority of a summary court martial shall appoint a qualified officer as judge advocate, whose duties shall be the same as those of a judge advocate of a general court martial."

"Colonel Snedeker, in his notes to the McGuire Articles, explains that these provisions are derived from the British and American Army systems."

"The White Articles contain the same provisions relating to the judge advocate, except that the words "who shall be an officer certified by the Judge Advocate General as qualified to perform the duties of such office" are omitted. The Judge Advocate General's proposed Articles follows White except that the judge advocate is to "advise" rather than rule with finality on questions of admissibility of evidence and is to "advise" rather than "instruct" the court on the applicable law. The Judge Advocate General proposal adds the following paragraphs:

"(5). Whenever the court rejects the advice of the judge advocate on questions of law, the reasons advanced by the judge advocate and the reasons for the court's ruling shall be noted upon the records."

"The White proposal agrees with that of the McGuire Committee upon the binding effect of the judge advocate's instructions to the court as to the law of the case."

"The Judge Advocate General's proposal provides merely that the court "shall give due regard to the advice of the judge advocate as to the law."

"Both the White Articles and the Judge Advocate General's proposed Articles follow the McGuire proposals with respect to the appointment of a judge advocate for summary courts martial."

"The Ballantine Report has recommended the designation of a judge advocate for a general court martial and, when the circumstances permit, for a summary court martial. He would be an officer specially trained under the supervision of the Judge Advocate General and certified by the latter as qualified. His rulings are to be advisory only, but in any case in which the court does not follow his advice with respect to matters of law and procedure the rejection of such advice and the reason therefor is to be noted in the record."

"The special recommendations of the minority members of the Ballantine Committee recommended adoption of the McGuire Articles in revised form. Under the revised draft of these articles the judge advocate is to be an officer "designated" (rather than "certified") by the Judge Advocate General as qualified; he is to advise the court on the admissibility of evidence (rather than rule finally thereon), and he is to "advise" (rather than "instruct") the court on the law of the case. The court is to "consider" his instructions on the law, rather than to be bound by it, but it is still to determine the guilt or innocence of the accused "in accordance therewith." These proposals further provide:

"In any case where the court does not follow the advice of the judge advocate with respect to matters of law and procedure, the reason therefor shall be spread on the record of proceedings."

"The difference in these various proposals are not so great that they could not be readily reconciled by the Advisory Council recommended in the Introduction hereof. All are agreed that there should be a judge advocate, trained in the law, to assist the court in arriving at its findings and sentence. All are agreed that he should not be a member of the court and should not vote. The only controversial questions are:

"(1) Should the judge advocate be designated (or certified) by the Judge Advocate General as qualified?

"(2) Should his rulings and instructions be binding or advisory?

"(3) Should a judge advocate be provided for the summary court martial?"

These questions will be taken up in order.

"(1) It seems obvious that there should be some assurance that the judge advocate be qualified to perform his duties. The McGuire and White draft articles require that he be certified or designated as qualified by the Judge Advocate General. This seems to be a reasonable solution and preferable to the Judge Advocate General's draft, which includes no such requirement. The Ballantine Report concurs with the McGuire and White drafts in this respect."

"Under the Articles of War the law member of a general court martial is supposed to be a member of the Judge Advocate General's Department, when available. As a matter of practice, especially during the war, Judge Advocate officers in the Army were nearly all assigned to staff judge advocate positions or other full time legal assignments, and it was the exception rather than the rule to find one available for detail as law member, despite the fact that they were very commonly used as trial judge advocates. That this represents a failure to carry out the statutory intention was recognized as far back as 1922. It is now recommended by responsible Army authorities that the actual presence of the law member be made a jurisdictional requirement in all cases tried by general courts martial and that it be further required that he be a member of the Judge Advocate General's Department. The House Military Affairs Committee, studying the Army system, has recommended that the law member be required to be a lawyer, sum up cases, but have no vote on findings or sentence. The War Department opposes the denial of the law member's vote."

"Since the Navy has established a group of legal specialist officers, pursuant to the recommendations of the Ballantine Committee, this problem could be solved by requiring that the judge advocate be a member of such group, just as it is now proposed that the law member of the Army general court be a member of the Army Judge Advocate General Corps. Inasmuch as provisions are now

being made for the training of a greater number of legally qualified officers, it should be practical for the Judge Advocate General to designate qualified officers to sit as judge advocates, and a statutory requirement that the judge advocate be an officer so designated would appear to be feasible."

"In this connection it is interesting to note that in 1919 the Judge Advocate General of the Navy strongly recommended the formation of a "permanent" corps of judges advocate for the naval service." He also recommended that the law be amended to require that a "law member" sit on every general court martial, whose advice upon legal questions arising in connection with the hearing shall be binding upon the court, but who should have no vote upon questions of fact." Although these recommendations were noted with approval by the Secretary of the Navy, apparently no action was taken on them at the time."

Keaffe Report (Recommendations, p. 84)

- "(1) That a judge advocate be provided for every general court martial, and, when practicable, for every summary court martial."
- "(2) That he be an officer whose qualifications have been approved by the Judge Advocate General, either by virtue of his being a Legal Duty Specialist, or as otherwise having the requisite legal training."
- "(3) That he be subject only to the supervision of the Judge Advocate General, and not of the convening authority, in the performance of his duties as judge advocate."
- "(4) That his instructions on the law applicable to the case be made in open court and be set forth in the record; that the court determine guilt or innocence in accordance therewith and on the basis of the facts found by it; and that on review prejudicial error in the judge advocate's instructions be grounds for setting aside a conviction."

Vanderbilt Report

The Vanderbilt Report recommended that it should be a jurisdictional requirement that the law members be trained lawyers and commissioned officers detailed by the J.A.G.D. and that it should be required that the law member be actually present throughout the trial. This recommendation was adopted in the amended Articles of War.

The Second Ballantine Report recommended the establishment of a judge advocate such as is not incorporated in the proposed Navy bill.

The First Ballantine Report and the McGuire Report are completely covered in the Keefe Report.

In hearings before a subcommittee of the House Armed Services Committee, all witnesses approved the qualifications of law members set forth in what is now Public Law 759.

All witnesses, except War Department representatives, recommended that a law member be appointed by the J.A.G.D. and not under influence of commanding officers.

The V.P.W. and Veterans Bar Association recommended that the law member not be entitled to vote, while the A.V.C. recommended that such a law member should be president of the court, regardless of rank.

FEL-1

P. & A.

Comparison of AW 8 and
comparable provisions of AGN

I - The Article of War now in force:

Article of War 8 designates the authorities by whom general courts-martial may be appointed; provides for the detail of a law member, and prescribes the latter's qualifications.

II - The Article of War as revised:

The 1948 revision changes Article 8 in important particulars: (1) By enlarging the list of appointing authorities, (2) by providing that the law member, if not J.A.G.D., shall be a member of the bar of a Federal or highest State court, and certified by the J.A.G. as qualified for such detail, (3) by enlarging the powers of the law members, and (4) by providing that no case may be disposed of in the absence of the law members.

The revision also transfers, quite logically, the provision rendering ineligible for membership an accuser or prosecution witness from Article 8 (GCM - By Whom Appointed) to Article 4 (Who May Serve on Courts-Martial).

III - The Articles for the Government of the Navy now in force:

AGN 38 (Naval Courts and Board B-40) is limited to designation of authorities by whom general courts-martial may be convened.

IV - The Navy Article as revised:

The Navy Bill (Article 22) makes no change in this Article.

V - Differences

AW 8 provides that general courts-martial may be appointed by:

The President of the United States
(The Commanding Officer of a territorial division - deleted in 1948 revision).

The Commanding Officer of a territorial department.

The Superintendent of the Military Academy.

The Commanding Officer of an army.

The Commanding Officer of an army corps.

The Commanding Officer of a division.

The Commanding Officer of a separate brigade.

And, when empowered by the President

The Commanding Officer of any district.

The Commanding Officer of any force.

The Commanding Officer of any body of troops.

P. & B.

The 1948 revision adds, after separate brigade:

The Commanding Officer of any corresponding unit of the Ground or Air Forces,

And also adds:

The Commanding Officer of any command to which a member of the Judge Advocate General's Department is assigned as staff judge advocate.

And:

Superior authority.

AGN provides that general courts-martial may be convened by:

The President

The Secretary of the Navy

The Commander in Chief of a fleet

The Commanding Officer of a naval station or a larger shore activity beyond the continental limits of the United States

And, when empowered by the Secretary of the Navy:

The Commanding Officer of a division, squadron, flotilla, or other naval force afloat.

The Commanding Officer of a naval district, naval base, or naval station.

The Commandant, Commanding Officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station.

Article of War 8 provides for the appointment of a law member of every general court martial who, in addition to his duties as a member of the court, shall perform such other duties as the President by regulations may prescribe. These duties are set forth in the Manual for Courts Martial (see Par. 51d, page 40).

Under its present procedure the Navy has a Judge Advocate who, in addition to acting as prosecutor, also acts as an adviser to the court on matters of law and procedure.

Proposed revision of the Articles for the Government of the Navy (Article 24(b)) would relieve the Judge Advocate of a general court martial of his duties as prosecutor and make him an adviser to the court upon all matters arising during a trial, authorize him to rule on interlocutory questions, except challenges, to instruct the court upon questions of law in open court, and to perform such other duties as the Secretary of the Navy may prescribe. The duties of this officer would correspond in many particulars to those of the Army law member, the essential differences being that the Navy Judge Advocate would not be a member of the court nor entitled to vote as is the Army law member, and that his rulings would not be final, and that the Navy Judge Advocate's rulings may be overruled by a majority vote of the court, whereas certain rulings of the Army law member are final.

P. 8C.

MEMORANDUM

Subject: AW 8 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of AW 8 and comparable provisions of AGN", undated, unsigned

1. "A difference between AW 8 and comparable provisions of AGN which has not been mentioned in subject memorandum is the provision appearing in Public Law 759 that when any appointing authority is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable. There is no similar provision in existing or proposed AGN. Such a provision would be impracticable and make the system unwieldy. Frequent Navy practice is that the highest authority in the area convene the general court martial. Reference to superior authority would often necessitate going into another area at a great distance and often without any ready means of communication. Detached authorities would find this especially difficult.
2. The accused gains little protection by requiring his accuser to refer charges to superior authority for trial. He receives greater protection by depriving the convening authority of reviewing power.
3. The AW also includes a provision that the court shall not receive evidence or vote upon its findings or sentence in the absence of the law member. There is no similar provision in Navy law.
4. Historically, the term judge advocate was associated with the official skilled in law who performed quasi judicial functions and on occasion had authority to judge and give sentence. See Winthrop page 179. To retain the term "judge advocate" for the legal officer of the court would appear more in line with such historical precedent than to use it for designation of strictly prosecution functions."

Uniform Code of Military Justice

Subject: Special Courts-Martial - By Whom Appointed - A.W. 9

I. Army Provisions

1. Articles of War

"ART. 9. Special Courts-Martial.--The Commanding Officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

2. Manual Courts Martial

Par. 5b. Special Courts-martial.--"The commanding officer designated in A.W. 9 may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior authority, and may in any case, be appointed by superior authority when by the latter deemed desirable. (A. W. 9.)

The principles of the last three subparagraphs of 5a apply to special courts-martial.

A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. For instance, the commanding officers of units that are independent, except in so far as they constitute parts of a division, who are responsible directly to the division commander for the maintenance of discipline in their respective commands, are competent to appoint special courts for the same, subject to the power of the division commander to appoint special courts for all subordinate organizations and detachments under his command if by him deemed desirable.

P. 2

The subordinate commander may exercise the power to appoint special courts-martial for his command unless a competent superior deems it "desirable" to reserve that power to himself and so notifies the subordinate."

3. Public Law 759--80th Congress, Chapter 625--2D Session

SEC. 207. Article 9 is amended to read as follows:

"ART. 9. SPECIAL COURTS-MARTIAL.-- The commanding officer of a district, garrison, fort, camp, station, or other place where troops are on duty, and the commanding officer of an Army group, an Army, an Army corps, a division, brigade, regiment, detached battalion, or corresponding unit of Ground or Air Forces, and the commanding officer of any other detached command or group of detached units placed under a single commander for this purpose may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 26. Convening authority.--Summary courts martial may be ordered upon petty officers and enlisted men in the naval service under his command by the commanding officer of any vessel, the commandant of any navy yard or naval station, the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, or marine barracks, and, when empowered by the Secretary of the Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing, for the trial of offenses which such commanding officer or commandant may deem deserving of greater punishment than he is authorized to inflict, but not sufficient to require trial by a general court martial (R. S., sec. 1624, art. 26; Aug. 29, 1916, c. 417, 39 Stat. 586).

2. Proposed Navy Bill

SEC. 18. Article 26 is renumbered as article 17 and amended to read as follows:

"ART. 17. Commanding officers of naval vessels and such other officers in command or in charge of naval forces or activities as may be designated by the Secretary of the Navy may convene summary courts martial for the trial of enlisted persons regularly or temporarily under their command or charge for alleged offenses deemed deserving of greater punishment than he is authorized to inflict, but not sufficient to require trial by general court martial."

III. Differences

1. Differences in Army and Navy Provisions

(a) Who may appoint.

The primary difference between the appointing authority of an Army special courts-martial under the amended A.W. and the Naval authority to convene summary courts-martial under the proposed Navy bill is that the former are enumerated and the latter are to be designated by the Secretary of the Navy.

(b) Appointing authority accuser or prosecutor

This is the same as the problem posed under A.W. 8 as to general courts-martial.

(c) Appointment by superior authority

Same as for general courts-martials. (See A.W. 8.)

2. Discussion

(a) Who may appoint

Neither the Keefe, Ballantine, McGuire, (Navy) nor the Vanderbilt Report (Army) recommends any change in appointing authority specifically for special courts-martial. (See discussion under Article of War 8.)

P. 4

(b) (See A.W. 8 for discussion on same problem with respect to general courts-martial).

(c) (See A.W. 8 for discussion on same problem with respect to general courts-martial).

IV. Other Proposed Reforms

The Keffe, Ballantine, McGuire and Vanderbilt reports all favor the appointment of a "law member" for special courts-martial where qualified officers are available on the same basis as for a general courts-martial. (See discussion under A. W. 8).

Keffe Report (Par. 1, 2, p. 81)

Whether a judge advocate should be appointed for a summary court is a question which this Board is not prepared to discuss at length, on the basis of its experience. Although the McGuire, White, and Judge Advocate General proposals all provided for this, it was realized that certain practical difficulties stand in the way. Accordingly, the Ballantine Report has recommended only that a judge advocate be appointed for a summary court martial "when the circumstances permit." The minority report of the Ballantine Committee recommended the language, "whenever practicable."

"The USFET Report noted, with respect to the Army special court martial, that the most recurring suggestion from judge advocate officers in the field was that there should be a lawyer either in the court or in a position of immediate supervision, such as a legal officer at regimental level. The Report recommended consideration of a proposal to place at least one legally trained officer on each inferior court martial."

All witnesses before House Armed Services Committee (other than army personnel) recommended law members for special as well as general courts-martial.

Attached is memo from Colonel Curry.

A

Comparison of A. W. 9 and comparable provisions of AGN

I The Article of War now in force:

A. W. 9 authorizes the appointment of special courts-martial by the commanding officer of a

District

Garrison

Fort

Camp

or other place where troops are on duty

Brigade

Regiment

Detached battalion

or other detached command

Provided he is not the accuser or prosecutor

or by Superior authority.

II The Article of War as revised.

The 1948 revision adds to foregoing list the commanding officer of

An army group

An army

An army corps

and deletes the commanding officer of "any other detached command."

For the reason explained in II under AW 8 the revision also deletes the provision now in AW 9 rendering ineligible for membership an accuser or prosecution witness.

III The Articles for the Government of the Navy now in force.

The Navy denominates its court which corresponds to the Army's special court as a Summary Court Martial (AGN 26, Naval Courts and Boards B-28, et seq). AGN 26 provides that Summary Courts Martial may be ordered by:

Commanding Officer of any vessel

The Commandant of any naval yard or naval station

The Commanding Officer of any brigade

The Commanding Officer of any regiment

The Commanding Officer of any separate or detached battalion

The Commanding Officer of any separate or detached command

The Commanding Officer of any Marine barrack

and when empowered by the Secretary of the Navy

The Commanding Officer or officer in charge of any other command not specifically mentioned above.

IV The Navy Article as revised.

Proposed revision of the Articles for the Government of the Navy (AGN 10 (a)) would designate the intermediate court under discussion as a Superior Court Martial.

(Note: Discussion of differences in jurisdiction between the Army Special Court Martial and the Navy Summary Court Martial are considered beyond the purview of this paper.)

22 July 1948

MEMORANDUM

Subject: AW 9 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of A.N. 9 and comparable provisions of AGN", undated, unsigned

1. Referenced memorandum in paragraph I inserts the provision of AW that the appointing authority of the special court martial may not be the accuser or prosecutor, but adds no comment to the effect that this provision appears nowhere in AGN. The restrictions of this provision appearing in AGN summary court martial authority would be even more objectionable than in general court martial authority. Navy vessels for prolonged periods are not in the presence of superior authority who might convene the court in cases. The commanding officer is probably rarely the accuser. Under naval practice he is required to investigate all disciplinary reports in person and normally comes close to fulfilling the "definition" of the prosecutor in the second sub-paragraph of par. 5(a) Manual for Courts-Martial USA (1928). On small vessels there are often too few officers to permit reference to an investigating officer and still have enough left to try the case aboard the same vessel. If the commanding officer of a naval vessel were circumscribed in his power to convene a summary court-martial it would retard the entire procedure and work a hardship on the vessel and on the accused and greatly impair administration of justice and the maintenance of discipline.

2. Public Law 759 retains the authority of the commanding officer of a detached command as appointing authority and adds "the commanding officer of any other * * * group of detached units placed under a single commander for this purpose".

3. AGN 26 includes a jurisdictional restriction that summary courts martial may be ordered only to try those enlisted persons under the command of the convening authority. While the referenced memo excludes discussion of jurisdiction, it is not clear with which AW, it will be discussed at all.

4. In paragraph IV of referenced memorandum, there is a reference to AGN 10 (a) of the "proposed revision of the Articles for the Government of the Navy". The paragraph referred to appears in the proposed Articles for the Government of the Armed Services. The proposed AGN would amend the present Article 26 by giving only the commanding officer of a vessel specific authority to convene summary courts martial. All "other officers in command or in charge of naval forces" must be designated by the Secretary of the Navy in order to have such authority. The title of summary court martial would be retained.

J. E. CURRY
Colonel, USMC

Uniform Code of Military Justice

Subject - Summary Courts-Martial (Army) and Deck Courts -
Who May Appoint. A.W. 10

I. Army Provisions

1. Articles of War

"ART. 10. Summary Courts-Martial.-- The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him."

2. Manual Courts-Martial

(Par. 5c. p, 5&6) Summary courts-martial.--"The commanding officers designated in A.W. 10 may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.)

Where the appointing authority of a summary court or the summary court officer is the accuser or the prosecutor of the person or persons to be tried, it is discretionary with the appointing authority whether he will forward the charges to the superior authority with a recommendation that the summary court be appointed by the latter; but the fact that the appointing authority or the summary court officer is the accuser or prosecutor in a particular case does not invalidate the trial.

When more than one officer is present, a subordinate officer will be appointed summary court-martial. When but one officer is present, no order appointing the court will be issued.

The principles of the third and fourth subparagraphs of both 5a and 5b apply to summary courts-martial."

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 64. (a) Officers authorized to order.--All officers of the Navy and Marine Corps who are authorized to order either general or summary courts martial may order deck courts upon enlisted men under their command, for minor offenses now triable by summary court martial (Aug. 29, 1916, c. 417, 39 Stat. 586)."

"ART. 66. Courts martial and punishments in hospitals and hospital ships.--When empowered by the Secretary of the Navy pursuant to article 26 to order summary courts martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict upon all enlisted men of the naval service attached thereto, whether for duty or as patients (Aug. 29, 1916, c. 417, 39 Stat. 586)."

2. Naval Courts and Boards

SEC. 692 (footnote 2) For the constitution and powers of a deck court see art. 64, A.G.N.

Who may act as deck court officer.--"Officers shall not be ordered as deck court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, and who have had less than six years' service as a commissioned officer, except that, in cases where there is no officer of such rank or of higher rank attached to the vessel, navy yard, station, or command, the commanding officer (if a commissioned officer) may act as deck court officer. An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

3. Proposed Navy Bill

SEC. 47

"ART. 15. All officers who are empowered to convene summary courts martial may convene deck courts martial for the trial of enlisted persons regularly or temporarily under their command or charge for minor offenses triable by summary courts martial."

III. Differences

1. Differences in Army and Navy Provisions

The principal difference between the appointing authority of Army summary courts-martial and the convening authority of Navy deck courts is that the Articles of War designate which commanding officers may appoint while the A. G. N. provide that all officers authorized to appoint general or summary courts-martial may appoint deck courts. The proposed Navy bill would change the latter provision to include only those who may appoint summary courts-martial.

The Articles of War also provide that a summary courts-martial (Army) may be appointed by superior authority when deemed desirable by such superior authority. The A. G. N. has no such provision.

2. Discussion

The McGuire Articles (Navy) would have abolished deck courts. In its report the board stated:

"Deck Courts are abolished. This seems to meet with the approval of all officers experienced in command with whom the matter has been discussed, and their demise will certainly not be mourned by enlisted personnel who have come to regard them merely as an instrumentality of the convening authority, with a fixed and predetermined concept of guilt - and with the power to inflict greater punishment than is permitted the authority that brings them into being. As a consequence, the jurisdiction at last, with due deference to the function of command, is increased, with the antecedent right to request and receive trial by summary court-martial."

The Second Ballantine Board recommended retention of deck courts:

"The Board believes although there is some difference of opinion on the subject, and that although some officers do not make full use of Deck Courts, they are nevertheless essential in ships, particularly in time of war. Furthermore, the authority now vested in a Deck Court must, in order to preserve the scale of punishments, be vested somewhere. It appears to the Board that the only place for this authority to go would be to the Commanding Officer.

The Board does not believe his powers should be increased to that extent."

The Keeffe Report does not comment on the convening authority of deck courts.

In regard to summary courts-martial (Army) the Vanderbilt Report recommends that if necessary to get officers of sufficient rank and experience, summary court officers should be appointed from a larger area or a larger unit than is at times done at present.

The Vanderbilt Committee also recommended further study by a board of officers of the advantages of the diminution of summary courts-martial and consideration of the dangers of abuse by new and untried company commanders.

In accordance with present Navy practice, an officer empowered to appoint deck courts may at his discretion, appoint himself deck-court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers of his command. Therefore, when there is one commissioned officer in a naval command empowered to appoint deck courts, he is deck-court officer, and thus the same result is reached as is in the proviso of A. W. 10.

Present Navy practice recommends that as the deck court must act impartially, any close personal knowledge of the man or the offense is a handicap. It is thus inadvisable to refer to a deck-court officer specifications against personnel under his immediate supervision with whom he has had close personal contact. Although there is no legal prohibition against the accusing officer serving as deck-court officer, a fairer trial will result if such cases are referred for trial to someone having no knowledge of the persons or offenses involved. Of course, in small commands, with a single officer or with a very limited number of officers present, if the maintenance of discipline requires immediate trial and punishment, the offenses may have to be tried by an officer familiar with the case, even the accusing officer. Where possible, however, such a result should be avoided.

Attached is memorandum from Colonel Curry.

A

Comparison of AW 10 and comparable provisions of AGN

I. The Article of War now in force.

AW 10 provides that summary courts-martial may be appointed by:

The commanding officer of a
Garrison
Fort
Camp
Other place where troops are on duty
Regiment
Detached battalion
Detached company
other detachment
Superior authority

And that, when only one officer is present with a command, he shall be the summary court.

II. The Article of War as revised.

No change.

III. The Articles for the Government of the Navy now in force.

The Navy equivalent of the Army Summary Court is the deck court which may be ordered (AGN 64, Naval Courts and Boards B-66) by any officer of the Navy or Marine Corps authorized to order either a general or a summary court-martial.

IV. The Navy Articles as revised.

Proposed revision of the Articles for the Government of the Navy would change the name of the present deck court to summary court.

V. Differences.

As indicated above.

(Note: Discussion of jurisdiction and punishment limitations are considered to be outside the purview of this paper.)

22 July 1948

MEMORANDUM

Subject: AW 10 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of AW 10 and comparable provisions of AGN", undated, unsigned

1. AW 10 contains a provision that when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. The AGN has no such provision for an automatic appointment. Naval Courts and Board section 692(2) provides: "Who may act as deck court officer. - Officers shall not be ordered as deck court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, and who have had less than six years service as a commissioned officer, except that, in cases where there is no officer of such rank or of higher rank attached to the vessel, navy yard, or command, the commanding officer (if a commissioned officer) may act as deck court officer. An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

2. Paragraph IV of referenced memorandum states that a proposed revision of AGN would change the name of the deck court to the summary court. It is the proposed Articles for the Government of the Armed Services which would make this change, not the proposed AGN, which would retain the existing Article 64.

J. E. CURRY
Colonel, USMC

Uniform Code of Military Justice

Subject: Appointment of Trial Judge Advocates and Counsel. A.W. 11.

I. Army Provisions

1. Articles of War

"ART. 11. Appointment of Trial Judge Advocates and Counsel.--For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, however, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case."

2. Public Law 759--80th Congress, Chapter 625, 2D Session

"ART. 11. Appointment of Trial Judge Advocates and Counsel.--For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Department or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Department, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as

defense counsel or assistant defense counsel unless expressly requested by the accused: Provided further, That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case."

II. Navy Provisions

1. Articles for the Government of the United States Navy

- a. There is no similar provision in the A.G.N. for the appointment of the judge advocate for the general court martial. Such authority is implied in the provisions for the appointment of the court itself. A.G.N. 40 provides for oaths for a judge advocate and for the judge advocate "or person officiating as such" to administer the oaths to the court.
- b. A.G.N. 27 "Constitution of summary courts martial.--A summary court martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder."

2. Naval Courts and Boards

- a. NC&B section 350, page 198: "The authority to convene a general court martial implies the power to appoint the judge advocate. The authority to appoint the recorder of a summary court martial is specifically given by the 27th A.G.N.; of a deck court by the 64th A.G.N., subsection (c). When, therefore, it is decided to assemble a general court martial, the convening authority shall select a competent commissioned officer who shall, if possible, not be liable to summons as a material witness in the case, to perform the duties of judge advocate, and shall name him as such in the precept. Similarly, in the case of a summary court martial, a commissioned or warrant officer shall be named; and in the case of a deck court a competent enlisted man. The judge advocate is in his military character responsible for the proper discharge of his duty to the convening authority."

- b. MC&B section 356, page 200: "The accused is entitled to counsel as a right; and whenever practicable to counsel of his choice. The court can not properly deny him the assistance of a professional or other adviser. Enlisted men to be tried shall be advised particularly of their rights and should be represented by counsel, if practicable, unless they explicitly state in open court that they do not desire such assistance. Should the accused state that he does not desire counsel he shall be informed by the court that counsel will be assigned him should he so desire, and he shall be advised to consult counsel before deciding to proceed with the case without counsel. A statement that this section has been complied with shall be entered upon the record of proceedings. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. In such a case, when mental incompetency becomes known, the case becomes one for a doctor rather than a court. Failure to comply with request of accused that counsel be provided him is a fatal error."

3. Proposed Navy Bill

- a. "ART. 18 (b) For every summary court martial, the convening authority shall appoint a prosecutor and a defense counsel, who shall be persons qualified to perform such duties. This shall not affect the right of the accused to counsel of his own choice."
- b. "ART. 24 (b) For every general court martial, the convening authority shall appoint: (1) a prosecutor and a defense counsel, who shall be certified by the Judge Advocate General as persons qualified to perform such duties, but the appointment of such defense counsel shall not affect the right of the person accused to counsel of his own choice; and (2) a judge advocate, whose duties * * *."

III. Differences

1. The Army uses the title "trial judge advocate." The Navy bill uses "prosecutor."

2. P.L. 759 provides for assistant trial judge advocates and assistant defense counsel. The Navy has no provision for such offices. (CJO 174-1918, 16; CJO 2-1925, 9; CJO 3-1944, 439).
3. P.L. 759 provides that the trial judge advocate and defense counsel shall, if available, be members of the JAGD or officers who are members of a bar. The Navy Bill provides that these officers shall be "persons qualified to perform such duties" in the SCM and "certified by the Judge Advocate General as persons qualified to perform such duties" in the GCM.
4. P.L. 759 provides for the excuse by the president of the court of the defense counsel when accused has other counsel of his own selection and does not desire the appointed counsel. The Navy makes no provision for such excuse.
5. P.L. 759 provides that no person who has acted as member, trial judge advocate or assistant trial judge advocate, or investigating officer shall subsequently act as defense counsel in the same case except by express request by the accused; that no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer shall subsequently act as member of the prosecution; and that no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case. The Navy has no similar provisions but has held it fatal error for the convening authority to sit on SCM and then review the proceedings. (CJO 9-1932, 12; CJO 9-1932, 15).
6. The defense counsel shall have equal professional qualifications to the trial judge advocate. The Navy does not specifically provide for this.

IV. Recommended Provisions

1. The Keefe Report, page 92, 93, & 94 contains the following recommendations:
 - "(1) Qualified officers who are lawyers should be provided to act as prosecuting lawyers and defense counsel for every general court martial, and, when practicable, for every summary court martial.

- "(2) Both prosecuting attorney and defense counsel should be officers whose qualifications have been approved by the Judge Advocate General, either by virtue of his being a Legal Duty Specialist or as otherwise having the requisite legal training and experience.
- "(3) Both prosecuting attorney and defense counsel should be subject only to the supervision of the Judge Advocate General in the performance of their duties as such.
- "(4) In selecting officers for these positions the Judge Advocate General should do his best to see to it that defense and prosecution lawyers are of equal ability.
- "(7) The above recommendations should not affect in any way the present right (N.C.&B., Section 356), of an accused to counsel of his own choice, civilian or naval, when such is available, to conduct his trial or appeal.

2.

The Ballantine Report, 1946, page 8, comments "The recommended change in the status of the judge advocate pre-supposes the appointment of another qualified individual to act as prosecutor. It is also assumed that provision for the counsel for the defense will be continued." The Ballantine Report, 1943, page 12, recommended that a defense counsel should be appointed for each general court martial, to represent all accused men who are not otherwise represented and to assist, if requested to do so, other counsel selected by accused men.

JEC

Uniform Code of Military Justice

Subject: Jurisdiction of General Courts-Martial. A.W. 12.

I. Army Provisions

1. Articles of War

"ART. 12. General Courts-Martial.--General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals; Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said Articles shall be observed."

2. Manual for Courts-Martial

Adds nothing.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"SEC. 209. Article 12 is amended to read as follows:

"ART. 12. GENERAL COURTS-MARTIAL.--General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

II. Navy Provisions

1. Articles for the Government of the United States Navy

There is no specific provision stating jurisdiction of general courts-martial.

"ART. 22. (a) Offense not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct."

"ART. 35. Authority to inflict summary court-martial punishments.--Any punishment which a summary court martial is authorized to inflict may be inflicted by a general court martial."

2. Naval Courts and Boards

Has no section defining jurisdiction of general courts-martial.

3. Proposed Navy Bill

"SEC. 47.

"ART. 23. A general court martial shall have jurisdiction to try and punish any person subject to the Articles for the Government of the Navy for any offense against said Articles."

"SEC. 25.

"ART. 35 is renumbered as article 30."

"SEC. 47.

"ART. 5 (d) The following shall be offense against the Articles for the Government of the Navy:

"First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.

"Second. Violations of the treaties or conventions of the United States, whenever adopted, during the time such treaties or conventions are in force.

"Third. Violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date of the passage of this Act and at the time they occurred.

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"Fourth. Violations of the laws, orders, regulations, or customs of the naval service.

"Fifth. Violations of the law of war."

III. Differences

1. As to Persons

Both Army and Navy general courts-martial have jurisdiction to try any person subject to military law or the A.G.N. respectively. Army general courts-martial also have jurisdiction to try any other person for offenses against the law of war, while the Navy general court does not. Apparently, other offenders against the law of war, are tried by Navy extraordinary tribunals not covered in the A.G.N. (See proposed A.G.N. Art. 5 (f)).

For persons subject to military law, see C.S., A.W. 2.

2. As to Offenses

Both Army and Navy general court-martial have power to try persons for all offenses against the Articles of War or A.G.N. respectively.

See C.S., A.W. 96 for violations of state and federal criminal laws of treaties and conventions of the U.S., and of the laws of war.

The proposed Navy bill contains a general provision as to jurisdiction of the A.G.N. as to offenses, while the amended Articles of War do not.

3. As to Punishment

The amended A.W. 12 states that a general court-martial may impose any punishment authorized by law or the custom of the service, while the corresponding A.G.N. article states that a general courts-martial may impose any punishment authorized for a summary (Navy) court-martial. As the punishment authorized to be adjudged by a summary court-martial (Navy) are very limited, the authority for a Navy general court-martial to impose greater punishments is inferred from the provisions that a Navy general court-martial has the power to punish any offense against the A.G.N. and that the court shall impose an adequate punishment.

As to punishments which general courts may impose, see Appendix to this comparative study.

A.W. 12 as amended gives authority for Army general courts-martial to adjudge bad-conduct discharges. This is the only punishment specifically stated in this article and might be placed elsewhere.

The Navy already has a bad-conduct discharge. As to discharge, see C.S., A.W. 108 and Appendix to C.S., A.W. 54.

IV. Recommendations

1. As to Persons

None of the reports contain any recommendation as to change the jurisdiction of general courts-martial as to persons.

As to persons subject to military law in general, see C.S., A.W. 2.

2. As to Offenses

As to general discussion of offenses, see Appendix to C.S., A.W. 54.

3. As to Punishments

There are no recommendations to limit the power of general courts-martial to impose punishment.

As to limitation on punishments, see C.S., A.W. 45.

See Appendix this article for authorized punishments.

Appendix

A.W. 12
P. A

Permissible Punishments Army and Navy Courts-Martial
(P.L. 759 and Proposed A.G.N.)

X Indicates Court May Impose Punishment

KIND	NAVY		ARMY		SUMMARY
	GENERAL	SUMMARY DECK	GENERAL	SPECIAL	
(1) Death	X ¹		X ^{1,2}		
(2) Dismissal (officer)	X ⁴		X ^{3,4}		
(3) Dishonorable Discharge	X		X ⁵		
(4) Bad Conduct Discharge	X	X	X	X	
(5) Confinement at Hard Labor	X ^{4,6}	6 MONTHS 1 MONTH	X ^{4,5,6}	6 MONTHS	1 MONTH
(5a) Hard Labor W/O Confinement (MCM 103:)			X ^{4,6}	3 MONTHS 3 MONTHS	1 MONTH
(6) Restriction	X ¹⁰	6 MONTHS 3 MONTHS	3 MONTHS 3 MONTHS (MCM 103f)		3 MONTHS
(7) Deprivation Shore Liberty	X	3 MONTHS			
(8) Loss of Pay	X	6 MONTHS ⁷ $\frac{1}{2}$ for 1 MONTH	X ⁸	2/3 for 6 MONTHS	2/3 for 1 MONTH
(9) Detention of Pay (EM Only)			2/3 for 3 MONTHS	2/3 for 3 MONTHS	2/3 for 1 MONTH
(10) Fine			X	X	X
(11) Reprimand & Admonition	X ⁹		X	X	
(12) Reduce in Rank (EM) ⁶	X	To next inferior	To private only (MCM 104c)	To private only	To private only
(13) Loss Numbers (Officer)	X	(NC&B 622 n.24)	X (MCM 103h)	X	
(14) Reduction to private (Officer)			in lieu of dismissal only		
(15) Suspension (Officer)	X ⁹	(NC&B 622 n.24)	X	X (MCM 103h)	

Appendix (Cont'd)

Permissible Punishments Army and Navy Courts-Martial
(P.L. 759 and Proposed A.G.N.)

X Indicates Court May Impose Punishment

<u>KIND</u>	<u>NAVY</u>		<u>ARMY</u>	
	GENERAL	SUMMARY DECK	GENERAL	SPECIAL SUMMARY
(16) Loss Seniority (Warrant O.)	X	(NC&B 622 n.24)	Warrant O., Nurses, etc.	treated as officers.
(17) Solitary Confinement on Bread and Water with Full Ration Every 3rd Day	X	30 DAYS	20 DAYS	

Cruel and Unusual

PROHIBITED - SEE C.S., A.W. 41.

NOTES

1. Death can be adjudged only for an offense which specifically provides for it.
2. Under A.W. death is mandatory in case of spies (A.W. 82) and either death or life imprisonment is mandatory for premeditated murder (A.W. 92). Navy has no mandatory punishments.
3. Dismissal is mandatory under A.W. 95, conduct unbecoming an officer; A.W.56 false muster; A.W. 57, false returns; and A.W. 87 personal interest in sale of provisions.
4. Officer must be dismissed if sentenced to confinement or hard labor. N.C.&B. 622 n.24, MCM 103c .
5. Army enlisted man must be given dishonorable discharge if more than six months' confinement. MCM 104b. Vanderbilt Report disapproves.
6. When Navy enlisted man is sentenced to more than three months' confinement, he should be reduced to lowest rating. N.C.&B. 622 n.21, MCM 104c.

Appendix (cont'd)

7. Navy summary court-martial may not adjudge more than loss of $\frac{1}{2}$ pay per month unless also bad conduct discharge. N.C.&B. 446.
8. May not adjudge loss of more than $\frac{2}{3}$ pay per month unless dishonorable discharge. HCM 104b.
9. Not favored N.C.&B. 622 n. 24.
10. Only confinement or restriction may be imposed.

COMBINATIONS

General courts - not restricted except as noted above.

Army special not restricted except as noted above.

Navy summary - No combinations except 3 months' confinement, and loss of pay not to exceed 3 months may be imposed in addition to bad conduct discharge; and loss of pay not to exceed 3 months may be imposed in addition to solitary confinement on bread and water, or confinement or restriction, or deprivation of shore liberty.

Army summary - not restricted except as noted above and where both confinement and restriction are imposed, both must be appor-tioned.

Navy deck - no combination except loss of pay in addition to solitary confinement on bread and water, or confinement or restriction, or deprivation of shore liberty.

Uniform Code of Military Justice

Subject: Jurisdiction of Special Courts-Martial. A.W. 13.

I. Army Provisions

1. Articles of War

"ART. 13. Special Courts-Martial.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months."

"ART. 12. General Courts-Martial.Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed."

2. Manual for Courts-Martial

Par. 14. Excepts officers from trial by special courts-martial under authority of proviso.

A crime is not capital in meaning of A.W. 13 when limitation on punishment prescribed by President is less than death and even though a crime is capital, it may be tried by a special court under the first proviso of Art. 12. But no crime or offense, capital or otherwise, may be tried by a special courts-martial if a mandatory punishment is prescribed which is beyond the power of the court to assess.

Nor can a special court-martial adjudge death, dishonorable discharge of an enlisted man or dismissal of an officer.

3. Public Law 759--80th Congress, Chapter 625--2D Session

"SEC. 210. Article 13 is amended to read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.

"Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: Provided further, That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case."

Proviso in A.W. 12 repealed.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 26. Summary courts-martial may be ordered upon petty officers and enlisted men in the naval service..... for the trial of offenses which such commanding officer or commandant may deem deserving of greater punishment than he is authorized to inflict, but not sufficient to require trial by a general court-martial."

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"ART. 30. Punishments by summary courts-martial.-- Summary courts martial may sentence petty officers and persons of inferior ratings to either a part or the whole, as may be appropriate, of any one of the following punishments, namely:

"First. Discharge from the service with bad conduct discharge; but the sentence shall not be carried into effect in a foreign country.

"Second. Solitary confinement, not exceeding thirty days, on bread and water, or on diminished rations.

"Third. Solitary confinement not exceeding thirty days.

"Fourth. Confinement not exceeding two months.

"Fifth. Reduction to next inferior rating.

"Sixth. Deprivation of liberty on shore on foreign station.

"Seventh. Extra police duties, and loss of pay, not to exceed three months, may be added to any of the above-mentioned punishments."

"ART. 31. Disrating for incompetency.--A summary court martial may disrate any rated person for incompetency."

2. Naval Courts and Boards

SEC. 652, n.11. When an offense charged is of such character that the punishment which a summary court martial is authorized to inflict is not adequate, the offender should be brought to trial before a general court unless it is impracticable to do so.

3. Proposed Navy Bill

"SEC. 18. Article 26 is renumbered as article 17 and amended to read as follows:

"ART. 17. Commanding officers of naval vessels and such other officers in command or in charge of naval forces or activities as may be designated by the Secretary of the Navy may convene summary courts martial for the trial of

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enlisted persons regularly or temporarily under their command or charge for alleged offenses deemed deserving of greater punishment than he is authorized to inflict, but not sufficient to require by general court martial."

"SEC. 22. Article 30 is renumbered as article 20 and amended to read as follows:

"ART. 20. (a) A summary court martial shall have power to impose either a part or the whole of any one of the following punishments:

"First. Discharge with a bad-conduct discharge;

"Second. Reduction to the next inferior rank or rating;

"Third. Solitary confinement on bread and water with full ration every third day for a period not exceeding thirty day, to run consecutively;

"Fourth. Confinement, or restriction within stated limits, for a period not exceeding six months, to run consecutively;

"Fifth. Deprivation of liberty on shore for a period not exceeding three months, to run consecutively;

"Sixth. Loss of pay not to exceed six months' pay.

"(b) Confinement for a period not exceeding three months, to run consecutively, and loss of pay not to exceed three months' pay may be imposed in addition to a bad conduct discharge; and loss of pay not to exceed six months' pay may be imposed in addition to any one of the punishments enumerated under (Third), (Fourth), and (Fifth) of section (a) of this article."

ART. 31 is repealed.

III. Differences

1. As to Persons

Under the Amended Articles of War, special courts-martial may try any persons subject to military law, while under the Navy bill, only enlisted persons under

the command of the convening authority, may be tried by Navy summary courts-martial.

As to trial of officers by special court-martial, see C.S., A.W. 16.

2. As to Offenses

Under the interpretation of A.W. 13 in the Manual for Courts-Martial, the only offenses that an Army special court-martial may not try are, (1) murder (A.W. 92) as the mandatory sentence for premeditated murder is death or life imprisonment; (2) false muster (A.W. 56), false returns (A.W. 57); personal interest in sale of provisions (A.W. 87), and conduct unbecoming an officer (A.W. 95) which offenses carry a mandatory sentence of dismissal; and (3) spying (A.W. 82) which must be tried by a general court by statute.

According to proposed article 17 of the A.G.N., a summary court-martial could try any offense. There is no specification in N.C.&B. as to which crimes are triable by summary courts except that the convening authority may exercise his discretion. However, Navy Department letters state Navy policy in this regard.

3. As to Punishment

See Appendix to C.S., A.W. 12.

As to bad conduct discharge, see Appendix to C.S., A.W. 54.

IV. Recommendations

1. As to Persons

See C.S., A.W. 16 as to trial of officers by special courts-martial.

There are no comments in Ballantine, McGuire, Keoffe, or Vanderbilt Reports or Navy JAG recommendations on trial of other persons by special courts-martial.

2. As to Offenses

As offenses triable by special courts-martial are more or less dependent on punishment authorized, see following section.

3. As to Punishment

The McGuire Articles recommend that:

A Summary (Navy) court-martial shall have power to impose:

1. Loss of pay not exceeding 6 months; extra duties not exceeding 6 months, the performance of which shall not, in itself, involve deprivation of liberty and,
2. Any one of the following:
 - a. Bad conduct discharge;
 - b. Confinement not in excess of 6 months;
 - c. Solitary confinement for not exceeding 30 days;
 - d. Reduction to next inferior rank or rating;
 - e. Deprivation of liberty not in excess of 6 months.

The First Ballantine Report recommended that Navy summary courts should be given power to adjudge confinement and loss of pay not exceeding six months and that bad conduct discharges should not be adjudged by special courts-martial unless the offense involves moral turpitude, or where the accused is neither presently nor prospectively of any value to the service.

The Second Ballantine Report recommends:

"Increase in Powers of Summary Courts-Martial.

Under the present Articles for the Government of the Navy, a Summary Court-Martial is authorized to award sentences of confinement not exceeding two months and loss of pay not exceeding three months. For the reasons stated below, the Board believes that the powers of punishment by Summary Courts-Martial should be increased. A Summary Court-Martial may try any enlisted person subject to naval law. The sentence which it may impose is limited to 'any one of several punishments, including discharge from the service with a bad conduct discharge,' to which may be added extra police duties and loss of pay not to exceed three months. Where a bad conduct discharge is awarded by such a court, and is later mitigated, the result under present provisions is that there is ordinarily no punishment. As a matter of practice, General Courts-Martial are prone to regard their minimum punishment of confinement as six months, thus there is a gap in the punishment scale which the Board feels should be closed. The Board recommends an increase in the powers of Summary Courts-Martial as follows:

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- "1. Discharge with a bad conduct discharge.
- "2. Confinement for a period not exceeding six months, to run consecutively.
- "3. Solitary confinement for a period not exceeding 50 days.
- "4. Reduction to the next inferior rating.
- "5. Deprivation of liberty on shore for a period not exceeding sixty days, to run consecutively.
- "6. Confinement for a period not exceeding three months, to run consecutively, and loss of pay not exceeding three months may be adjudged in addition to a bad conduct discharge. No bad conduct discharge shall be executed in a foreign country.

"Adoption of the above scale of punishments will, in the opinion of the Board, reduce the number of General Courts-Martial. Additional safeguards provided for the rights of the accused (detail of a judge advocate is one) are believed to be commensurate with the increase of the limitations of Summary Court-Martial punishments as recommended. It is to be noted that the foregoing permits a combination of confinement, loss of pay, and bad conduct discharge. In the opinion of the Board, this flexibility is desirable, in that it makes it possible for a man to be sentenced to a bad conduct discharge to be placed on probation without his escaping punishment entirely."

The Keoffe Report states:

"Nevertheless, the Board feels that the rate of trial by general court-martial could be reduced even further without impairing discipline. The Board was impressed by the number of cases reviewed by it what appeared to be relatively minor offenses had been referred to trial by general courts-martial....."

"The Board is of the opinion that cases of this type, and they seem to be numerous, should not go before general court-martial. The reasons they have gone before general courts are, beside the special conditions presented by wartime:

- "a. The limited sentencing power of the summary court-martial;
- "b. The limitations which have been placed on the discretion of convening authorities in referring cases to trial.

"These reasons will be discussed severally.

"a. As has been pointed out both by the McGuire Committee and the Ballantine Committee, the limitations on the sentencing powers of the summary court have resulted in too great a gap between the sentence of the general court, which by custom nearly always imposes a sentence including discharge and a fairly substantial period of confinement, and the summary court-martial, whose powers are severely limited by law.

"The obvious solution is to increase the dignity and power of the summary court-martial so that it can handle cases of this nature without the necessity of resorting to trial by general court-martial. Such a recommendation has been made both by the McGuire Committee and by the Ballantine Committee. This recommendation is implemented in Article 4 (c) of the proposed McGuire Articles, with which the White and Judge Advocate General draft articles concur generally.

"The enlargement of the powers of a summary court-martial is a prerequisite to the retention of the prestige formerly attained by the general court-martial. Trial by the latter type of court should be reversed for the most serious of military offenses and for felonies.

"The nature of the increased powers which should be granted to the summary court-martial is a matter which the Advisory Council will have to consider. The McGuire, White, and Judge Advocate General draft articles recommend forfeiture. This is the present power of the Army special court. It should be pointed out here that the USFET Report has recommended that the powers of the Army special court-martial, already greater than those of the Navy summary court-martial (except that an Army special court may not impose a discharge), be still further increased to authorize confinement up to one year, with appropriate forfeitures, but without dishonorable discharge (the bad conduct discharge is unknown to the Army). If the Navy summary court possesses this power, many of the cases referred to above could have been tried thereby, even in wartime.

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"b. Although in theory the convening authority has full control over the disposition of charges, his powers and discretion in this respect are severely limited by Department policy. A series of letters on court-martial policies have been promulgated by the Secretary of the Navy, establishing policies in regard to absence offenses. The latest of these letters, dated 12 October 1945, one month after V-J Day, prescribes, as a matter of policy, that absence offenses will be disposed of as follows:

"(1) First Offense:

Absence over leave for over 30 days: General court.

Absence without leave for over 20 days: General court.

"(2) Second absence offenses:

All offenders who were convicted by summary court for their first absence offense, unless the second was less than 8 days.

"(3) Third Absence Offenses:

All offenders with at least one prior conviction by general or summary court, unless the third absence was less than 4 days.

"(4) Repeated Absence Offenses:

In the discretion of the convening authorities, regardless of the length of absence.

"(5) Missing Ship or Mobile Unit:

All cases, regardless of the length of absence, in the absence of extenuating circumstances, or unless the ship has merely moved from one pier or anchorage to another, or had only gone on a trial or port repair run or local shakedown.

"The letter also provided that all men more than 45 days absent should be charged with desertion. Policies as to sentences, confinement, and other matters were also set forth. Exceptions to these policies could be made when special circumstances so indicated, but in all such cases the convening authority was required to state his reasons in his action.

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"The Board understands that a subsequent letter relaxing these policies considerably has recently been published.

"The Board realizes that these letters were rendered necessary by certain serious disciplinary problems which arose during the war. This was particularly so with respect to missing ship, which during the war was tantamount to desertion. Even after V-J Day, prolonged absences and cases of missing ship interfered seriously with the demobilization program. The Board also realizes that it is highly desirable to establish uniform policies in court-martial matters and that the Navy, by prescribing uniform centralized policies, has achieved a very commendable result in the direction of uniform justice.

"Nevertheless, the effect of the policies just cited to deprive local commanders of most of their discretion over court-martial matters, prior to trial. If the proper theory is that the convening authority is responsible for all matters of discipline within his command, nothing could be further removed from this policy than to prescribe in advance just what he is to do in each and every case which comes before him. The escape clause, providing that these policies need not be followed when the circumstances indicate otherwise, is largely nullified by the requirement that in every such case the convening authority must state in his action his reasons for departure from policy. It is obvious that only in very exceptional cases will a convening authority take this trouble.

"Furthermore, the policies laid down seem much too restrictive, especially since the termination of hostilities. They are at variance with Army policies, which prescribe that no case of absence without leave should be referred to trial by general court-martial unless it approached desertion in seriousness. Consequently, an absence offense of less than 30 days was nearly always tried by inferior court-martial and most absences of from 30 to 60 days were thus disposed of, except of course, in actual combat areas. Even where an offender had prior convictions, trial by general court-martial was not ordinarily regarded as necessary because of one or two prior convictions by inferior court.

"The attempt to categorize all offenses and to prescribe their disposition in advance, with little or no regard to the varying factors of age, education, civilian background, previous service, combat record, domestic conditions, hardship, and other mitigating circumstances is an archaic approach to law enforcement, completely at variance with modern notions of penology and criminology. Even from a purely military and disciplinary standpoint, it is less advance than the Army's more flexible approach to the same subject.

"Finally, to lay down, even as a statement of policy, the rule that all absences in excess of 30 days shall be charged as desertion comes dangerously close to legislation.

"The official policy of the Department is that trial by general court-martial shall not be resorted to unnecessarily, where trial by summary court-martial or other action will accomplish the ends of discipline.

"In the Army the policy is announced that:

"With due regard to the policies of the War Department and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment.

"Investigating officers, commanding officers, and appointing authorities are enjoined by Army directives to bear this policy in mind and are further reminded that charges should not be referred to trial by general court-martial unless they can be disposed of in no other manner consistent with military discipline.

"It is recommended that the Advisory Council give consideration to the following:

"(a) A substantial increase in the sentencing power of the summary court-martial so that only the most serious charges need be referred to trial by general court-martial."

The Vanderbilt Report recommends the abolition of all mandatory minimum sentences. This would make all offenses triable by special courts-martial under present criteria.

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The Navy JAG recommends:

1. "Punishments:
 - "a. BCD;
 - "b. Reduction to the next inferior rating.
 - "c. Confinement not exceeding 6 months;
 - "d. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 30 days.
 - "e. Deprivation of liberty, not exceeding 3 months.
 - "f. Loss of pay, not exceeding 6 months' pay (which punishment may be imposed independently or in addition to any punishment other than BCD).
 - "g. Confinement not exceeding 3 months, and loss of pay not exceeding 3 months' pay, may be imposed in addition to a BCD.
2. "Abolish solitary confinement and extra police duty.
3. "A SCM confinement sentence--even where it extends to the recommended maximum of 6 months--shall not carry with it the "accessories."
4. "Retain present practice that no good conduct credit is given in SCM confinement cases."

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Uniform Code of Military Justice

Subject: Jurisdiction of Summary (Army) Courts-Martial and Deck Courts. A.W. 14.

I. Army Provisions

1. Articles of War

"ART. 14. Summary Courts-Martial.--Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring to trial before a general court-martial. Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law."

"Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay."

2. Manual for Courts-Martial

Par. 16. :....."Under the authority of A.W. 14, persons of actual, relative, or assimilated rank above that of private, first class, in the Army are hereby excepted from the jurisdiction of summary courts-martial, provided that noncommissioned officers of actual, relative, or assimilated rank below that of technical sergeant in the Army may be tried by summary court-martial, either if they do not object, or if such trial is authorized by the officer competent to bring them to trial before a general court-martial."

3. Public Law 759--80th Congress, Chapter 625--2d Session

"SEC. 211. Article 14 is amended to read as follows:

"ART. 14. SUMMARY COURTS-MARTIAL.--Summary courts-martial shall have power to try any person subject to military law, except an officer, a warrant officer, or

a cadet, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial: Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay."

II. Navy Provisions

I. Articles for the Government of the United States Navy

"ART. 64. (a) Officers authorized to order.--All officers of the Navy and Marine Corps who are authorized to order either general or summary courts martial may order deck courts upon enlisted men under their command, for minor offenses not triable by summary court martial (Aug. 29, 1916, c. 417, 39 Stat. 586).

"(b) Constitution and powers.--Deck courts shall consist of one commissioned officer only, who, while serving in such capacity, shall have power to administer oaths, to hear and determine cases, and to impose either a part or the whole, as may be appropriate, of any one of the punishments prescribed by article 30 of the Articles for the Government of the Navy: Provided, That in no case shall such courts adjudge discharge from the service or adjudge confinement or forfeiture of pay for a longer period than twenty days (Feb. 16, 1909, c. 131, sec. 2, 35 Stat. 621.)

"(g) Objection to trial by deck court.--No person who objects thereto shall be brought to trial before a deck court. Where such objection is made by the person accused, trial shall be ordered by summary or by general court martial, as may be appropriate (Feb. 16, 1909, c. 131, sec. 7, 35 Stat. 621)."

2. Naval Courts and Boards

SEC. 692, n.4.--The jurisdiction of a deck court is expressly limited to "minor offenses."

3. Proposed Navy Bill

"SEC. 47.

"ART. 15. All officers who are empowered to convene summary courts martial may convene deck courts martial for the trial of enlisted persons regularly or temporarily under their command or charge for minor offenses triable by summary courts martial."

"ART. 16. (b) A deck court shall have power to impose either a part or the whole of any one of the following punishments:

"First. Reduction to the next inferior rank or rating;

"Second. Solitary confinement on bread and water with full ration every third day for a period not exceeding twenty days, to run consecutively;

"Third. Confinement, or restriction within stated limits, for a period not exceeding one month;

"Fourth. Deprivation of liberty on shore for a period not exceeding one month.

"Fifth. Loss of pay not to exceed one month's pay.

"(c) Loss of pay not to exceed one month's pay may be imposed in addition to any one of the punishments enumerated under Second, Third, and Fourth of section (b) of this article.

"(f) No person who objects thereto shall be brought to trial before a deck court martial. Where such objection is made by the person accused, trial shall be ordered by summary or general court martial, as may be appropriate."

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III. Differences

1. As to Persons

Under the amended Articles of War, any enlisted person below the rank of technical sergeant (corresponding Navy rank, Petty Officer 1st class) may be tried by summary court-martial, while Navy deck courts may try any enlisted person.

However, any Naval person may object to trial by deck court, while only Army personnel above the rank of private first class may object to trial by summary court-martial.

2. As to Offenses

Any Army summary court can try any offense triable by a special court; while Navy deck courts are limited to "minor offenses."

3. As to Punishment

As to permissible punishments, see Appendix to C.S., A.W. 12.

IV. Recommendations

1. As to Persons

The McGuire Report recommended abolition of deck courts. All other Navy Reports favored retention.

The first Ballantine Report recommended that the right to object should be eliminated as it was rarely used and of no substantial value to the accused.

The second Ballantine Report does not comment on deck courts other than favoring their retention.

The Keefe Report does not deal with deck courts.

The Vanderbilt Report recommended further study of increasing the dignity, power, and authority of summary courts.

2. As to Offenses

No other comment than as noted above.

3. As to Punishments

McGuire - abolish

The first Ballantine Report recommended:

"Authorized punishments. The powers of deck courts to adjudge punishment are set out above in the descriptive account of the disciplinary system. The powers of deck courts are circumscribed by limitations preventing the most effective use of deck courts. In the summary court martial, a proper distinction is made between mere confinement and solitary confinement on bread and water. Although solitary confinement on bread and water is not generally looked upon with favor, a deck court must resort to this punishment to exercise its maximum powers since the same time limitation is applicable both to solitary confinement on bread and water and to ordinary confinement. It would be desirable to increase the power of the deck court to impose loss of pay, so that an adequate punishment of this nature, which is frequently appropriate than confinement, could be imposed.

"Recommendation: An amendment to article 64 of the Articles for the Government of the Navy should be sought, empowering deck courts to adjudge confinement and forfeiture of pay for not more than one month."

The Second Ballantine and Keefe Reports make no comment.

The White Report recommended confinement increased from 20 to 30 days. Solitary confinement on bread and water decreased from 20 to 15 days, deprivation of shore liberty limited to 30 days, loss of pay for 30 days.

The Navy JAG recommended:

3. "Punishments:

- "a. Reduction to the next inferior rating;
- "b. Confinement not exceeding 30 days;
- "c. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 20 days;

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"d. Deprivation of liberty, not exceeding 1 month;

"e. Loss of pay, not exceeding 1 month's pay, may be imposed independently or added to one of the other punishments.

4. "Abolish solitary confinement and extra police duties."

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Uniform Code of Military Justice

Subject: Jurisdiction Not Exclusive. A.W. 15

I. Army-Air Force Provisions

1. Articles of War

"ART. 15. Jurisdiction not Exclusive.--The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals."

2. Public Law 759--80th Congress, Chapter 625, 2D session

P.L. 759 does not change A.W. 15.

3. Offenses denounced by Articles 80; dealing in captured or abandoned property, and 82, spies, are specifically made punishable by military commission or other military tribunal.

4. "U.C.M." 1928, Section 2, provides:

"Military commissions and provost courts for the trial of offenses within the respective jurisdiction. These tribunals are summary in nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial;"

II. Navy Provisions

1. No provision can be found in the present A.G.N. similar to A.W. 15.

2. The proposed Navy Articles provide in Article 5 (f) as follows:

"The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as affecting the jurisdiction of extraordinary military tribunals."

3. Appendix D of U.C.M. defines "extraordinary military courts" as including the military commission, the superior provost court, and the provost court. Appendix D fully sets out the procedure of these extraordinary courts as similar to the three types of Navy courts martial.

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Study of A. W. 15 and comparable provisions in Navy Court-Martial System.

III.

It is not considered that these matters are controversial or that any particular difficulty will be encountered drafting a uniform system.

SSM

Uniform Code of Military

Subject: Officers - How Triable. A.W. 16.

I. Army Provisions

1. Articles of War

"ART. 16. Officers; How Triable.--Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank."

Note: "The provision as to rank is directory only on the appointing authority. The sentence of a court can not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable." (Swain v. U.S. 165 U.S. 553).

"ART. 13.the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes or persons subject to military law."

2. Manual for Courts-Martial

Par. 14....."Under the authority of A.W. 13 commissioned officers are hereby excepted from the jurisdiction of special courts-martial.".....

3. Public Law 759--80th Congress, Chapter 625-2d Session

"SEC. 212. Article 16 is amended to read as follows:

'Art. 16. PERSONS in the MILITARY SERVICE--HOW TRIABLE--Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in rank. No on-listed person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit."

SEC. 210. Repeals clause of A.W. 13 allowing President to except from jurisdiction of special courts-martial.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 39.....But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried....." (This article pertains only to general courts as officers are only triable by general courts-martial).

ART. 64 (a) and 26 provide that only enlisted men be tried by summary and deck courts.

2. Naval Courts and Boards

"SEC. 346.....As a matter of policy in such case (trial of officer) all should be senior. The convening authority is justified in departing from this rule only under the most unusual circumstances."

3. Proposed Navy Bill

No change.

III. Differences

1. Trial by special or summary (Navy) courts-martial.

Under present practice officers in both services are triable only by general courts-martial.

Under the Amended Articles of War, Army officers are triable by both general and special courts-martial, while under the proposed Navy bill officers are still only triable by general courts-martial.

2. Trial by inferiors in rank.

Under the amended A.W., persons must be tried by superiors in rank, when available, while the A. G. W. provide that no more than half, exclusive of the president, shall be inferior in rank, where it can be avoided without injury to the service. The U. S. Supreme Court held the Army provision to be only directory and presumably the Navy provision would be interpreted in a like manner.

The Amended Articles of War also provide that no enlisted person shall sit as a member of a court martial for the trial of another enlisted person who is a member of the company or similar unit.

The proposed Navy bill does not provide for enlisted men as members of courts-martial.

As to enlisted men on courts see C.S. A.W. 4.

As to confinement and punishment prior to sentence, see C.S. A.W. 69.

IV. Recommendations

1. Trial of officers by special courts-martial

Both Ballantine Reports make no comment.
 McGuire Report makes no comment.
 The Keefe Report makes no comment.
 Navy JAG - no comment.
 The Vanderbilt Report recommended:

"The trial of officers by special courts should be authorized in order to bridge the gap between punishment under Article 104 and punishment by a general court. The existence of that gap was given by many witnesses as the reason why officers did not receive more punishment. The only court punishment available was that imposed by general court after trial and, in many instances, such a trial was considered too drastic. We see no adequate reason why an officer should not be tried by special court. Some witnesses took the position that an officer should not be tried unless conviction was to be followed by dismissal from the service, since a convicted officer is no good to the service. Records of general court-martial officer trials and conviction do not bear out that conclusion. In the European Theater there were 1737 officers tried, 1396 were convicted. Of those convicted 74 per cent were not dismissed from the service but were retained in the service and, presumably, continued to render valuable military service."

The House Armed Services Committee Report (H.R. Rep. 1034) stated:

"A greater equality in the treatment of officers and enlisted men should be provided,

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The committee agrees that a greater equality must be attained and has accordingly amended section 10, page 7, making officers subject to trial by special courts martial. Heretofore, the President has had authority to exempt such classes as he may designate from trial by special and summary courts martial and under that authority has exempted officers from trial by these two courts. As a result, officers have been triable by general courts martial only. This resulted in a reluctance on the part of superior commanders to subject officers to trial and possible dismissal for comparatively minor offenses. As a result, officers would escape punishment for the same offenses for which enlisted men were tried and convicted."

2. Trial by inferiors in rank.

There is no comment on trial by inferiors in rank in the Ballantine, McGuire, Koeffe, or Vanderbilt Reports.

The Navy JAG recommends that if enlisted men are allowed to sit on courts, they should also be superior in rank to the accused.

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Uniform Code of Military Justice

Subject: Duties of the Trial Judge Advocate
and Defense Counsel. A.W. 17, 116.

I. Army Provisions

1. Articles of War

"ART. 17. Trial Judge Advocate to Prosecute; Counsel to Defend.-- The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

"ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.-- An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

2. Manual for Courts-Martial

"SEC. 41. Courts-Martial -- Personnel -- Trial Judge Advocate

"b. Duties in general

"When charges are referred to him for trial, it is his duty to bring them promptly to trial before the court indicated in the reference for trial.....

"Unless otherwise directed by the appointing authority, he will submit a weekly report to the latter through the president of the court..... This report will include a statement of the reasons for the delay in finally disposing of cases that have been on hand for over two weeks.

"Immediately upon any final adjournment of a court in a case, and irrespective of whether any announcement in open court was made concerning the result, the trial judge advocate will notify the proper commanding officer in writing of the result, including any findings reached and any sentence imposed by the court.

"Subject to the provisions of this manual, he should be left free by the court to introduce his evidence in such order as he sees fit. In general, he may bring cases to trial in such order as he

deems expedient. He will be given ample opportunity properly to prepare the prosecution of each case. With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters.

"c. Duties prior to trial.--

"He will report to the appointing authority any substantial irregularity in the order appointing the court or in the charges or accompanying papers. Ordinarily he will correct and initial slight errors or obvious mistakes in the charges, but will not without authority make any substantial change therein. He will take proper action to the end that the data as to service, etc., and any evidence of previous convictions may be complete and free from errors of substance or form.

"Unless otherwise directed by the president or unless obviously unnecessary, he will send a timely notice to the members of the court and to all others concerned, including the officer, if any, whose duty it is to see that the accused attends, of the date, hour, and exact place of any meeting of the court.....

..... "As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by relevant evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty. Whatever the defense may be, this burden never changes.....

"If, while preparing a case for trial, he discovers a matter, which in his opinion makes it inadvisable to bring the case to trial, he will at once bring such matter to the attention of the appointing authority, provided it is reasonably apparent that such matter was not known to the appointing authority when the charges were referred for trial. Such action would be appropriate where, for example, the trial judge advocate discovers evidence that the accused was or is insane, or finds that the only witness to an essential fact has disappeared or repudiates the substance of the testimony expected from him.

"d. Duties during trial.-- He executes all orders of the court. Under the direction of the court he keeps or superintends the keeping of the required record of the proceedings. He signs the record of each day's proceedings.

"While his primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited.

"While the court is in open session, he should respectfully call its attention to any apparent illegalities or irregularities in its action or in the proceedings.

"He will take care that any papers in his possession which relate to a case referred to him for trial and which are not in evidence, are not exposed to any risk of inadvertent examination by members of the court.

"Aside from opinions expressed in the proper discharge of his duty to prosecute (e. g., in an argument on the admissibility of evidence), he should not give the court his opinion upon any point of law arising during the trial except when it is asked for by the court in open court. When he addresses the court he will rise. The court may require him to reduce his arguments to writing.

"e. Relations to the accused and his counsel.--Except to the extent that this manual may otherwise require, it is not his duty to assist or advise the defense.

"Immediately on receipt of charges referred to him for trial he will serve a copy of the charge sheet as received and corrected by him on the accused and will inform the defense counsel of the court that such copy has been so served. Except as otherwise directed by the appointing authority, he will permit the defense to examine from time to time any papers accompanying the charges, including papers sent with charges on a rehearing. He will also permit the defense to examine from time to time the orders appointing the court and all modifying orders.

"Ordinarily his dealings with the defense will be through any counsel the accused may have. Thus if he desires to know how the accused intends to plead he will ask the defense counsel or other counsel, if any, of the accused. He should not attempt to induce a plea of guilty.

"The defense will be allowed to read the record as it is written up, except unannounced findings and sentence; and the trial judge advocate of a general court-martial will furnish every person tried by the court who desires one a copy of the record of trial, less unannounced findings and sentence and exhibits not copied."

"SEC. 42. Courts-Martial -- Personnel -- Assistant Trial Judge Advocate.--

"a. Duties in general..... He will perform such duties as the trial judge advocate may designate.

"b. Term 'trial judge advocate' includes assistant.--Wherever in this manual the trial judge advocate of a general court-martial is mentioned the term will be understood to include assistant trial judge advocates, if any, unless the context shows clearly

that a different sense is intended."

"SEC. 43. Courts-Martial -- Personnel -- Defense Counsel.--

"b. Duties--When the defense is not in charge of a counsel of the accused's own selection, the duties, etc., of the defense counsel are those of a military counsel of the accused's own selection. (See 45.) When the defense is in charge of a counsel of the accused's own selection, civil or military, the duties of the defense counsel as associate counsel are such as the selected counsel may designate.

"Immediately upon charges being referred for trial to the court he will inform the accused of that fact and of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection. Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel.

"c. Term 'counsel for the accused.'--Whenever the phrase 'counsel for the accused,' or any similar phrase, is used in this manual it is to be understood, unless the context indicates otherwise, as including the defense counsel of the court and any individual counsel."

"SEC. 44. Courts-Martial -- Personnel -- Assistant Defense Counsel.--

"a. Duties.-- Unless in charge of the defense, he will perform such duties in connection with the trial as the counsel in charge of the defense may designate.

"b. Term 'defense counsel' includes assistant.--Whenever in this manual the defense counsel of a general court-martial is mentioned, the term will be understood to include an assistant defense counsel, if any, unless the context shows clearly that a different sense is intended."

"SEC. 45. Courts-Martial -- Personnel -- Individual Counsel for the Accused.--

"b. Duties in general; freedom in conducting defense.--An officer, or other military person, acting as individual counsel for the accused before a general or special court-martial, will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in or in connection with the case which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the accused's innocence or to tolerate any manner of fraud or chicanery.

"With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters.

"Before the trial he will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such plea; his right to testify or to remain silent; his right to make a statement; his right to introduce in extenuation; and, in an appropriate case, his right to plead the statute of limitations. These explanations will be made regardless of the intentions of the accused as to testifying, making a statement, or as to how he will plead.

"His preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that such evidence as he proposes to introduce in defense may be confined to relevant evidence, and that he may be ready to make appropriate objection to any irrelevant evidence that might be offered by the prosecution. In determining the order in which he proposes to introduce evidence for the defense, he should observe the general principle stated in the third subparagraph of 4lc.

".....

"He will examine the record of the proceedings of the court before it is authenticated.

"The court will avoid any unwarranted interference in his conduct of the defense, but may require him to reduce his arguments to writing. When he addresses the court he will rise.

"Ample opportunity will be given him and the accused properly to prepare the defense, including opportunities to interview each other and any other person.

"Where the trial proceeds after the accused has escaped, the individual counsel continues to represent him."

3. Public Law 759--80th Congress, 2D Session

ART. 17, A. W., is not changed by P.L. 759.

"SEC. 241. Article 116 is amended to read as follows:

'ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.-- An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.'

II. Navy Provisions

1. Articles for the Government of the Navy

There is no provision in A. G. N. which corresponds to Art. 17 of the Articles of War.

Art. 27, A. G. N. provides that a summary court martial shall consist of three officers, as members, and of a recorder. (The duties of the recorder are essentially those of the Army's trial judge advocate). The commander of a ship may order any officer under his command to act as recorder. Art. 28, A. G. N., deals with the oath to be taken by the recorder; the oath taken does not indicate that the recorder acts as prosecuting counsel.

Art. 40, A. G. N., provides for the administering of an oath by the president of a general court martial to the judge advocate or person officiating as such. The oath administered does not indicate that the judge advocate acts as prosecuting counsel.

Art. 64 (c) provides that any person in the Navy under the command of the officer appointing a deck court may be detailed to act as recorder. (The duties of the recorder of a deck court are only to keep a record of proceedings; he does not act as counsel. Cf. N.C.B., Sec. 698, Fn.(9))

2. Naval Courts and Boards

"SEC. 351. Duties of judge advocate before trial.--
The judge advocate should confer with the accused as soon as practicable after the latter has received a copy of the charges and specifications. He should scrupulously avoid even the slightest suggestion to the accused that he plead guilty to anything charged against him. He should inform the accused that he is entitled to counsel; that he may have a reasonable time in which to prepare his defense; and of his rights in regard to having witnesses summoned for the defense. The judge advocate should inform the accused as to the probable witnesses to be called for the prosecution, although it is unnecessary to inform him as to the testimony expected from them. In many cases the accused will not know whether he wants or needs counsel. In that event the judge advocate must explain to him the general duties of counsel for the defense. If, in discussing the case with the accused, it develops that he might have any good defense whatever, or the accused believes he has, discussion of the merits of the case should be terminated at once and the accused advised to plead not guilty and secure counsel. The judge advocate should endeavor to ascertain what statement, if any, the accused contemplates making at the trial, as this will enable the judge advocate to determine whether the accused has or believes he has any defense to offer. Whenever an accused has secured counsel, all negotiations by the judge advocate must be conducted through counsel."

"....."

(Other duties described in section correspond to those of Army trial judge advocate. Cf. also Sects. 352, 353, and 354.)

"SEC. 400. Duties of judge advocate during trial.-- During the trial the judge advocate conducts the case for the Government. He executes all orders of the court; reads the convening order; administers the oath to the members, reporter, and interpreter; arraigns the accused; examines witnesses; and is responsible for the keeping of a complete and accurate record of the proceedings.
.....

"The accused and his counsel have a right to the opinion of the judge advocate, in or out of court, upon any question of law arising out of the proceedings....."

"SEC. 355. Counsel for judge advocate.-- In order that a counsel for the judge advocate may have standing before a court, it is necessary that he be detailed or authorized by the convening authority. If so detailed the court shall give him equal facilities with the counsel for the accused in the performance of his duties."

"SEC. 385. Counsel for judge advocate.-- If counsel be detailed or authorized by the convening authority to assist the judge advocate, the court shall give him equal facilities with the counsel for the accused in the performance of his duties. Such counsel should be present when the court first meets, or, if detailed after the trial has begun, he should report as soon as possible thereafter."

"SEC. 356. Accused entitled to counsel.-- The accused is entitled to counsel as a right, and whenever practicable to counsel of his choice. The court can not properly deny him the assistance of a professional or other adviser. Enlisted men to be tried shall be advised particularly of their rights, and should be represented by counsel, if practicable, unless they explicitly state in open court that they do not desire such assistance. Should the accused state that he does not desire counsel he shall be informed by the court that counsel will be assigned him should he so desire, and he shall be advised to consult counsel before deciding to proceed with the case without counsel. A statement that this section has been complied with shall be entered upon the record of proceedings. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. In such a case, when mental incompetency becomes known, the case becomes one for a doctor rather than a court. Failure to comply with request of accused that counsel be provided him is a fatal error."

"SEC. 357. Officer detailed as counsel.-- When the accused before a court martial has no legal adviser, the commandant of the Navy yard or station, the convening authority, or the senior officer

present within whose jurisdiction the court sits shall, if the accused so requests, detail a suitable officer to act as his counsel..... An officer so detailed shall perform such duties as usually devolve upon the counsel for the defense before civil courts in criminal cases. As such counsel he shall use all legal means to protect the interests of the accused and to present to the court such defense as the accused may have, and to offer such evidence in extenuation, mitigation, etc., as he may be able to obtain. Ordinarily, when so requested by the accused, counsel should be detailed a sufficient time in advance of trial to enable him properly to prepare the accused's case. He should, so far as practicable, be relieved of all other duties which interfere with this. If accused does not request counsel until he enters court, the court is powerless to appoint one, but should adjourn from day to day until the appointment is made by one of the officers named above. It is never proper in such case to detail the judge advocate as counsel."

"SEC. 359. Accused to be informed of his rights.-- The counsel for the accused or, in case there is no counsel, the judge advocate, should before trial carefully explain to the accused that he may, besides introducing witnesses in his behalf, either (1) take the stand and testify under oath, or (2) make a statement not under oath; that should he take the stand, he may be subjected to a rigorous cross-examination as set forth in chapter III; and that should he not under oath make a statement which contains averments of material facts, such averments can not be considered as evidence or accorded evidentiary weight by the court. In advising the accused as to his right to take the stand, the judge advocate should carefully refrain from influencing the accused in this respect except as set out by section 401.

"Where the accused has made a statement to the court not under oath, the judge advocate (if there be no counsel) will, upon the completion of such statement, inform the court that the provisions of this section have been complied with."

"SEC. 384. Counsel for accused.-- Immediately after the accused is brought before the court he should be asked if he desires counsel, and if he does, counsel should take seat as such. If the counsel for the accused is absent at any stage of the proceedings, the record should show affirmatively that the accused waived the privilege of having counsel present at that time. Otherwise the court should adjourn for a reasonable time, if it appear that the counsel will then be present, or until the convening authority appoint another counsel.

"Permission to address the court should be granted by the court to counsel for the accused, and the latter should be allowed to use all legal means to protect the interests of the accused, but shall not be permitted to interfere in any manner with the court's proceedings.

"Counsel for the accused shall, when he so requests, be allowed to examine the record of proceedings, exclusive of the findings and sentence, as it is prepared."

"SEC. 401. Duties of judge advocate during trial: To protect interests of accused who does not have counsel.-- In the event that the accused has no counsel, the judge advocate shall protect his interests, having in mind, however, at all times his duties as prosecutor. Under such circumstances he shall not fail to advise the accused against advancing anything which may tend either to criminate him or prejudice his cause; he shall see that no illegal evidence is brought against the accused, and shall assist him in presenting to the court in proper form the facts upon which his defense is based, including such evidence as there may be in extenuation or in mitigation as well as evidence of previous good conduct and character.

"If, during the progress of the trial of an accused without counsel, evidence is adduced that develops that he might have a good defense which could be better presented by counsel, the judge advocate should strongly advise the accused to get counsel, and the court should do the same. The judge advocate should scrupulously avoid questioning an accused in an improper manner in court, as by asking him if he will admit he is the accused, as this savors of making him give evidence against himself."

3. Proposed Navy Bill

"SEC. 19. Article 27 is renumbered as article 18 and amended to read as follows:

'ART. 18 (b) For every summary court martial, the convening authority shall appoint a prosecutor and a defense counsel, who shall be persons qualified to perform such duties. This shall not affect the right of the accused to counsel of his own choice.

'(c) It shall be the duty of the prosecutor, under such rules of practice, pleading, and procedure as the Secretary of the Navy may prescribe, (1) to summon all witnesses and (2) to keep the record of proceedings.'"

"SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

'ART. 24 (b) For every general court martial, the convening authority shall appoint: (1) a prosecutor and a defense counsel, who shall be certified by the Judge Advocate General as persons qualified to perform such duties, but the appointment of such defense counsel shall not affect the right of the person accused to counsel of his own choice

"SEC. 47.

'ART. 16 (d) Any person in the naval service under command of the officer by whose order a deck court martial is convened may be detailed to act as clerk thereof.

'ART. 38. In every court-martial proceeding in which the accused pleads not guilty, defense counsel, if there be one, shall, in the event of conviction, attach to the record of proceedings either a brief of such matters as he feels should be considered on behalf of the accused on review or a signed statement setting forth his reasons for not so doing.'"

ART. 36, under the proposed Navy bill, will deal with depositions.-- A proviso is that the defense shall be given an opportunity to be present and to cross-examine the deponent.

III. Differences

There are no substantial differences between the Articles of War and the provisions of the proposed Navy bill. These minor points may be noted, however:

1) The proposed Navy articles do not state who shall keep the record of a general court-martial proceeding. (Cf. C.S., A.W. 33-34).

2) There is no provision in the present A.G.N., the proposed A.G.N., or in N.C.B., which requires the court to permit the accused to have civilian counsel if he provides it.

3) The proposed A.G.N. do not specify that the defense counsel appointed shall act as associate counsel if the accused has counsel of his own selection, and desires it. (A.W. 11, as amended, provides for the dismissal of the defense counsel appointed if the accused has counsel of his own selection and does not desire the presence of the regularly appointed defense counsel as assistant defense counsel. There is no similar provision in the proposed Navy articles.)

4) There is no provision in the proposed Navy articles for the appointment of an assistant prosecutor or assistant defense counsel. Sec. 355, N.C.B., provides for the appointment of counsel for the present judge advocate. Such counsel assists the judge advocate but is not an "assistant judge advocate" as that title is defined by A. W. 116. That he is not competent to perform any duty devolving upon the judge advocate is indicated by Sec. 379, N.C.B., which provides that the court must adjourn from day to day in case of the absence of the judge advocate.

However, Sec. 542, N.C.B., Fn. (12), states that one or more judge advocates may be appointed for a general court martial. The duties and competency of a second judge advocate are not covered in N.C.B. or A.G.N., but it appears that they function separately, at different trials held by the court. See Sec. 542, N.C.B.

UNIFORM CODE OF MILITARY JUSTICE

Subject: Court-Martial Procedure, Challenges. A. W. 18

I - ARMY PROVISIONS

1. Articles of War.

Article 18. Challenges. - Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

2. Title II of Public Law 759 does not effect Article 18 of the Articles of War.

3. United States Army Courts - Martial Manual.

Only the members of a general or special court-martial are subject to challenge, and they may be challenged only by the judge advocate and the accused. Although challenges should be made before arraignment, challenges for cause may be permitted at any time provided that the challenger has exercised due diligence.

Among the grounds of challenge for cause are:

- First: That he (the challenged member) is not competent or is not eligible to serve on courts-martial.
- Second: That he is not a member of the court.
- Third: That he is the accuser as to any offense charged.
- Fourth: That he will be a witness for the prosecution.
- Fifth: That (upon a rehearing) he was a member of the court which first heard the case.

(P.-2)

- Sixth: That he personally investigated an offense charged as member of a court of inquiry or otherwise.
- Seventh: That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.
- Eighth: That he will act as reviewing authority or staff judge advocate on the case.
- Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality.

II - NAVY PROVISIONS

1. Articles of the Government of the Navy.

The subject of challenges is not dealt with in the Articles of the Navy.

2. S. 1338, Proposed Navy Bill.

The following provisions deal with the subject of challenges:

Sec. 20, Article 28 is renumbered as Article 19 and amended to read as follows:

Article 19 These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of the accused to challenge any member of the court shall not thereby be prejudiced.

Sec. 29, Article 39 is renumbered as Article 24 and amended to read as follows:

Article 24(b) For every general court martial, the convening authority shall appoint: . . . (2) a judge advocate, whose duties it shall be . . . (2) to rule on interlocutory questions, except challenges; And provided further, that the judge advocate shall be subject to challenge.

(P.-3)

Sec. 30, Article 40 is renumbered as Article 25 and amended to read as follows:

Article 25 These oaths shall not be required if the accused was present when such oaths were previously administered. Provided, That the right of an accused to challenge any member of the court or the judge advocate shall not thereby be prejudiced.

3. Naval Courts and Boards.

The accused and the judge advocate have equal rights of challenge. Such challenges shall generally be made before the court is sworn, but may occur at any stage in the proceedings for cause not previously known.

Challenges made upon any of the following grounds, if admitted or proved, shall be sustained:

- (a) That he (the challenged member) sat as a member of a court of inquiry or board which investigated the charges.
- (b) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.
- (c) That he is the accuser. (This does not include an officer who merely refers for trial charges preferred by another, unless he has formed a definite opinion.)
- (d) That he will be a material witness for the prosecution or for the defense - except only as to the previous good character of the accused.
- (e) That he sat as a member of a court or board which tried or investigated another person upon charges based on the same transaction concerning which the accused is on trial.
- (f) That he is related by blood or marriage to the accused.
- (g) That he has a declared enmity against the accused.

(P.-4)

III - DIFFERENCES

1. Army and Navy practice on challenges is substantially the same, except that in the Army, the accused and the trial judge advocate are permitted one peremptory challenge each, while in the Navy no peremptory challenge or challenge to the array is permitted. Peremptory challenges in the Army are limited in that the law member of the court may be challenged only for cause.

Specific grounds for challenge for cause differ as between the Army and Navy, but the intent is similar.

Whereas in the Army, the subject of challenges is covered broadly by A. W. 18, in the Navy the procedure on challenges is set forth by regulations prescribed by the Secretary of the Navy.

2. Vanderbilt Report.

Subject of challenges not specifically mentioned.

3. Ballantine Report.

Subject of challenges not specifically mentioned.

4. McGuire Rules of Procedure for Navy.

The McGuire committee proposed that the prosecutor and accused should have an equal right to challenge any member for cause, and that the judge advocate should determine the challenge. Although the McGuire Rules do not mention the point, it may be inferred that they intend that the judge advocate should not be subject to challenge.

5. Keefe Report on Court Martial.

The Keefe report cites the recommendations of the McGuire Committee, and agrees with the position that the judge advocate should be a separate authority judging the case, and not subject to challenge. It endorses a provision whereby either the prosecutor or accused might file a petition and affidavit of disqualification as to the judge advocate of a general court-martial, and suggests that the judge advocate should probably be permitted to rule upon the petition itself. It further urges that the Army practice of permitting each side one peremptory challenge each be adopted unilaterally.

(P.-5)

Its specific recommendations are:

- (1) That provisions for challenging, substantially as contained in Rule 5 of the McGuire Rules, be included in Rules of Procedure to be adopted;
- (2) That the Advisory Committee consider the following problems:
 - (a) Whether the judge advocate on the court should pass upon challenges for cause;
 - (b) Whether the prosecution and defense should each be allowed one peremptory challenge;
 - (c) Whether the prosecution and defense should each be allowed to petition for disqualification of the judge advocate;
 - (d) If such a petition is allowed, who should pass upon it.

6. Comments.

Altogether, the question of challenges is a technical one which should be considered as a part of the larger problem of the degree of independence that should be granted to the Judge Advocate.

Uniform Code of Military Justice

Subject: Oaths

I. Army Provisions

1. Articles of War

"ART. 19. Oaths.-- The trial judge advocate of a general or special court-martial shall administer to the members of the court, before the proceed upon any trial, the following oath or affirmation: 'You, A.B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: 'You, A.B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentences of the court to any but the proper authority until they shall be duly disclosed. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation

in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted."

"ART. 100. Oath of Members and Recorders.-- The recorder of a court of inquiry shall administer to the members the following oath: 'You, A.B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God.' After which the president of the court shall administer to the recorder the following oath: 'You, A.B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God.'"

"ART. 101. Powers; Procedure.-- A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath of affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial....."

"ART. 114. Authority to Administer Oaths.-- Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law: Provided, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized."

2. Other Legislation

A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military

administration. See sec. 4, act August 21, 1941 (55 Stat. 653).

3. Manual Courts-Martial

Paragraph 49(b) provides the required oaths must be administered in each case tried. Paragraph 95 specifies the oath to be taken by a challenged member.

4. Public Law 759--80th Congress, 2D Session

No changes.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 28. Oath of members and recorder.-- Before proceeding to trial the members of a summary court martial shall take the following oath or affirmation, which shall be administered by the recorder: 'I, A.B., do swear (or affirm) that I will well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience.' After which the recorder of the court shall take the following oath or affirmation, which shall be administered by the senior member of the court: 'I, A.B., do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof' (R. S., sec. 1624, art. 28)."

"ART. 40. Oaths of members and judge advocate.-- The President of the general court martial shall administer the following oath or affirmation to the judge advocate or person officiating as such:

'I, A.B., do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.'

"This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge advocate or person officiating as such:

'I, A.B., do swear (or affirm) that I will truly try without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for

the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law' (R. S., sec. 1624, art. 40)."

"ART. 41. Oath of witness.-- An oath or affirmation in the following form shall be administered to all witnesses, before any court martial, by the president thereof:

'You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth, and that you will state everything within your knowledge in relation to the charges. So help you God (or 'this you do under the pains and penalties of perjury')' (R. S., sec. 1624, art. 41)."

"ART. 64 (b) Deck courts shall consist of one commissioned officer.... who.....shall have power to administer oaths,....."

"ART. 57. Powers.-- Courts of inquiry shall have power to summon witnesses, administer oaths....."

"ART. 58. Oath of members and judge advocate court of inquiry.-- The judge advocate, or person officiating as such shall administer to the members the following oath or affirmation: 'You do swear (or affirm) well and truly to examine and inquire, according to the evidence, into the matter now before you, without partiality.' After which the president shall administer to the judge advocate or person officiating as such, the following oath or affirmation: 'You do swear (or affirm) truly to record the proceedings of this court and the evidence to be given in the case in hearing' (R. S., sec. 1624, art. 58)."

"ART. 69. Oaths for purpose of naval justice, etc.-- Judge advocate of naval general courts martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant of the Marine Corps, and such other officers of the regular Navy and Marine Corps, or the Naval Reserve, and of the Marine Corps Reserve, as may be hereafter designated by the Secretary of the Navy, are authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration (Jan. 25, 1895, c. 45, 28 Stat. 639; Mar. 3, 1901, c. 834, 31 Stat. 1086; Mar. 4, 1917, c. 180, 39 Stat. 1171; July 1, 1918, c. 114, 40 Stat. 708; Feb. 28, 1925, c. 374, sec. 1, 43 Stat. 1080)."

"ART. 70. Investigations; oaths of witnesses.-- Any officer of the Navy or Marine Corps detailed to conduct an investigation, and the

recorder, and if there be none the presiding officer, of any naval board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation (R. S., Sec. 183; Feb. 13, 1911, c. 43, 36 Stat. 898)."

2. Naval Courts and Boards

References to oaths are collaterally presented in the text of the manual.

The subject matter, with respect to the forms to be utilized and procedure to be followed, is contained in Appendix E, and presents all oaths necessary for the purpose of administration of naval justice, including oaths not prescribed in the A.G.N., such as the oaths for a reporter and an interpreter and the oath on voir dire. These forms will be used, where appropriate, and must be administered in each case by one authorized to do so. Failure to administer the prescribed oath constitutes fatal error.

3. Proposed Navy Bill

"ART. 16. (a) Deck courts martial shall consist of one commissioned officer only, who, while serving in such capacity shall have power to administer oaths and to hear and determine cases."

SEC. 20. Article 28 is renumbered as article 19 and amended to read as follows:

"ART. 19. The senior member of the summary court-martial shall administer the following oath or affirmation to the prosecutor: 'I, A.B., do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof.' This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the prosecutor: 'I, A.B. do swear (or affirm) that I will truly try, without prejudice or partiality, the case (s) now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required to do so, before a court of justice in due course of law.' These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of an accused to challenge any member of the court shall not thereby be prejudiced."

SEC. 30. Article 40 is renumbered as article 25 and amended to read as follows:

"ART. 25. The president of the general court martial shall administer the following oath or affirmation to the judge advocate: 'I, A.B., do swear (or affirm) that I will discharge all my duties

as judge advocate of this court without prejudice or partiality or fear of disfavor.' This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge advocate: 'I, A.B., do swear (or affirm) that I will truly try without prejudice or partiality, the case (s) now depending, according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.' These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of an accused to challenge any member of the court or the judge advocate shall not thereby be prejudiced."

SEC. 31. Article 41 is renumbered as article 26 and amended to read as follows:

"ART. 26. An oath or affirmation in the following form shall be administered to all witnesses, before any court martial, by the president or senior member thereof: 'You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth. So help you God (or 'this you do under the pains and penalties of perjury')'."

SEC. 43. Article 57 is renumbered as article 43 and amended as follows:

"ART. 43. Courts of inquiry, and, when empowered by the convening authority, boards of investigation and investigations conducted by one officer shall have power to administer oaths....."

"SEC. 44. Articles 58.....repealed."

"ART. 47 (a) Such officers as may be designated by the Secretary of the Navy shall at all times have authority to administer oaths for the purpose of naval administration, including naval justice, and, shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts."

SEC. 48. A.G.N. 64 (b) is repealed and replaced by A.G.N. 16 (a). A.G.N. 69 is repealed and replaced by A.G.N. 47 (a).

III. Differences

The Articles of War provide the same procedure for administering the oath of office to the prosecutor and members of general and special courts-martial, and to the recorder and members of courts of inquiry in that, the recorder or prosecutor tenders the

oath to the members of the court and is, in turn, sworn by the president. In the proposed Navy bill, however, the prosecutor of a summary court and the judge advocate of a general court are sworn first and they, in turn, then administer the oaths to the members. The proposed articles do not specifically require that the prosecutor of a Navy general court take an oath. Nor is there such a requirement as to "counsel" or members of a court of inquiry, reporters, and interpreters.

The context of each oath prescribed in the Articles of War is not the same as its corresponding provision in the proposed Navy bill. However, it should be stated that, notwithstanding these differences, the purpose for which oaths are authorized and the import to be derived therefrom, are the same.

A.G.N. 19 and 25, as proposed, do not require the administration of oaths to be repeated, if the accused was present, to the prosecutor and members of a summary court-martial and to the judge advocate and members of a general courts-martial provided, that the right of the accused to challenge any member of the court or the judge advocate shall not be thereby prejudiced. The A.W. do not contain this proviso.

IV. Recommendations

1. Keefe Report

- A. Repeated administration of oaths to the proper officers of the court should be dispensed with provided personnel of said court does not change.¹
- B. That the different persons to be tried should either be present at the administration of the oath to exercise their right to challenge, or if not present, their right shall be preserved.

2. McGuire Report

- A. Rule 17, Rules of Procedure; The following oath shall be taken both by the Judge Advocate and the members of the court:²

"I,-----, do solemnly swear (or affirm) that I will administer justice without respect to persons or rank, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as -----(Judge Advocate, President, or member of court) according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

1. Report of the Ballantine Committee, 24 September, 1943, McGuire Rules of Procedure, Rule 18.
2. Adaptation of U.S. Judge's oath, Title 28 U.S.C. Sec. 372.

Uniform Code of Military Justice

Subject: Continuances. A.W. 20.

I. Army Provisions

1. Articles of War

"ART. 20. Continuances.--A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just."

"ART. 70.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."

2. Manual for Courts-Martial

The number of continuances which may be granted to either party is unlimited, provided such requests are reasonable. It is suggested, however, that the necessity for a continuance may often be obviated by requesting the president to postpone the assembling of the court or requesting court to adjourn or to table a recess.

In time of peace, premature arraignment of the accused before a general court martial may be ground for a continuance.

3. Public Law 759--80th Congress, Chapter 625, 2d Session

A.W. 20.

No changes.

A.W. 70.

Identical language now found in A.W. 46c.

II. Navy Provisions:

1. Articles for the Government of the United States Navy

None.

2. Naval Courts and Boards

Either the judge advocate or the accused may request a postponement of the trial stating his reasons therefor.

But an application to suspend proceedings of a court for a longer period than from day to day, Sundays excepted, must be referred to the officer convening the court, who alone has authority to grant such request.

3. Proposed Navy Bill

"SEC. 47.

'ART. 37. A court martial may, for reasonable cause, grant a continuance for such time and as often as may appear to be just. In time of peace no person shall, against his objection, be brought to trial before a general, summary, or deck court-martial within periods of five days, three days, and twenty-four hours, subsequent to the service of specifications upon him, respectively.'

III. Differences

Attention is invited to the opening sentence of S. 1338, Sec. 47, A.G.N. 37, wherein the Navy proposes that the subject matter herein under discussion be incorporated in the Articles for the Government of the Navy. As proposed, the language conforms to that contained in A.W. 20, except that the words "to either party" have been deleted.

It may be of interest to note that the second sentence of A.G.N. 37, hereinabove cited, is almost identical to the text found at the conclusion of A.W. 46c., as amended (P.L. 759). The Manual for Courts Martial, sec. 52b, referring to A.W. 70, states that a violation of the proviso therein, concerning premature arraignment of the accused, may be ground for a continuance.

Uniform Code of Military Justice

Subject: Refusal or Failure to Plead. A.W. 21.

I. Army Provisions

1. Articles of War

"ART. 21. Refusal or Failure to Plead.-- When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty."

2. P.L. 759, 80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

There is no Article for the Government of the Navy which corresponds to A.W. 21.

2. Naval Courts and Boards

Sec. 413, 416, 417, and 420 provide substantially the same rules concerning "refusal or failure to plead" as is contained in A.W. 21.

3. Proposed Navy Bill

"ART. 48. The Secretary of the Navy is authorized to prescribe and to modify from time to time the rules of pleading and procedure before naval courts martial and other naval tribunals....."

III. Differences

Other than the fact that the Army is bound by A.W. 21 in this matter, there are no material differences between the Army rule and those promulgated by the Secretary of the Navy, and embodied in N.C.B.

IV. Recommended Provisions

1. White Report, 1946.

ART. 18. Rules and Procedure. Substantially the same as is presented in ART. 48, proposed Navy Bill.

2. Keeffe Report.

Submits the following recommendation for adoption either in the Rules of Procedure or N.C.B.:

- (a) Plea of guilty shall not be received in capital cases.
- (b) Plea of guilty to be accepted only after accused has conferred with counsel.
- (c) Judge Advocate to explain effect of guilty plea to the accused.
- (d) Judge Advocate to determine whether a guilty plea should be accepted.

Uniform Code of Military Justice

Subject: Process to Obtain Witnesses

I. Army Provisions

1. Articles of War

"ART. 22. Process to Obtain Witnesses.--Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions."

"ART. 101. Powers; Procedure.--A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof.".....

2. Public Law 759--80th Congress, Chapter 625--2d Session

SEC. 213. Article 22 is amended to read as follows:

"ART. 22. Process to Obtain Witnesses.--Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. Witnesses for the defense shall be subpoenaed, upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witnesses for the prosecution."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 42. (b) Witnesses; process for.--A naval court martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue (Feb. 16, 1909, c. 131, sec. 11, 35 Stat. 621)."

2. Proposed Navy Bill

SEC. 32. Article 42 is renumbered as article 35 and amended to read as follows:

"ART. 35: (a) A general court martial, a summary court martial, and a court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States Courts of criminal jurisdiction within the State, Territory, District, or possession where such naval court shall be ordered to sit may lawfully issue. Such process shall run to any part of the United States, its Territories, and possessions."

III. Differences

A.M. 22 as it will be amended by Public Law 759 provides for the issue of process by general, special, or summary courts-martial, in the same manner as courts of the United States having criminal jurisdiction. The proposed A.G.M. would differ in that the lowest court would not have the power to issue such process, and the assimilation is to United States courts of criminal jurisdiction within the State, Territory, or District where the naval court-martial is ordered to sit.

The new A.M. 22 will also provide that defense witnesses shall be subpoenaed in the same manner as prosecution witnesses. The proposed Navy bill is silent on this point, but Navy general courts-martial at the present time have the authority to subpoena witnesses for the defense, and the judge advocate is specifically charged with this duty (U.C. and B. sec. 245).

IV. Recommended Provision

Follow the wording of A.M. Art. 22 as it will be amended by Public Law 759, making only the necessary changes in wording to adapt it to all the armed forces.

H.J.M.

Uniform Code of Military Justice

Subject: Civilians -- (1) Refusal to Appear or Testify, (2) Compensation of Witnesses, (3) Offenses Against Public Justice - A.W. 23.

I. Army Provisions

1. Articles of War

"ART. 23. Refusal to Appear or Testify.--Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, wilfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: Provided further, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this Act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled 'An Act to codify, revise, and amend the penal laws of the United States' (volume 35, United States Statutes at Large, p. 1088), or any amendment thereof, shall be punished as therein provided."

2. Other statutory provisions.

Relevant provisions of Chapter 6 of the Act of March 4, 1909, (referred to in 2nd proviso above) as amended, codified and reenacted in Title 18, USC, by Public Law No. 772, 80th Congress, Second Session. (June 25, 1948):

<u>Criminal Code</u> (Section)	<u>Title 18, USC</u> (Section)	<u>New Heading</u>
125	1621	Perjury generally.
126	1622	Subornation of perjury.
127	1506*	Theft or alteration of record or process, false bail.
128, 129	2071	Concealment, removal, or mutilation [of records] generally.
130	505	Seals of courts; signatures of judges or court officers.
131	206	Offer to judge or judicial officer.
134	210	Acceptance [of bribe] by witness
135	1503*	Influencing or injuring officer, juror or witness generally.
137	1504*	Influencing juror by writing.
140	1501*	Assault on process server.
141	1071	Concealing person from arrest.
141, 143	752	Instigating or assisting escape.
142	753	Rescue to prevent execution.
144	754	Rescue of body of executed offender.
145	873	Blackmail
146	4	Misprision of felony.

*These sections are grouped under Chapter 73 - Obstruction of Justice.

3. Manual for Courts-Martial.

"PAR. 97 - Attendance of Witnesses.--

"In order to maintain a prosecution under the part of A.J. 23 referred to, a person must not only be duly subpoenaed but be

paid or tendered fees, including fee for one day's actual attendance, and mileage both ways 'at the rates allowed to witnesses attending the courts of the United States.' (A.W. 23.) Whenever such action appears to be advisable, appropriate steps will be taken by the trial judge advocate with a view to such payment or tender at the time of the service of the subpoena. See AR 35-4120. If an officer, charged with serving a subpoena, pays the necessary fees and mileage to a witness, taking receipt therefor, he is entitled to reimbursement."

"PAR. 99 - Employment of Experts.--

"When the employment of an expert is necessary during a trial by court-martial, the trial judge advocate, in advance of the employment, will, on the order or permission of the court, request the appointing authority to authorize such employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. Where in advance of trial the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the appointing authority for authority to employ the expert, stating the necessity therefor and probable cost thereof."

4. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 42(c).--Refusal of witness to appear or testify; privilege.--

"Any person duly subpoenaed to appear as a witness before a general court martial or court of inquiry of the Navy, who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the person so offending, and the punishment of such person, on

conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That this shall not apply to persons residing beyond the State; Territory, or District in which such naval court is held, and that the fees of such witness and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or District shall be duly paid or tendered said witness, such amounts to be paid by the Bureau of Supplies and Accounts out of the appropriation for compensation of witnesses: Provided further, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him (Feb. 16, 1909, c. 131, sec. 12, 35 Stat. 622)."

2. Naval Courts and Boards

"SEC. 247. The word 'District' applies to the District of Columbia only.

" . . . a subpoena issued by a naval court to compel the attendance of witnesses will run throughout the United States but . . . the penalties provided in article 42(c), do not attach where the person resides beyond the State."

"SEC. 248. Authority of the judge advocate in summoning civilian witnesses.—

"The judge advocate is authorized to subpoena as a witness any civilian who is to be a material witness as to facts, and who is within the State, Territory, or District in which a naval court sits and can compel attendance.

"The judge advocate is not authorized to subpoena as a witness, at the expense of the United States, any civilian who is not within the territorial limits in which the court can compel attendance, even though such witness be considered a material one and be willing to attend. In such cases the judge advocate shall forward the subpoena to the Secretary of the Navy, together with the information and in the manner required when forwarding a summons for a naval witness who is not present at the station where the court-martial is convened."

"SEC. 249. Same: Witnesses as to character or as experts not to be summoned or subpoenaed at Government expense.—

"The general rule is that a witness will neither be summoned nor subpoenaed at Government expense when it does

not appear that such witness has personal knowledge of the facts at issue before the court, but rather that his testimony is desired merely as to character or as an expert.

"When expressly authorized by the Secretary of the Navy, however, such a witness may be summoned or subpoenaed, and, in the case of a civilian expert witness, if special compensation is authorized by the Secretary of the Navy, this compensation will be paid, as provided in section 257, either in lieu of or in addition to the fees therein authorized, as directed by the Secretary."

3. Proposed Navy Bill

"ART. 35.

"(b) Any person, not subject to the Articles for the Government of the Navy, duly subpoenaed to appear as a witness before a general court martial, summary court martial, or court of inquiry, who fails to appear or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, or who refuses to give his evidence or to give it in the manner provided by these Articles, or behaves with contempt to the court, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage in the rates provided for witnesses in the United States district court for said State, Territory, District, or possession shall be duly paid or tendered said witness, such amounts to be paid by the Navy Department out of the appropriations made therefor."

III. Differences

1. A.W. 23 applies to witnesses before any military court, commission; court of inquiry or board, or officer designated, by one of these, to take a deposition. Proposed AGN 35(b) applies only to witnesses subpoenaed to appear before a general or summary court-martial or court of inquiry.

2. A. W. 23 makes it a misdemeanor to wilfully neglect or refuse to appear. Proposed AGM 35(b) makes it a misdemeanor to fail to appear. Furthermore, the proposed articles make it a misdemeanor to refuse to give evidence or give it in a manner provided by the AGM. (For contempts see C.S., A.W. 32.)
3. Proposed AGM 35(b) does not contain the provision in A.W. 23 giving territorial courts jurisdiction.
4. Proposed AGM 35(b) does not contain the provision in A.W. 23 which brings within the scope of chapter 6 of the Act of March 4, 1909, acts committed either before or in relation to proceedings of a military tribunal or board. Most of the provisions of that chapter have reference to acts committed in relation to "any court of the United States." There is some doubt that a court-martial is included in the quoted phrase (Winthrop, Military Law and Precedents, Reprint 1920, p. 49). Certain provisions of the chapter, however, are broader in scope and (in the writer's opinion) encompass acts related to both Army and Navy courts-martial. They include:

Perjury
 Subornation of perjury
 Offer to judges or judicial officer
 Acceptance of bribe by witness
 Blackmail
 Misprision of felony

5. Expert witnesses. -- The employment of expert witnesses must be authorized by the Army convening authority as opposed to the Secretary of the Navy.

IV. Recommendations

1. Keeffe Report

"Where the testimony of a civilian witness is essential in a trial by naval court-martial, injustice may result from lack of power to require attendance. A general court-martial should have statutory power running throughout the United States, its territories and possessions, to issue process to compel the attendance of civilian witnesses. Any such witness who wilfully

neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person has been legally subpoenaed to produce should be deemed guilty of a misdemeanor. This power to punish should not be limited to persons residing in the State, Territory, Possession, or District where in the court is held." (p. 148)

"Where the defendant cannot afford to pay the expenses of his own witnesses, and the judge advocate is satisfied as to this and their need, the government should assume the financial burden. A special fund is necessary to remove this fund from the regular Navy budget. If Congress appropriates money directly year by year to the use of the Judge Advocate General for the purpose, there is no danger that budget difficulties will prevent a defendant having needed witnesses." (p. 149)

"RECOMMENDATIONS:

* * * * *

"(2) Article 42 (c) should be repealed, and in its stead a new article should be enacted, provided that any person subpoenaed to appear as a witness before a general court-martial, a summary court-martial, or a court of inquiry of the naval service, who wilfully neglects or refuses to appear, to testify or to produce documentary evidence which such person may have been subpoenaed to produce shall be deemed guilty of a misdemeanor.

* * * * *

"(4) The judge advocate in his discretion should be authorized to order transportation at government expense of witnesses for defense where it appears that the defendant is without means, and Congress should be asked to appropriate a special fund outside the regular Navy budget upon which the Judge Advocate General may draw for this purpose." (p. 150)

2. White Draft

There is no provision penalizing failure to comply with a subpoena in the White Articles.

3. McGuire Draft

"Article 9. Witnesses.

"(a) Process for. A summary court-martial, a general court-martial, and a court of inquiry of the naval service shall have

power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or insular possession where such naval court shall be ordered to sit may lawfully issue. Such process shall run to any part of the United States, its Territories and possessions.

"(b) Refusal of witness to appear or testify. Any person subpoenaed to appear as a witness before a summary court-martial, a general court-martial or court of inquiry of the naval service, who wilfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce documentary evidence, which such person may have been subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person may be prosecuted in the district court of the United States and may be punished by a fine of not more than \$500 or imprisonment for not exceeding six months, or both, at the discretion of the court: Provided, that the fees of such witness and his mileage at the rates provided for witnesses in the United States district court for said State, Territory or insular possession shall be duly paid or tendered said witness."

4. First Ballantine Report

"Recommendation: An amendment of paragraph (c) of Article 42 of the Articles for the Government of the Navy should be sought making the provisions now applicable in respect of witnesses subpoenaed by general courts martial applicable to witnesses subpoenaed by summary courts martial." (p. 27)

5. Colonel Curry recommends the following change in proposed AGN 35(b):

"Any person, not subject to the Articles for the Government of the Navy, who, duly subpoenaed to appear as a witness before a general court martial, summary court martial, or an officer of the armed services or a civil official designated to take his deposition, or court of inquiry, fails to appear or refuses to qualify as a witness or to testify or to give his evidence or to give it in the manner provided by these Articles, or who, duly subpoenaed to produce documentary or real evidence before a general court martial, summary court martial, or an officer of the armed services or a civil official designated to take his deposition, or court of inquiry, fails or refuses to produce such evidence, or who behaves with contempt to the court, shall be deemed guilty of a misdemeanor * * *."

V. Comment

1. By its terms A. W. 23 applies to persons not subject to military law and proposed AGN 35(b) applies to persons not subject to the AGN. It should be considered whether or not these provisions should be separate from a code of military justice.

2. In light of 18 U.S.C., Section 1, it is unnecessary to designate the crime of refusing to appear or testify as a misdemeanor.

Uniform Code of Military Justice

Subject: Compulsory Self-Incrimination Prohibited, A. U. 24

I. Army Provisions

1. Articles of War

"ART. 24. Compulsory Self-Incrimination Prohibited. No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

2. Public Law 759, 80th Congress, Chapter 625, 2d Session

"SEC. 14. Article 24 is amended to read as follows:

"ART. 24. Compulsory Self-Incrimination Prohibited.-- No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

"The use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

II. Navy Provisions

1. Articles for the Government of the United States Navy

There is no provision in the Articles for the Government of the Navy corresponding to A. T. 24. The 29th, 60th and 68th Articles for the Government of the Navy lay down rules of evidence for naval courts and boards. In none of these is "self-incrimination" involved.

By Executive Order of the President, approved 5 March 1937, "Naval Courts and Boards, 1937" was issued for the government of all persons attached to the Naval service. It was required that such persons make themselves acquainted with, observe, and comply with the provisions contained therein.

Section 235 of "Naval Courts and Boards, 1937" contains the following provision:

"The Constitution provides that no person shall be compelled to give any evidence against himself. The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material."

2. Proposed Navy Bill:

ART. 49. The Secretary of the Navy is authorized to prescribe, and to modify from time to time, the rules of pleading and procedure, including modes of proof, in proceedings before naval courts martial, other naval tribunals, and fact-finding bodies as will insure the enforcement of discipline and the fair and impartial administration of justice in the United States naval service: Provided, That, insofar as applicable, such modes of proof shall follow the law of evidence prevailing in the district courts of the United States in the trial of criminal cases: Provided further, That nothing contrary to or inconsistent with these Articles shall be so prescribed.

III. Differences

Public Law 759 carries forward in statutory form the fundamental right against compulsory self-incrimination guaranteed by the 5th Amendment to the Federal Constitution. It goes further and provides that a witness may not be called upon to answer a question that

is degrading, whether or not it is material to the issues. But for such statutory provision, the rule would be otherwise. As said in 70 Corpus Juris, in paragraph 894 on page 740:

"Although it has been asserted in a number of cases that a witness may refuse to give answers disgracing him or exposing him to infamy, the general rule is that unless excused by statute, (not 5th Amendment to Constitution) a witness will not be excused from answering a question on the sole ground that his answer will disgrace him or bring him into disrepute, where it concerns a matter material or relevant to the issues,"

citing *Brown v Walker* (U.S. Sup Ct) 161 U.S. 591; *U. S. v Thomas* (Dist Ct) 49 Fed Supp 547. The states which follow the above rule are: Arkansas, Indiana, Delaware, Illinois, Kentucky, Michigan, Missouri, Nevada, New York, Ohio, Pennsylvania, Utah.

The proposed Navy bill authorizes the Secretary of the Department of the Navy to prescribe rules of pleading and procedure, including rules of proof, "that, insofar as applicable shall follow the laws of evidence in the United States District Court".

But the rule against self-incrimination is more than a rule of pleading or procedure or a rule of evidence; it is a constitutional guarantee. Not so are questions that tend to degrade. Under the proposed Navy bill the Secretary of the Department of the Navy might lawfully prescribe regulations as to questions which tend to degrade.

IV. Recommended Provision

That any provision on this subject follow the language of the present Article of War 24 by providing that no witness shall be compelled to answer any question not material to the issue when such answer might tend to degrade him.

V. Comment

The practice of including in state codes relevant constitutional provisions in the form of statutes might well be followed in a code for the Government of the Armed Forces. In operations overseas, in time of war, a paucity of reference material on courts martial usually prevails. The code should speak out clearly in every respect, including within its provisions basic constitutional guarantees and limitations. Many who are called upon to administer such law are unlearned in the law. Unless constitutional provisions are reflected within the code, the natural tendency is to not to venture beyond the exact language of the code. Reversals by courts and criticisms from the war may be avoided by resort to such a device.

Uniform Code of Military Justice

Subject: Depositions - when admissible and before whom taken,
A.W. 25-26.

I. Army Provisions

1. Articles of War

- a. "ART. 25. Depositions - When Admissible.- A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases."

"ART. 26. Depositions - Before whom taken. - Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths."

- b. The Army permits introduction of deposition by opposite party when not used by the party for whom secured. (UCMJ p. 123; CM 280375 (1945) IV Bull. JAG, 229). Army also permits use of deposition by prosecution in capital cases where expressly consented to by the defense made or presented in court. (UCMJ p.123; CMO WFO 1693 (1944) III Bull. JAG, 185; CM 280375 (1945) IV Bull. JAG, 229). Depositions taken before the charges were referred to trial are to be treated as mere affidavits (CM 162743 (1944), Dig. Op. JAG 1912-1940, p. 209). Art 25 and 38 are not applicable to the trial of an enemy combatant by a military commission for violation of the laws of war. (Application of Yamashita and Yamashita v. Styer, 66 S.Ct.340).

2. Public Law 759--80th Congress, Chapter 625--2d Session

- a. "ART. 25. Depositions - When Admissible - A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to, appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases: Provided further, That a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial: And provided further, That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases."

- b. Art. 26 was not amended by P.L. 759.

II. Navy Provisions

1. Articles for the Government of the United States Navy

- a. "ART. 68. Depositions in naval courts.--The depositions of witnesses may be taken on reasonable notice to the opposite party, and when duly authenticated, may be put in evidence before naval courts, except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year as follows:

First, depositions of civilian witnesses residing outside the State, Territory, or District in which a naval court is ordered to sit.

Second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or District in which a naval court is ordered to sit, or who are under orders to go outside of such State, Territory, or District.

Third, where such naval court is convened on board a vessel of the United States, or at a naval station not within any State, Territory, or District of the United States, the depositions of witnesses may be taken and used as herein provided whenever such witnesses reside or are stationed at such a distance from the place where said naval court is ordered to sit, or are about to go to such a distance as, in the judgment of the convening authority, would render it impracticable to secure their personal attendance."

- b. Navy rule does not permit use of deposition by opposite party over objection of party for whom deposition was taken. Instead a new deposition must be taken with court's permission. (NC&B, sec. 215, p. 152). "The refusal to allow an accused an opportunity to obtain by deposition testimony regarding a material element of the case denies him the right to a full and free defense and was therefore prejudicial." (CFO 4-1945, p. 156; CFO 6-1947, p. 192). Limitation of sentence when a deposition is used by prosecution applies only to those specifications into which evidence introduced by deposition enters. (NC&B sec. 454, p. 232; CFO 2-1944, p. 272).

2. Proposed Navy Bill

- a. "ART. 36. Except in trials by courts-martial of offenses in which the maximum punishment is death under Article 8 of these Articles and not excepted by the maximum limitations of punishment which the President may have prescribed under Article 33 (b) of these Articles, a duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence

before any naval court when it appears to the satisfaction of the judge advocate of the general court martial; or the senior member of the summary court martial, or the deck court-martial officer, or the president of the court of inquiry; that the witness; by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or in foreign places, because of nonavailability to process, refuses to appear and testify in person at the place of trial or hearing: Provided, That the accused, or defendant, and his counsel, or a representative of the accused or defendant if so desired by the accused or defendant, shall be given an opportunity to be present and cross-examine any deponent against the accused or defendant, unless the Secretary of the Navy has, in extraordinary circumstances, expressly authorized the taking of the deposition without the granting of such opportunity."

III. Differences

1. Public Law 759 and the Navy bill differ in the following respects in the provisions for the taking of depositions and their admissibility:

a. The Army rules provide for the use of depositions whenever the death penalty is authorized but not mandatory and the appointing authority has directed that the case be treated as not capital; in which case the court may not adjudge the death penalty. The Navy rules do not provide for any discretion on the part of the convening authority.

b. Under the Army rules, the court, commission, board, or appointing authority rules on the reason for the deposition. Under the Navy Bill, the judge advocate of the general court martial, the senior member of the summary court martial, the deck court-martial officer or the president of the court of inquiry will rule on the reason for the deposition.

c. The Army provides for use when the witness is beyond the distance of one hundred miles from the place of trial or hearing, or resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit. The Navy bill provides among its reasons for use of deposition, death and military necessity.

d. The Army rules provide for use of depositions by the defense in capital cases. The Navy does not include this provision but in a CPO has said that the use by the defense of deposition in a capital case does not reduce the maximum sentence of death. (CPO 2-1944, p. 272).

e. P.L. 759 provides for the taking of depositions after the charges have been signed but before referral to trial under orders of the appointing authority and with representatives of the prosecution and defense present. The Navy Bill provides for the presence of the accused or a representative at the time of the taking of the deposition.

IV. Recommended Provisions

1. A proposed re-draft of Article 36 of the AGM has been considered, reading as follows:

"ART. 36 (a) (1) A deposition may be taken either:

'First. By agreement of the parties, prior to the assembling of the court, or

'Second. Upon reasonable notice to the opposite party, either prior or subsequent to the assembling of the court, if it appears to the satisfaction of the judge advocate of the general court martial, or the senior member of the summary court martial, or the deck court-martial officer, or the president of the court of inquiry; that the evidence sought is otherwise admissible, and either that the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or that he is not amenable to process and refuses to appear and testify in person at the place of trial or hearing, or that he resides, is found, or is about to go beyond the distance of one hundred miles from the place of trial or hearing and his testimony does not seem to be determinative of an essential element of the case. When the request to take a deposition is made subsequent to the assembling of the court, the decision of the judge advocate of the general court martial, senior member of the summary court martial, and president of the court of inquiry shall be subject to being overruled by the court.'

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"(2) The accused, or defendant, and his counsel, or a representative of the accused or defendant if so desired by the accused or defendant, shall be given an opportunity to be present and to cross-examine any deponent against the accused or defendant, unless the Secretary of the Navy has, in extraordinary circumstances, expressly authorized the taking of the deposition without the granting of such opportunity.

"(b) A deposition taken as provided for in section (a) of this article may, if duly authenticated and otherwise admissible as evidence, be received in evidence before any naval court if it appears to the satisfaction of the judge advocate of the general court martial, such judge advocate being subject to being overruled by the court, or the summary court martial, or the deck court-martial officer, or the court of inquiry that either the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or that he is not amenable to process and refuses to appear and testify in person at the place of trial or hearing, or that he resides, is found, or is about to go, or went, beyond the distance of one hundred miles from the place of trial or hearing and his testimony does not seem determinative of an essential element of the case, or that the present whereabouts of the witness is unknown: Provided, That where the testimony contained in a deposition is used against an accused under the authority of his paragraph, the punishment imposed with respect to the specifications in regard to which the deposition is so used shall not extend to death."

2. The White Report, Article 16 (b), page 25, Study No. 2, provides as follows:

"(b) Use of depositions. Evidence by duly authenticated deposition taken under oath is admissible before naval courts-martial and courts of inquiry:

(1) Where the deposing witness is not available to testify in person;

(2) Where full opportunity to subject the deposing witness to cross-interrogatories has been afforded the party against whom the deposition is offered; and

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(3) Provided that no person whose conviction has been secured by the use of a deposition or depositions shall suffer death or imprisonment for a period in excess of five years."

3. The McGuire Report, Rules of Procedure before Naval Courts-martial, page 5, provides that depositions may be used only by the accused and will be taken in accordance with the Federal rules of procedure in criminal trials.

JEC

ARTICLE OF WAR 26

SEE C.S., A.M. 25

Uniform Code of Military Justice
Subject: Courts of Inquiry--Records of, When Admissible

I. Army Provisions

1. Articles of War

"ART. 27. Courts of Inquiry--Records of, When Admissible.-- The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: Provided, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer."

2. Public Law 759--80th Congress, Chapter 625--2D Session

Does not amend this article

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 60. Proceedings; authentication; use in evidence.-- The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court martial, provided oral testimony cannot be obtained (R. S., sec. 1624, art. 60)."

2. Proposed Navy Bill

"SEC. 45. Article 60 is renumbered as article 44 and amended to read as follows:

'ART. 44. The proceedings of courts of inquiry shall be authenticated by the signatures of the president of the court and of the counsel for the court; but in case the proceedings cannot be authenticated by the signatures of the president and of the counsel, by reason of death, disability, or absence of either or both of them, they shall be signed by a member in lieu of the president and by another member in lieu of the counsel. The sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, shall be evidence before a court martial of a defendant before said court of inquiry: Provided, That where such testimony is used in evidence against the accused person, other than under the general rules of evidence, the punishment imposed shall not extend to death.'"

III. Differences

A.W. provides that the record of proceedings may be read in evidence. A.G.N. provides that the sworn testimony contained in the duly authenticated record of proceedings shall be evidence.

A.W. requires consent of the accused. A.G.N. does not require consent.

A.W. prohibits the introduction of the record in cases extending to the dismissal of an officer. A.G.N. provides that death may not be inflicted as a punishment in those cases where sworn testimony from the record has been introduced other than under the general rules of evidence.

A.W. specifically provides that the record may be read in evidence before any other court of inquiry or a military board. A.G.N. has no such provisions.

IV. Recommended Provision

The sworn testimony, contained in the duly authenticated record of the proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may be read in evidence in any proceeding before any court martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board. The defense may adduce such evidence in any case.

Uniform Code of Military Justice

Subject: Certain Acts to Constitute Desertion.

See C.S., A.W. 58 -- Desertion.

Uniform Code of Military Justice

Subject: Announcement of Action and Closed Sessions. A.M. 29-30

I. Army Provisions

1. Articles of War

"ART. 29. Court to Announce Action.--Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe the findings and sentence in other cases may be similarly announced."

MCJ 1928, par. 81: "Courts-Martial--Procedure--Announcing Sentence; Matters of, and Recommendations to, Clemency; Adjournment.--When a court-martial has sentenced an accused, the court will at once announce the findings and sentence in open court, unless, in the court's opinion, good reasons exist for not making the findings and sentence public at that time. In this latter event, the president may state in open court that the findings and sentence are not to be announced."

"ART. 30. Closed Sessions.--Whenever a general or special court-martial shall sit in closes session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, of there be any."

MCJ 1928 contains numerous regulations implementing this Article, particularly pars. 49, 50, 51, 78, and 80.

2. Public Law 759--80th Congress, Chapter 625--2d Session

No change

II. Navy Provisions

1. Articles for the Government of the United States Navy

No A.G.N. similar to A.M. 29.

NCB, Sec. 433, requires announcement of acquittal in whole or in part.

No A.G.N. similar to A.M. 30.

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NCB, Sec. 402, provides for withdrawal of accused, his counsel, and judge advocate, but provides for recall of judge advocate to record findings and sentence.

2. Proposed Navy Bill

ART. 28 (a) (1) and ART. 28 (c) "Every court shall announce in open court its finding and sentence as soon as determined."

No provision for closed sessions.

III. Differences

There is no substantial difference between present Articles of War and Proposed Navy Bill as to announcement of findings and sentence. Present and proposed A.G.N. make no provision for closing court.

IV. Recommendations

A.M. 29 - Keefe Report - same as Proposed Navy Bill.

A.M. 30 - No comment found.

SSM

ARTICLE OF WAR 30

SEE C.S., A. U. 29

Uniform Code of Military Justice

Subject: Voting, Rulings of Law Member, Reasonable Doubt. A.W. 31,43.

I. Army Provisions

1. Articles of War

"ART. 31. Method of Voting.--Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The law member of the court, (if any, or if there be no law member of the court), then the president, may rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: Provided, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: And provided further, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: Provided further, however, That the phrase, 'objection to the admissibility of evidence offered during the trial', as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all

these questions arising on the trial; if any member object to any ruling of the law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid."

"ART. 43. Death Sentence—When Lawful.—No Person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

2. Manual Courts-Martial (Synopsis)

In case of tie vote, on interlocutory questions, the objection, challenge, motion, etc., is overruled or denied.

Voting upon challenges is by secret written ballot marked "sustained" or "not sustained." Deliberation on challenges may include full and free discussion, but the influence of superiority in rank should not be employed in an attempt to control the independence of members in the exercise of their judgment. (Par. 58f)

A finding of not guilty results if no other valid finding is reached, but a court may reconsider any finding before it has been announced or the court opened to receive evidence of prior convictions. In computing the number of votes required for a finding, a fraction counts as one. Thus where five members vote, a requirement that two-thirds concur is not met if less than four concur.

The procedure of voting on sentence is the same as for voting on finding. The computation of fractions is in the same manner. (Par. 80).

".....Reasonable Doubt (Par. 78).--In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. By 'reasonable doubt' is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere probability that the accused is guilty.

"The rule as to reasonable doubt extends to every element of the offense. Thus, if, in a trial for assault with intent to kill, a reasonable doubt exists as to such intent, the accused can not properly be convicted as charged, although he might be convicted of the lesser included offense of assault. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to such element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental disease, defect, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

"A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inference from them.
....."

3. Public Law 759--80th Congress, Chapter 625--2D Session

"SEC. 216. Article 31 is amended to read as follows:

"ART. 31. METHOD OF VOTING.--Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court. The law member of a general court-martial or the president of a special court-martial, shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: Provided, That unless such ruling be made by the law member of a general court-martial, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: And provided further, That any such ruling made by the law member of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law member may in any case consult with the court, in closed session, before making a ruling, and may change any ruling made at any time during the trial. It shall be the duty of the law member of a general or the president of a special court-martial before a vote is taken to advise the court that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted; if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; that the burden of proof to establish the guilt of the accused is upon the Government."

"SEC. 220. Article 43 is amended to read as follows:

"ART. 43. DEATH SENTENCE--WHEN LITUL: VOTE ON FINDINGS AND SENTENCE.--No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the

vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. Conviction of any offense for which the death sentence is not mandatory and any sentence to confinement not in excess of ten years, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 50. Sentences, how determined.--No person shall be sentenced by a court martial to suffer death, except by the concurrence of two-thirds of the members present, and in the cases where such punishment is expressly provided in these articles. All other sentences may be determined by a majority of votes."

2. Naval Courts and Boards

"SEC. 400. Duties of judge advocate during trial.-- During the trial the judge advocate conducts the case for the Government. He executes all orders of the court; reads the convening order; administers the oath to the members, reporter, and interpreter; arraigns the accused; examines witnesses; and is responsible for the keeping of a complete and accurate record of the proceedings.

"While the court is in open session, it is the duty of the judge advocate to advise the court in all matters of fact and of law. On every occasion when the court demands his opinion he is bound to give it freely and fully; and, even when it is not requested, to caution the court against any deviation from essential form in its proceedings, or against any act or ruling in violation of law or material justice.

"He shall at all times exercise great care in regard to the authenticity of any statements he may make to the court.

"The accused and his counsel have a right to the opinion of the judge advocate, in or out of court, upon any question of law arising out of the proceedings. The judge advocate shall acquaint himself with the rules of evidence, and apply them in determining the admissibility of evidence. He shall offer only such evidence as is properly admissible. When in doubt, he shall offer the evidence. The judge advocate is particularly to object to the admission of improper evidence, and he shall point out to the court the irrelevancy of any evidence that may be adduced which does not bear upon the matter under investigation. Should the advice of the judge advocate be disregarded by the court, he shall be allowed to enter his opinion upon the record. Under such circumstances it is also proper for the court to record the reasons for its decision. The minutes of opinion and decision are made for the information of the reviewing authority, who should have the error, on whichever side it may be found, brought fairly under his consideration, but neither the judge advocate, the accused, nor any member of the court has any right to enter an exception or protest on the record."

(Recorder of summary court-martial has same duties of judge advocate of general court).

"SEC. 370. General duties of members.--In general, the members of the court as a body finally decide upon all questions as to the admissibility of evidence, and pass upon all questions presented to the court during the course of the proceedings."

"SEC. 371. Voting.--The vote of each member upon a question arising during the progress of trial--as, for instance, the competency of members or witnesses--has equal weight, and, in taking the opinion of the court, the junior member shall vote first, *viva voce*, and then the others in inverse order of their seniority. In the event of a tie vote upon a motion or objection, the same is not sustained. Where evidence is taken upon such questions the issue is determined by a preponderance of the evidence--that is, by the evidence which best accords with reason and probability--and the party having the affirmative need not prove beyond a reasonable doubt. Where there is a majority, the view of the majority becomes the decision of the court."

"SEC. 425. Method of arriving at findings.--The court is closed to deliberation upon its findings, except where the accused has plead guilty to all specifications and charges, and it is patent that the findings will be simply 'proved by plea' and 'guilty'. In arriving at the findings, the plea of the accused, the evidence adduced, and the arguments made are to be carefully considered. After the court has sufficiently deliberated, the president of the court shall, upon each specification of each charge, beginning with the first; put the question whether the specification is 'proved, 'not proved', or 'proved in part.' Each member shall write 'proved, 'not proved', or 'proved in part'--and if so, what part--over his signature, and shall hand his vote to the president of the court. The latter, after he has received all the votes upon each specification, shall read them aloud without disclosing how each member voted; Likewise, in the case of a general court martial, after the members have voted upon all the specifications of any charge, they shall in the same manner vote as to whether the accused is of such charge 'guilty', 'not guilty', or 'guilty in a less degree than charged'--and if so, in what degree. No written minutes of the votes shall be preserved, unless so ordered by the unanimous vote of the court. The decision of a majority becomes the finding of the court. When there is a tie vote upon any of the findings, the accused is given the benefit thereof and the result is recorded in that way which is the more favorable to the accused."

"SEC. 443. Method of arriving at sentence.--When the court has been closed for the purpose of determining the sentence, each member shall write down and subscribe the measure of punishment which he may think the accused ought to receive and hand his vote to the president, who shall, after receiving all the votes, read them aloud. Except in the case of a death sentence, which requires the concurrence of two-thirds of the members present, all sentences may be determined by a majority of votes. If the requisite number do not agree upon the nature and degree of the punishment to be inflicted, the president proceeds in the following manner to obtain a decision: He shall begin with the mildest punishment that has been proposed and, after reading it aloud, shall ask the members successively, beginning with the junior in rank. 'Shall this be the sentence of the court?' And every member shall vote viva voce, and the president shall note the votes. Should there be no decision, the president shall,

in the same manner as before, obtain a vote on the next mildest punishment, and shall so continue until a sentence is decided upon. A tie vote on any sentence should be reconsidered, with a view to obtaining a majority for or against before passing on to the next sentence."

"SEC. 426. Reasonable doubt.--The accused shall not be found guilty of any charge or specification or of any offense included in it unless a majority of the court are convinced of his guilt beyond a reasonable doubt. (See sec. 159.)"

"SEC. 159. Reasonable doubt defined.--By reasonable doubt is meant an honest, substantial, misgiving generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony, nor is it a doubt born of a merciful inclination to permit the accused to escape conviction nor prompted by sympathy for him or those connected with him. Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of a mistake. A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, one can candidly say that one is not satisfied of the defendant's guilt, he has a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, one can truthfully say that one has an abiding conviction of the defendant's guilt such as one would be willing to act upon in the more weighty and important matters relating to one's own affairs, he has no reasonable doubt. A moral certainty of guilt persuaded by the proof calls for conviction. When such has been established, a court can not more properly acquit than could it convict when there has been an insufficiency of proof."

3. Proposed Navy Bill

"SEC. 47.

"ART. 28 (a) (1) Every finding shall be determined by a majority vote. A tie vote shall be a determination in favor of the accused. The court shall announce its findings in open court as soon as they have been determined.

"(c) No person shall be sentenced to death, except by the concurrence of all the members of the court martial, and then only for the offenses for which the punishment of death is expressly provided in article 8 of these Articles subject to any exceptions which the President may have prescribed under 33 (b) of these Articles; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members. All other sentences by general or summary court martial shall be determined by a two-thirds vote of the members....."

"SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

"ART. 24 (b) For every general court martial, the convening authority shall appoint: (2) a judge advocate, whose duties it shall be (1) to advise the court on all matters of law arising during the trial of the case; (2) to rule on interlocutory questions, except challenges; (3) in open court, to instruct the court upon the law of the case; and (4) to perform such other duties as the Secretary of the Navy may prescribe: Provided, That the judge advocate may be overruled by a majority vote of the court, in which case the reasons therefor shall be spread upon the record: Provided further, That the judge advocate shall be an officer certified by The Judge Advocate General as qualified to perform the duties herein prescribed and who shall be responsible to The Judge Advocate General for the performance thereof: And provided further, That the judge advocate shall be subject to challenge."

III. Differences

1. Methods of Voting and Number of Required Votes.

Under the provisions of the amended articles of war, all votes upon question of challenge, findings, and sentence are by secret written ballot, while under the proposed Navy Bill, there is no provision for secret written ballot on these questions. Current naval procedure for voting on challenges is by voice vote starting with the junior member; for voting on findings is by signed ballot; for sentence by signed ballot.

Under the amended articles of war, the junior member of the court counts the votes, and is checked by the president who announces the result. The proposed Navy bill contains no provisions for counting the votes, but under present Navy practice, the president receives the written votes and reads them aloud, without disclosing how each member voted.

Questions of challenge are decided in both services by a majority vote, and in case of a tie vote, both services deny the challenge.

In order to convict of an offense the amended A.W. require a two-thirds vote, while the Navy bill requires only a majority vote.

In order to convict of an offense for which the death penalty is mandatory by law, under the amended articles of war, all members of the court must concur. The Navy has no offenses for which there is a mandatory death penalty.

In order to impose a death sentence, both bills require the concurrence of all members.

In order to impose a sentence of life imprisonment or of confinement for more than ten years, a vote of three-fourths of the members is required by both bills, which also agree in that all other sentences may be imposed by a vote of two-thirds of the court.

2. Law Member and Interlocutory Questions.

Under the amended articles of war, the law member of a general court-martial rules in open court on interlocutory questions other than challenge, and his rulings are final except in regard to a motion for a finding of not guilty or questions as to the accused's sanity. Under the proposed Navy bill none of "judge advocate's" rulings are final. The procedure in both the Army and Navy is the same when the law member or "judge advocate's" ruling is not final--a member of the court may object to the ruling and the court is closed. After discussion, a voice vote, beginning with the junior member, is taken on the question, and the vote of a majority is decisive.

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The president of an Army special court-martial makes rulings similar to those of the law member of a general court-martial, but none of his rulings are final and all are subject to objection and voice vote as for any non-final ruling as above. The A.G.N. have no provision for interlocutory rulings on summary courts-martial and all interlocutory questions are decided by voice vote of the court.

In addition A.W. 31 as amended allows the law member to consult with the court in closed session before making any ruling and permits him to change any ruling made at any time during the trial. The proposed A.G.N. have no such provision.

However the proposed A.G.N. require the court to set forth on the record the reasons why the court overruled the "judge advocate", while the amended Articles of War have no similar provision.

Another difference is in that the law member is required to give an instruction on reasonable doubt and burden of proof as stated in A.W. 31 as amended, while the proposed Navy bill states that it is the duty of the judge advocate to instruct the court on the law of the case in open court.

Further duties of the law member under the amended Articles of War may be prescribed by the President (A.W. 8), and further duties of the "judge advocate" may be prescribed by the Secretary of the Navy under the proposed Navy bill.

(In regard to other discussion on the function and duties of the law member of "judge advocate", see the discussion under A.W. 8).

Under the amended Articles of War, provision is made for a motion for a finding of not guilty, while the Navy bill does not provide for such a motion. However, the Army has had such a motion without statutory implementation, and under the amended A.G.N., the Secretary of the Navy has authority to prescribe rules of procedure.

3. Reasonable Doubt.

The Army and Navy definitions of reasonable doubt are substantially the same.

IV. Recommendations

1. Methods of Voting and Number of Required Votes

(a) Votes on Findings

The Keefe Board (Navy) recommended that voting on findings be by secret written ballot, that a two-thirds vote be required for conviction, that a unanimous vote on conviction be prerequisite for imposition of death penalty. The objections to the two-thirds rule considered by the board were (1) should a minority be allowed to acquit? and (2) if peremptory challenges were allowed in Navy Courts-martial, could the defense make conviction more difficult by challenging one member peremptorily? The Keefe Board also recommended announcement of findings immediately after the vote. This recommendation is incorporated in the proposed Navy bill.

The McGuire Articles and White Board (Navy) recommend conviction by a majority, a tie being an acquittal and findings to be announced immediately.

The two Ballantine Reports make no recommendations on these points.

The Vanderbilt Report (Army) recommended announcement of findings as soon as reached.

The Navy JAG recommends adoption of secret written ballot, majority vote to convict, tie to acquit, and announcement of findings.

(b) Votes on Sentences

The Keefe Report favors secret written ballot on all voting, and unanimous vote for imposition of death penalty. The Board also recommended (1) that the court be furnished with as much information as possible on the background of the accused and when feasible to do so, to postpone sentence for a reasonable time after conviction for the purpose of studying the various sentence factors; (2) that sentence be announced immediately after agreed upon by court; and (3) that credit as part of the sentence be given for time in confinement before trial.

The McGuire Articles and White Report recommend (1) majority vote for sentence except for death sentence, for which vote should be unanimous, (2) sentence to be announced by court, and (3) allow court to place accused on probation with execution of sentence suspend.

The Second Ballantine Report favored announcement of the sentence by the court.

The Vanderbilt Report favored immediate announcement of the sentence.

The Navy JAG recommended adoption of the Army requirements of unanimous vote for death, three-fourths for life or more than ten years, two-thirds for all other sentences, secret written ballot, and sentence to be announced by court.

(c) Voting on Challenges and Non-Final Rulings

There are no recommendations in the various reports on changing the method of voting on challenges (Army-secret written, Navy-voice). Nor are there any recommendations on the method of voting on interlocutory questions (both - oral vote beginning with junior member).

Discussion of finality of law member and "judge advocate" rulings and challenge of law member and "judge advocate" are discussed infra.

2. Law Member and Interlocutory Questions

(a) The Law Member or Judge Advocate in General.

The McGuire Report recommended that duties of the Navy judge advocate be split so that there would be two officials of a court, a prosecutor, functioning in the manner indicated by that title, and a judge advocate, who was to act in a manner similar to a civil judge sitting with a jury. The McGuire Committee thought that having one officer acting both as prosecutor and adviser on law was completely inconsistent with the elementary principles of justice. In addition, this officer was to be independent of command and to be under the direct control of the Judge Advocate General. This officer was to summon all witnesses, rule on all questions of admissibility of evidence, give impartial

advice on law and procedure to the prosecutor, accused and his counsel, and to the court; question witnesses as he believed necessary for the full disclosure of the facts; instruct the court prior to deliberations on findings; and keep the record.

The White, Ballantine, and Keefe Committees and the JAG all recommended the designation of such an officer but varied as to the final effect of the judge advocate's rulings and the extent of his duties.

(Qualifications and whether the judge advocate should be a member entitled to vote are considered under A.W. 8).

(b) Finality of Rulings

The McGuire and White Reports recommended that the judge advocate should rule on all questions of admissibility of evidence and challenges and such rulings should be final.

The Second Ballantine Report followed the McGuire recommendations, but recommended that such rulings not be binding on the court, but that where the court overruled the judge advocate, the reason for doing so should be placed in the record.

The Keefe Report recommended that the judge advocate rule on admissibility of evidence and all interlocutory questions of law except challenges, and referred for further study the question whether such rulings should be binding.

The Vanderbilt Report recommended that the law members' rulings be binding except as to the sufficiency of the evidence.

The Secretary of War recommended that the law members' rulings should be final except to challenges.

The Navy JAG recommended that the judge advocate should rule on all interlocutory questions except challenges, including admissibility of evidence and privileges of witnesses, but that such rulings be subject to being overruled by the court, in which case, the reasons therefor to be included in the record.

(c) Instructions on the Law of the Case

The McGuire, Ballantine, White, and Keefe Reports recommended that the judge advocate give instructions on the law of the case, which would be included in the record, before deliberation and vote on findings.

The Keefe Report would make prejudicial error in the judge advocate's rulings cause for sitting aside conviction on review.

The Navy JAG recommended that the judge advocate read to the court the elements of the offenses charged, elements of lesser and included offenses, and the elements of proof required before the prosecution begins. Upon request of a member or his own motion he might repeat such reading at any time during the trial, especially after a motion to dismiss and prior to deliberation and vote on the findings.

As a result of hearings, the Armed Services Committee inserted a requirement in the Amended Articles of War that the law member instruct the court on burden of proof and reasonable doubt.

(d) Motion for a Finding of not Guilty.

Both the first Ballantine and the Keefe Report recommended that Navy procedure include a motion for a finding of not guilty at the end of the prosecutions case. The Keefe Report would have the judge advocate rule on this motion, subject to being overruled by the court.

The Navy JAG recommends following present Army practice.

(e) Special Courts-martial

No provision is made for a law member or judge advocate for special or summary (Navy) courts-martial. (See part IV, Art. War 9). Therefore, interlocutory questions would be decided by majority voice vote of Navy summary courts, and by the president of Army special courts-martial subject to objection by the court.

3. Reasonable Doubt

There is no comment in the McGuire, Ballantine, Keefe, White, or Vanderbilt Reports except that it be the duty of the Judge Advocate or law member to instruct the court as to reasonable doubt.

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Uniform Code of Military Justice

Subject: Correction - Number of Votes Required
for Sentence.

III. Differences

<u>Punishment</u>	<u>Navy</u>	<u>Army</u>
Death	All	All
Life imprisonment	Three-fourths	Three-fourths
Confinement - more than 10 years	Three-fourths	Three-fourths
Confinement - <u>not</u> more than 10 years	Two-thirds	Two-thirds
All other sentences		
(Including dismissal, discharge, etc)	Two-thirds	<u>Majority</u>

FEL-1

Uniform Code of Military Justice

Subject: Lesser Included Offenses and Basis of Sentence.
A.W. 31, 43.

I. Army Provisions

1. Articles of War

No comparable provisions.

2. Manual for Courts-Martial

Par. 78c.....

"Lesser Included Offense.-- If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substantial matter. A familiar instance is a finding of guilty of absence without leave under a charge of desertion. Such a finding may be thus worded when the specification is in the usual form: Of the specification: Guilty except the words 'desert' and 'in desertion,' substituting therefor, respectively, the words 'absent himself without leave from' and 'without leave', of the excepted words not guilty, of the substituted words guilty.

"In the discussion of certain offenses some of the included offenses are stated."

"Par. 80a. COURTS-MARTIAL--PROCEDURE--Sentence.--

"a. General.--Basis for Determining.--To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline.

"In deliberating upon the sentence the court will consider only such evidence of previous convictions as relate to offenses committed in the case of an enlisted man for general prisoner during the one year, and in the case of others during the three years next preceding the commission of any offense of which the accused has been found guilty by the court.

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"The imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute.

"If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect.

"For the information of the reviewing authority a court-martial may formulate for inclusion in the record a brief statement of the reasons for the sentence."

3. Public Law 759—80th Congress, Chapter 625, 2D Session

No comparable provisions.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 51. Adequate punishment; recommendation to mercy.--

"It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."

2. Naval Courts and Boards

"Sec. 429. When specification is proved in part.--

"It is a peculiarity of the finding at military law that a court martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of the specification only, excepting the remainder; or, finding him guilty of the whole (or any part), to substitute correct words or allegations in the place of such as are shown by the evidence to be incorrect. Provided the exceptions or substitutions leave the specification still supporting the charge (or in the case of a summary court martial still stating the same or a lesser included offense), the court may then find the accused guilty. Familiar instances of the exercise of this authority occur when there is a mistake in name and rank or rating, or an erroneous averment of time or place, or an incorrect statement as to amount or value. But the authority

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to find guilty of a lesser included offense or to make exceptions and substitutions in the findings does not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged or specified. Care must be taken in all such findings not to except the words which express the gravamen of the offense in law. In making exceptions and substitutions, the court must see that the specification as found proved is grammatically complete."

"Sec. 430. 'Guilty in a less degree than charged.'--

"If the evidence prove the commission of an offense less in degree than that specified, yet included in it, the court may except words of the specification, substitute others, pronounce what words are not proved and what words are proved, and then find the accused guilty in a less degree than charged, guilty of the lesser included offense. Of this form of finding, the most familiar example is the finding of guilty of 'absence from station and duty without leave (or after leave has expired)' upon a charge of 'desertion.'

"Where one of the articles of the articles for the government of the Navy does not include 'attempt' in its express terms, if the specification is found proved so as to show an attempt to commit the offense charged, and not the completed offense, the accused should be found guilty of the charge in a less degree than charged, guilty of one of the general charges.

"In a general court-martial case where there are two or more specifications under a charge and some specifications are found proved, and others proved in part, and as thus proved those latter support a charge of a lesser included offense, the findings on the charge should be recorded, for example: '* * * of the first charge guilty by the findings on the first and third specifications, and of the first charge guilty in a less degree than charged, guilty of * * * by the findings on the second and fourth specifications.' "

"Sec. 436. Previous convictions: Introduced.--

"The judge advocate shall, immediately after recording the findings, except where such findings have resulted in an acquittal, state whether or not he has any record of previous convictions by courts martial. If not, an entry to this effect shall be made in the record, but the court need not be reopened. If there be such record, the court shall be opened and the record shall be submitted to the accused for opportunity to object to its admission. If there be no valid objection, it shall be read by the judge advocate in the presence of all parties to the trial."

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"Sec. 438. Same: Must relate to current enlistment or current extension of enlistment—Exceptions.—

"The general rule is that the record of previous convictions, in order to be admissible, must relate to the current enlistment or current extension of the accused, if an enlisted man. On the other hand, when the last enlistment was terminated by sentence of court martial or by discharge as undesirable by order of the department, or where the accused deserted and subsequently fraudulently enlisted, all convictions occurring in the prior enlistment are admissible."

"Sec. 442. Matter in mitigation.—

"After the findings the accused may introduce matter into mitigation or extenuation (see sections 164 and 165), or matter from his service record or testimony as to past character."

"Sec. 164. Character evidence.—

"Character evidence is of two types, namely, (a) that introduced before the finding and tending to prove the guilt or innocence of the accused and (b) that which is introduced after the finding and which is, strictly speaking, not evidence but is more properly termed matter in mitigation.

"Matter in mitigation, referred to in (b) above, has for its purpose the lessening of the punishment to be assigned by the court or the furnishing of grounds for a recommendation to clemency. As thus offered it has a wide latitude and is not, as in (a), limited to the general good character of the accused nor to the nature of the charges. Such matter may include particular acts of good conduct, bravery, etc., and may exhibit the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any of the other traits that go to make a good officer or enlisted man."

"Sec. 165. Matter admissible on behalf of accused after finding.—

"After the court has arrived at its finding, following either a plea of guilty or not guilty, the accused may introduce (1) matter in mitigation of the punishment, which is described in the preceding section, and (2) matter in extenuation of the offense. This latter may properly explain the circumstances surrounding the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification. If matter purporting to be in extenuation or mitigation is introduced after a plea of guilty and is found to controvert any element of the

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offense, the court should proceed as set forth in section 417. The accused may also at this time introduce matter from his service record and testimony as to past character."

"Sec. 444. Punishment to be adjudged.--

"It is made by law the duty of courts martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense committed. In so doing due regard must be had to the requirements of the articles for the government of the Navy and the limitations prescribed by the President for punishments in time of peace. In cases where there has been evidence in mitigation or extenuation, a court martial may recommend the person convicted to clemency; this clemency, however, is to be exercised only by the reviewing authorities, who are expressly clothed with the power to mitigate or remit punishment. Sentences must be neither cruel nor unusual, and must accord with the common law of the land and the customs of war."

3. Proposed Navy Bill

"ART. 28 (a)

"(2) A court martial may convict the accused of the offense charged, or a lesser and included offense, or an attempt of either, or of a lesser but no included offense. A lesser but not included offense shall be construed to mean an offense which is not included in the offense charged and only because of proof of criminal negligence instead of criminal intent.

"(b) It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."

III. Differences

1. Lesser Included Offenses.

Both services provide for conviction of lesser included offenses; however, the proposed Navy bill provides for the conviction of an offense where criminal negligence is proved instead of criminal intent. This the Navy bill would call a "lesser but not included offense."

(This terminology might be confusing, as it might lead the layman to believe that a court could convict of any lesser offense.)

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2. Basis of Sentence.

Under the amended Articles of War, a court in determining sentences is permitted to take mitigating and extenuating circumstances into consideration, while the proposed Navy bill seems to retain the present practice of not allowing the court to consider such circumstances in adjudging sentences, but allows the court to make recommendations as to clemency. According to many critics, this procedure allows the convening authority to fix the sentence rather than the court, due to the fact that Naval courts-martial felt bound to impose a maximum or heavy sentence and leave clemency entirely in the hands of the convening authority in accordance with the mandate of Naval Courts and Boards.

In considering previous convictions, an Army court may only look at an enlisted man's conviction within the previous year, while Naval courts may consider convictions within the present enlistment.

IV. Recommendations

McGuire Articles:

"Article 4 (c) (2) Determination of sentence. It shall be the duty of the court, in all cases of conviction, to impose adequate punishment. The court may, in appropriate cases, suspend the execution of the sentence and place the accused on probation for a specified period. No person shall be sentenced to suffer death, except by the unanimous concurrence of the members present, and only in cases where such punishment is expressly provided in these articles. All other sentences may be determined by a majority vote."

White Articles (Study No. 2):

"Article 10 (c) (2) Determination of sentence. It shall be the duty of the court, in all cases of conviction, to impose adequate punishment. The court may, in appropriate cases, suspend the execution of the sentence and place the accused on probation for a specified period."

First Ballantine Report:

"14. Sentences. A study of over 1600 cases cleared through the Office of the Judge Advocate General in the months of April, May, and June of 1943 shows that over three-quarters of sentences adjudged by general courts martial are substantially mitigated in the process of review.

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"Under the existing procedure it is the duty of the court, in all cases of conviction, to 'adjudge a punishment adequate to the nature of the offense' and 'due regard must be had to the requirements of the Articles for the Government of the Navy and the limitations prescribed by the President for punishment in time of peace.' At the same time it is the privilege of the members of the court individually to 'recommend the person convicted as deserving clemency' and to state on the record their reasons for so doing. Clemency, however, 'is to be exercised only by reviewing authorities who are expressly clothed with the power to mitigate or remit punishment.' Moreover, the courts are admonished not to 'presume upon the prerogative of the reviewing authority in exercising clemency'; for such action, so it is declared, 'would be in effect, a reflection upon the judgment of the reviewing authority.' Inconsistently, courts are expressly authorized to receive matter in mitigation for the purpose of lessening 'the punishment to be assigned by the court.'

"The British system, even with due allowance for fundamental differences, furnishes a sharp contrast in this respect. 'In awarding sentence, the court should take into consideration the former services and any other claims which the accused may lay before them, with a view to his being dealt with more leniently. It is objectionable for a court to award a sentence and then to recommend a prisoner to the favourable consideration of the Admiralty. Such a course throws a responsibility upon others which properly belongs to the court.' (Manual of Naval Law and Court-Martial Procedure, by Stephens, Gifford, and Smith, 4th Edition 1912, pp. 89-90.)

"Except in the matter of determining general policies governing punishments, the court is in the best position to fix sentences. It is the only place in the system where the man himself is actually under observation and appraisal.

"Increase in the powers of courts to determine ultimate punishment might well be accompanied by a procedural change requiring the announcement of findings and sentence in open court at the conclusion of trial. This would augment the sense of responsibility of the court. The prompt, public announcement of sentences as imposed by the courts should have a desirable deterrent effect. In addition, the suggested procedure would have the advantage of affording the accused a fair opportunity to make an informed appeal to the reviewing authority.

"Recommendation: Naval Courts and Boards should be revised to grant general courts martial larger powers and responsibilities for fixing sentences."

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Second Ballantine Report:

No comment.

Keeffe Report:

"RECOMMENDATION:

"That the Advisory Council consider whether the Rules of Procedure should provide that the complete record of past offenses, civilian and military, including record of past punishments, be available after findings by the court for the purpose of sentence.

"It is suggested that courts-martial be given greater discretion in the determination of sentences, and that to this end, courts be encouraged to consider, in arriving at proper punishment, not only the facts and circumstances of the offense, including matters in aggravation and prior convictions, but also matters in extenuation and mitigation which the accused may lay before them. Clemency and the imposition of just sentences should not be confused.

"That the Advisory Council consider adoption of a requirement that in every general court-martial case where it is feasible, a report of psychiatric examination should be submitted to the court, after the findings, and before a sentence is fixed. Such report should be accompanied by information concerning the accused's family background, education, environment, employment and economic status.

"A thorough study should be made by the Advisory Council of the general problem of offenders having personality disorders, and such questions considered as whether an immediate administrative discharge should be permitted for such offenders guilty of purely military offenses.

"Recommendation of Clemency by the Court:

"It has already been pointed out in this section that evidence or statements offered by the accused in extenuation or mitigation are properly factors which should be considered by the court in passing upon the sentences. The weight to be given such evidence or statements can best be evaluated by the court. Heretofore, these matters have been regarded as matters of clemency for the consideration of the reviewing authority alone. Members of courts have been empowered to recommend clemency in proper cases, but are not supposed to infringe upon the powers of the reviewing authority by giving weight to such matters when determining sentence. The Board has suggested that discretion be given the court

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in the determination of sentence, with full power to consider all circumstances in extenuation or mitigation. If this suggestion is adopted, there will be no need to recommend clemency to a superior authority. Whatever clemency is indicated can be reflected by a suspension of sentence on probation.

"This of course relates to exercise of clemency in the first instance. It has nothing to do with subsequent clemency, extended by the Navy Department, either upon initial review of the case, or upon periodic clemency review."

Vanderbilt Report:

"3. The Manual should contain a statement that it is the duty of courts-martial to exercise their own judgment in imposing sentences and that they should not pronounce sentences which they know to be excessive, relying on the reviewing authority to reduce them.

"All courts-martial should announce their findings as soon as reached and, in case of conviction, should hear arguments of counsel on questions of sentence and that upon reaching a determination as to sentence, should announce the sentence."

Uniform Code of Military Justice

Subject: Contempts

I. Army Provisions

1. Articles of War.

"ART. 32. Contempts.-- A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: Provided, That such punishment shall in no case exceed one month's confinement, or a fine of \$100, or both.

2. Manual for Courts-Martial, Sec. 101.

"The conduct described in A. W. 32 constitutes a direct contempt and is punishable by one month's confinement, or a fine of \$100, or both. Indirect or constructive contempts, (i.e., those not committed in the presence or immediate proximity of the court), and the conduct and acts described or referred to in A. W. 23 are not included, may be punishable under other provisions of law, such as for instance, A. W. 23, in the case of persons not subject to military law, and A. W. 96 in the case of persons so subject.

"The words "any person" as used in A.W. 32 includes all persons whether subject to military law or not. This construction, however, does not apply to members of the court. The court has no power to punish its members." However, improper conduct on the part of any member is considered a military offense.

"Where a contempt punishable under A. W. 32 has been committed, the court may, after giving the party an opportunity to be heard, impose sentence within the limits of A.W. 32. Before sentence can be executed, it must be approved by the reviewing authority. The court may if it desires cause the removal of the offender and in a proper case initiate a prosecution against him before a civil or military court."

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No changes.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 42(a) Contempts of court.-- Whenever any person refuses to give his evidence or to give it in the manner provided by these articles, or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him

for any time not exceeding two months: Provided, That the person charged shall, at his own request but not otherwise, be a competent witness before a court martial or court of inquiry, and his failure to make such request shall not create any presumption against him (R. S. sec. 1624, Art. 42; Mar. 16, 1878, c. 37, 20 Stat. 30).

2. Naval Courts and Boards, page 180-1.

"Authority of naval courts to punish contempts is contained in A.G.N. 42. The article is not construed as extending the authority to punish for contempt to a summary court martial or deck court.

"When a witness is charged with contempt, he should be permitted to reply. The action taken is properly summary; a formal trial is not required. If the reply is satisfactory, the proceedings for contempt may be ended." Where a civilian witness is adjudged guilty of contempt, the matter shall be certified to the U. S. district attorney for the necessary action in the premises as required by law.

3. Proposed Navy Bill.

"SEC. 32. Article 42 is renumbered as article 35 and amended to read as follows:

"ART. 35(b) Any person not subject to the Articles for the Government of the Navy.....who refuses to give his evidence or to give it in the manner provided by these Articles, or behaves with contempt of court, shall be deemed guilty of a misdemeanor.....and.....shall be punished in the district court of the United States."

"ART. 35(c) Whenever any person, subject to the Articles for the Government of the Navy, refuses to give his evidence before a general or summary court martial or court of inquiry or to give it in the manner provided by these Articles, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not exceeding two months."

III. Differences

1. 13 Corpus Juris 5, Sec. 3 defines direct contempt as an open insult committed in the presence of the court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority, or improper conduct so near to the court as to obstruct its proceedings. Under the provisions of A.W. 32, a military court is limited to punish for contempt any person who degrades the dignity of the tribunal or obstructs its proceedings by creating disorders. The proposed

A.G.N. 35(c), relating to persons subject to naval law, and its corresponding proviso in Art. 35(b), referring to persons not so subject, is broader in concept and conforms substantially to the above definition.

2. Any military tribunal may summarily try and punish an offender, military or civil, for contemptuous behavior in violation of A.W. 32. The proposed Navy bill, on the other hand, confers jurisdiction only upon general and summary courts, and courts of inquiry to penalize for contempt persons subject to naval law. However, where the violator is not subject to the Articles the matter may be certified to the U.S. district attorney, Art. 35(b).
3. A.W. 32 authorizes punishment not to exceed one month's imprisonment or \$100 or both, subject to approval of the reviewing authority. The maximum punishment applicable to persons subject to naval law shall not exceed two months confinement, A.G.N. 35(c). Sentences adjudged for contempt by the herein authorized naval courts are not subject to review.

IV. Recommendations

1. McGuire Report, 1946.
 - (a) General and summary courts martial, and courts of inquiry may punish any person subject to A.G.N. who refuses to give testimony or commits contempt.
 - (b) Punishment shall consist of two months' pay or two months' confinement.
 - (c) Persons may appeal to Secretary of the Navy within 10 days. Execution of sentence to be suspended pending decision on appeal.
 - (d) Any civilian.....who refuses to testify may be prosecuted in the District Court of the U.S.
2. Keesffe Report.

Repeal A.G.N. 42(a). Enact new article empowering general and summary courts martial, and courts of inquiry to punish any person for contempt of court.
3. Judge Advocate General (Navy) Recommendations.

Suggests empowering general and summary courts-martial, and courts of inquiry to punish any person subject to A.G.N., who are guilty of direct contempts, by two (2) months confinement.

Persons, subject to A.G.N., who willfully neglect or refuse to appear or to produce documentary evidence when duly subpoenaed may be punished under the general article for conduct to the prejudice of good order and discipline by separate disciplinary action. Contempts by civilians should be added to offenses constituting misdemeanors.

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Uniform Code of Military Justice

Subject: Record of Proceedings -- A.W. 33-34

I. Army Provisions.

1. Articles of War.

"ART. 33. Records - general courts-martial.-- Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record cannot be authenticated by the president and trial judge advocate, by reason of the death, disability or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court."

"ART. 34. Records - Special and Summary Courts Martial.-- Each special court martial and each summary court martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe."

"ART. 17. Trial judge advocate to prosecute; Counsel to defend.-- The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall under the direction of the court, prepare the record of its proceedings.
....."

"ART. 115. Appointment of Reporters and Interpreters.-- Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand....."

2. Manual for Courts-Martial.

"SEC. 85. Courts-Martial - Records - General Courts-Martial.

"a. General and miscellaneous....."

"The record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it. It is immaterial to the sufficiency of a record whether the same was kept or written by the trial judge advocate or by a clerk or a reporter acting under his direction. The trial judge advocate will preserve or cause to be preserved any notes, stenographic or other, from which the record of trial is prepared.

These notes may be destroyed after final disposition of the case under A.W. 48, 50 $\frac{1}{2}$, or 51....."

"b. Contents;..... The record must show all the essential jurisdictional facts, and will set forth a complete history of the proceedings had in open court in a case, and all the material conclusions arrived at in both open and closed sessions. For details of contents and certain exceptions to the foregoing general rule, see App. 6....."

"SEC. 86. Courts-Martial - Records - Special and Summary Courts-Martial.-- Except as otherwise indicated in the form of record of trial by special court-martial (App. 7) or elsewhere, the requirements of 85 are in general applicable to records of special courts-martial. As to records of summary courts-martial, see App. 8.

"At the conclusion of the trial of each case a summary court will record and sign its findings and the acquittal or sentence as indicated by the form and will transmit the record of trial and any papers received with the charges or as evidence without letter of transmittal to the appointing authority or his successor."

"SEC. 46. Courts-Martial - Personnel - Reporter.

"a. Authority for appointment or detail....."

"Subject to such exceptions as may be made by appointing authorities, and within the limitations of the statutes quoted above, the appointment of reporters or the detail of enlisted men to serve as stenographic reporters is hereby authorized, except for summary courts-martial and except for special courts-martial, when the appointing authority does not direct that the testimony be reduced to writing....."

3. Public Law 759--80th Congress, 2D Session

Articles of War 33, 34, 17, and 115 are not changed by P.L. 759.

"SEC. 210. Article 13 is amended to read as follows:

'ART. 13.....

'Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate

review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: Provided further, That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case."

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 52. Authentication of judgment.-- The judgment of every court martial shall be authenticated by the signature of the president, and of every member who may be present when said judgment is pronounced, and also of the judge advocate (R. S., sec. 1624, art. 52)."

"ART. 64 (f). Records of proceedings; filing and review.-- The records of the proceedings of deck courts shall contain such matters only as are necessary to enable the reviewing authorities to act intelligently thereon, except that if the party accused demands it within thirty days after the decision of the deck court shall become known to him, the entire record or so much as he desires shall be sent to the reviewing authority. Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall be filed in, the office of the Judge Advocate General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy for his action (Feb. 16, 1909, c. 131, sec. 5, 35 Stat. 621)."

2. Naval Courts and Boards.

"SEC. 517.-- Records of proceedings.-- Every court-martial will keep an accurate record of its proceedings. The judge advocate is directly responsible for seeing that this is done. The record of a deck court shall be made on the card furnished by the Navy Department. The record of proceedings in each case tried shall set forth the names of the members of the court who were present during the trial; that the accused was furnished a copy of the charges and specifications against him; that the precept was read aloud in the presence of the accused; that he was afforded an opportunity to challenge members; and that the members, judge advocate or recorder, reporter, interpreter, and witnesses were duly sworn. It shall further show the arraignment, preliminary motions, pleas, objections, and grounds therefor, all testimony and documentary evidence received, decisions and orders of the court, adjournments, statements and closing arguments, findings and sentence or acquittal; in short, the entire proceedings of the court which are necessary to a complete understanding by the reviewing authority of the whole case and every incident material thereto....."

"SEC. 370. General duties of members.-- In general, the members of the court as a body finally decide upon all questions as to the admissibility of evidence, and pass upon all questions presented to the court during the course of the proceedings. Also, the members of a court as well as the judge advocate, are responsible for the correctness of its record of proceedings."

"SEC. 500. Introductory.-- the term 'judge advocate' shall, in general, include a recorder....."

"SEC. 448. Recordation and authentication of sentence.-- The sentence must be recorded in the judge advocate's own handwriting.....After the sentence has been recorded, the proceedings.....shall be signed by all the members present when judgment is pronounced, and also by the judge advocate. These signatures are for authentication....." (of the judgment).

"SEC. 691. Deck court card,--

("Reverse). Additional information necessary to the completeness of this record, and which has to be forwarded to the Department should be typewritten on thin bond paper uniform in size with this sheet, and attached by pasting on this area. Testimony, etc., is usually retained on board."

3. Proposed Navy Bill.

"SEC. 38. Article 52 is renumbered as Art. 29 and amended to read as follows:

'ART. 29. The record of every general court shall be authenticated by the signatures of the President and of the Judge Advocate; but in case the record cannot be authenticated by the President and the Judge Advocate, by reason of death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the President and by another member in lieu of the Judge Advocate.'

"SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

'ART. 24 (b). For every general court martial, the convening authority shall appoint: (2) a judge advocate, whose duties it shall be..... (4) to perform such other duties as the Secretary of the Navy may prescribe.....'

"SEC. 13. Article 27 is renumbered as Art. 18 and amended to read as follows:

'ART. 18(b) For every summary court martial, the convening authority shall appoint a prosecutor.....'

'ART. 18(c) It shall be the duty of the prosecutor, under such rules of practice, pleading and procedure as the Secretary of the Navy may prescribe,..... (2) to keep the record of proceedings.'

"SEC. 47.

'ART. 16(d). Any person in the naval service under command of the officer by whose order a deck court martial is convened may be detailed to act as clerk thereof.'

'ART. 16(e). The record of the proceedings of deck courts-martial shall contain such matters only as are necessary to enable the reviewing authorities to act thereon.'

III. Differences

1. General Courts-Martial

a. Preparation.

1) Army: Record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it (A.W. 17; AMCM, Sec. 85(a)). It may be kept or written by a clerk or reporter acting under the trial judge advocate's direction (A.W. 115; AMCM, Sec. 46(a)).

2) Navy: The present judge advocate is made responsible for seeing the record is kept (N.C.B., Sec. 517); the members of the court are responsible, with the judge advocate, for its correctness (N.C.B., Sec. 370). The proposed Navy bill does not specify who shall prepare the record of proceedings in a general court martial. Impliedly, it is to be the duty of the proposed Judge Advocate, since he is designated to authenticate it. (See also C.S., A.W. 19 on oaths. The present Navy judge advocate takes an oath that he will keep a true record of the proceedings (A.G.N. 40); under the proposed Navy bill, there is no oath prescribed to be given to the proposed prosecutor. This may indicate an intent that the proposed prosecutor shall not keep the record. The proposed Judge Advocate takes an oath that he will discharge all his duties. Under proposed Navy bill, Sec. 29, new Art. 24(b)(2)(four), the Judge Advocate is required to perform such other duties as SecNav may prescribe; thus there is authority for requiring that the record shall be kept by the Judge Advocate). This would create a difference from the Army system, where the record is prepared by the trial judge advocate, whose function in the Army system is more akin to that of the proposed Navy prosecutor than to that of the proposed Navy Judge Advocate.

b. Authentication.

1) Army: Record is authenticated normally by the president and trial judge advocate.

2) Navy: The present A.G.N. 52 provides that the judgment of the court shall be authenticated by the signature of the president of the court, and of every other member present when the judgment is pronounced. (Cf. also N.C.B., Sec. 448). The proposed Navy bill, Sec. 38, amends Art. 52 to provide that the record of every general court-martial shall be authenticated by the signature of the president of the court and the proposed Judge Advocate. Other members of the court would sign the record only in lieu of the president or Judge Advocate, in case of their death, disability or absence. Again, there is the distinction to be drawn between the Army trial judge advocate, who authenticates the Army record, and the proposed Navy Judge Advocate.

c. Contents and Form.

Army and Navy systems have equivalent provisions as to what the record shall contain. Testimony in both systems is recorded verbatim. See: AMCM, Sec. 85(b), quoted, page 2, of this paper, and N.C.B., Sec. 517, quoted, page 3, of this paper.

As to form, see AMCM, Appendix 6, and N.C.B., Chap. VI.

2. Special (Navy Summary) Courts-Martial

a. Preparation.

1) Army: Record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it (AMCM, Sec. 86). It may be kept or written by a clerk or reporter, but if the appointing authority of the court does not specifically direct that the testimony be reduced to writing, the appointment of a clerk or reporter is not authorized. (AMCM, Sec. 46(a)).

2) Navy: The present recorder is responsible for seeing that the record is kept (N.C.B., Sec. 517); the members of the court are responsible, with the recorder, for its correctness (N.C.B., Sec. 370). Under the proposed Navy bill, the prosecutor would be responsible for seeing the record is kept (Proposed Navy bill, Sec. 19, Art. 18(c)).

b. Authentication.

1) Army: The record shall be authenticated in such manner as may be required by regulations prescribed by the President (A.W. 34). Authentication appears to be the same as that for record of a general court martial.

2) Navy: A.G.N., Art. 52, provides that the judgment of a summary court-martial shall be authenticated by the signature of the president of the court, and of every member who may be

present when judgment is pronounced, and also of the recorder. The proposed Navy bill amends Art. 52, but the amended article covers only the records of general courts-martial. Thus, under the proposed bill, the subject of authentication in the case of a summary court-martial will not be covered in A.G.N.

c. Contents and Form.

1) Army: Under present practice, the special court martial record contains approximately the same material as the record for a general court, except that, if a reporter has not been appointed, a summary only of the testimony and of any oral statements made on behalf of the defense need be recorded, and data as to service, etc., need not be copied. (Cf. AMCM, Appendix 7). AMCM, Sec. 46(a), now provides that a reporter may be appointed only if the convening authority directs that the testimony be reduced to writing. However, P.L. 759, Sec. 210, amending A.W. 13, provides that a special court martial may not adjudge a bad-conduct discharge unless a complete record of the proceedings of oral testimony taken by the court is made in each case. The effect of this would appear to be to require the appointment of a reporter, and the recording of testimony verbatim, in every case, unless the court is to be forestalled from adjudging a bad-conduct discharge.

As to form, see AMCM, Appendix 7.

2) Navy: The record contains the same material as the record for a general court. Testimony and other statements are not summarized in any case (N.C.B., Sec. 517).

As to form, see N.C.B., Chap. VII.

3. Summary (Navy Deck) Courts-Martial

a. Preparation.

1) Army: Prepared by summary court-martial officer (AMCM, Sec. 86); the employment of a clerk or reporter is not authorized (AMCM, Sec. 46(a)).

2) Navy: Prepared by clerk; any person under the command of the convening authority may be detailed to act as clerk (Proposed Navy Bill, Sec. 47, Art. 16(d)). The court martial officer records the findings and sentence.

b. Authentication.

Record is signed by court-martial officer in both systems.

c. Contents and Form.

1) Army: Record is prepared on a printed form which is attached to charge sheet. (See: NMCM, Appendix 3 and Appendix 8.)

Testimony is not recorded.

2) Navy: Record is prepared on a printed form (See: N.C.B., Chapter VIII). Testimony is recorded verbatim but is retained (N.C.B., Sec. 691). The record itself shall contain only such matters as are necessary to enable the reviewing authorities to act thereon. (Proposed Navy Bill, Sec. 47, Art. 16(e).)

IV. Recommendations

1. 1st. Ballantine Report (P. 17):

Administrative recommendation that for summary courts-martial a printed form be made available for use in preparing the record when accused pleads guilty. Recommendation accepted in Navy JAG recommendations.

2. 2d. Ballantine Report (P. 7):

Recommendation that the proposed Judge Advocate of a GCM shall keep, with the assistance of a clerk, the record of proceedings. This report distinguishes between the Judge Advocate and the prosecutor of a Navy general court martial.

3. Keefe Report:

Comments on brevity of record in cases where a plea of guilty. Recommendation that the Advisory Council consider including in the record of guilty cases, first, the complainants testimony taken under oath before a sentence, and second, the pre-trial report of investigation.

The defense counsel should be allowed to object to the inclusion of the pre-trial report of investigation when it is prejudicial to the accused or for any other reason.

4. McGuire Report (Proposed A.G.N., Art. 4(b)(4).)

Recommendation that Judge Advocate shall keep the record of a general court-martial.

Uniform Code of Military Justice

Subject: Record of Proceedings, A. W. 33-34.

ADDENDA

II. Navy Provisions

3. Proposed Navy Bill.

"SEC. 47.....

"ART. 38. In every court-martial proceeding in which the accused pleads not guilty, defense counsel, if there be one, shall, in the event of conviction, attach to the record of proceedings either a brief of such matters as he feels should be considered on behalf of the accused on review or a signed statement setting forth his reasons for not so doing."

III. Differences

There is no provision in A. W. similar to proposed A.G.N. 38, cited above.

IV. Recommendations

1. Vanderbilt Report, page 15: Recommendation that Department of the Army consider a provision that upon direction of the law member there shall be included in the transcript of the record of every general court martial the opening statements and/or closing arguments of counsel where the precise position of either party is not sufficiently emphasized in the record.

ARTICLE OF WAR 34

See C.S., A.W. 33.

Uniform Code of Military Justice

Subject: Disposition of Records A. W. 35-36.

I. Army Provisions

1. Articles of War.

"ART. 35. Disposition of Records - General Courts-Martial.-- The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army."

"ART. 36. Disposition of Records - Special and Summary Courts-Martial.-- After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed."

2. Manual for Courts-Martial, U. S. Army.

a. General Courts-Martial

"Par. 85. Courts-Martial - Records - General court-martial.

"(c) Disposition.-- The original record and accompanying papers with proper letter of transmittal.....will be sent by the trial judge advocate directly to the appointing authority or to his successor, or, in the case of a court appointed by the President, to The Judge Advocate General of the Army."

b. Special Courts-Martial

"Par. 87. Courts-Martial - Action - Reviewing Authority.--

"(c) Disposition of record..... - Special Court-Martial. The record and accompanying papers, together with a copy of the order publishing the result of the trial, will be forwarded by indorsement to the officer exercising immediate general court-martial jurisdiction over the command."

c. Summary Courts-Martial

"Par. 86. Courts-Martial - Records - Special and Summary Courts-Martial.--

"At the conclusion of the trial of each case a summary court will record and sign its findings and the acquittal or sentence as indicated by the form and will transmit the record of trial and any papers received with the charges or as evidence without letter of transmittal to the appointing authority or

his successor. Where the summary court is the only officer present with the command, the record will so state, and such officer thereafter holds the record as transmitted to himself as reviewing authority."

"PAR. 87. Courts-Martial - Action - By Reviewing Authority.--

"(c) Disposition of records..... - Summary Courts-Martial.-
The several records of trial by summary courts-martial within a command shall be filed together in the office of the commanding officer and shall constitute the summary court record of the command..... A report of each trial--that is, a copy of the record--will be sent to the officer exercising immediate general court-martial jurisdiction over the command."

3. Public Law 759--80th Congress, Chapter 625--2D Session

Article 35, A.W., is not changed by Public Law 759.

"SEC. 217. Article 36 is amended to read as follows:

'ART. 36. DISPOSITION OF RECORDS--SPECIAL AND SUMMARY COURTS-MARTIAL.-- After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to the headquarters of the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate: Provided, however, That each record of trial by special court-martial in which the sentence, as approved by the appointing authority, includes a bad-conduct discharge, shall, if approved by the officer exercising general court-martial jurisdiction under the provisions of article 47, be forwarded by him to The Judge Advocate General for review as hereinafter in these articles provided. When no longer of use, records of summary courts-martial may be destroyed as provided by law governing destruction of Government records.'"

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 34. Proceedings and record of summary court:.....all such proceedings shall be transmitted in the usual mode to the Navy Department, where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy."

"ART. 64. Deck Courts (f) Records of proceedings; filing and review: Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall

be filed in, the office of the Judge Advocate General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy for his action."

2. Naval Courts and Boards.

"SEC. 524. Final disposition of record.-- The records of proceedings of all courts martial shall be forwarded, unfolded, direct to the office of the Judge Advocate General by the convening authority. General courts-martial records are forwarded by the convening authority after action thereon, except when convened by the Secretary of the Navy, in which case, the records are forwarded by the presiding officer of such courts. Records of summary courts martial and deck courts are forwarded after the proper reviewing authorities have taken action thereon,....."

3. Proposed Navy Bill.

"SEC. 24. Article 34 is renumbered as article 21 and amended to read as follows:

"ART. 21. The records of proceedings of all courts-martial shall be transmitted to the Navy Department to be kept on file: Provided, That the records of summary and deck courts martial may be destroyed in the discretion of the Secretary of the Navy at such time as their retention will serve no useful purpose."

"SEC. 48. The following Acts, as amended, are repealed:

'(c) Act of February 16, 1909 (.....)'" (This act contained Article 64(f) of A.G.N.)

III. Differences

1. Special (Navy Summary) Courts-Martial

- a. Army: Record forwarded by court to convening authority or his successor for his action, then is transmitted to headquarters of the officer exercising general court martial jurisdiction over the command, there to be filed in office of staff judge advocate; except if sentence includes a BCD, which is approved by the officer appointing the court and by the officer exercising GCM jurisdiction, the record shall be forwarded by the latter to JAG for action and retention. (Cf. A.W. 36, as amended).
- b. Navy: Record forwarded by court to convening authority for action, then it may be transmitted to the next senior officer in the chain of command who is empowered to convene a GCM, if he is present or is found by convening authority to be reasonably available. If it is transmitted, it is reviewed for legality, and then sent to JAG, Navy for action

and retention; if it is not transmitted, the convening authority reviews it for legality, and then sends it to JAG, Navy for action and retention. (Cf. proposed Navy bill, Sec. 39(d)).

If the sentence of the Summary Court involves a bad conduct discharge, the record must be forwarded to the Bureau of Naval Personnel for comment and recommendation as to disciplinary, but not legal, features. As a matter of practice, the records for certain other classes of cases are forwarded to the Bureau of Naval Personnel for review as to disciplinary features. (Cf. B. '43 - page 8).

Proposed Navy Bill, Sec. 24, new Art. 21, provides records of summary courts-martial may be destroyed in discretion of SecNav at such times as their retention will serve no useful purpose. (Cf. 2b below for note on this provision). The Army has no provision for destroying records of special courts-martial.

2. Summary (Navy Deck) Courts-Martial.

- a. Army: Record is sent to appointing authority, who retains it after acting on it. Where the summary court is the only officer present with the command, the record will so state, and such officer thereafter holds the record as transmitted to himself as reviewing authority. (JMCM, paragraph 86).

A copy of the record is sent to the officer exercising immediate general court-martial jurisdiction over the command, for filing in the office of the staff judge advocate. (A.W. 36, as amended.)

P.L. 759, Sec. 217, provides that records of summary courts-martial may be destroyed as provided by law governing destruction of government records. (For law governing destruction of government records, cf. 44 USC 366-380. In general, destruction of records must be authorized by a joint Congressional committee, acting through the Archivist of the U.S. The Archivist may empower the head of an agency to dispose of records, after they have been in existence a specified period of time, of the same character as records which have previously been authorized to be destroyed.) It is not clear whether this means the original record, or the copy which is sent to the officer having GCM jurisdiction, or both.

- b. Navy: Same procedure as for Navy summary courts-martial.

Note that proposed Navy bill, Sec. 24, new Art. 21, provides that the records of summary and deck courts-martial may be destroyed in the discretion of SecNav at such time as their

retention will serve no useful purpose. This authority is contrary to the provisions of the law governing disposal of government records, as cited above. Under it, SecNav could authorize destruction of records only if empowered to do so by the Archivist of the U.S.

IV. Recommendations

1. There are a number of recommendations which would change the review procedures to be followed. Any changes adopted would change the routine for disposition of the record of proceedings.
2. Report of the Institute of Living Law

"SEC. 25. Article 35 (AW 35) is amended to read as follows:

'ART. 35. DISPOSITION OF RECORDS.-- The law member of each general or special court-martial shall forward the record to such persons and in such manner as may be required by regulations which the President may from time to time prescribe, and such record shall be disposed of as required by such regulations: Provided, That one permanent record of all general and special courts-martial shall be kept in such place as said regulations shall designate.'"

ARTICLE OF WAR 36

See C.S., A.W. 35.

Uniform Code of Military Justice

Subject: Effect of Irregularities. A.W. 37

I. Army Provisions

1. Articles of War

"ART. 37. Irregularities--Effect of.--The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: Provided further, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments."

2. Manual for Courts-Martial

(Par. 2, p. 74)--"A. W. 37 vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The effect of a particular error within the purview of A. W. 37 should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a finding or the sentence. No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby. If through mistake or inadvertance the trial judge advocate should be present during all or part of the closed session of a court, such irregularity is not a ground for a disapproval, unless it appears that such presence of the trial judge advocate injuriously affected the substantial rights of an accused."

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the United States Navy

A.G.N. contains no provision corresponding to A.W. 37.

2. Naval Courts and Boards

"SEC. 472 (b) Objection to the charges or to the specifications should not be considered unless made at the trial, except where a charge or specification fails to state an offense. Where a specification fails to support the charge under which it is laid but supports some other charge, and the punishment imposed by the court is excessive for the appropriate charge, the reviewing authority should reduce the sentence to an amount commensurate with such appropriate charge."

"SEC. 472 (e) If there has been no miscarriage of justice, the finding of the court should not be set aside or new trial granted because of technical errors or defects which do not affect the substantial rights of the accused.

"Reviewing authorities in acting upon the record should bear in mind the maxim, "The law does not regard small matters", and should not disapprove on account of small deviations in immaterial ways not tending to prejudice the rights of any individual."

"SEC. 452. Hard Labor Included in Confinement.--In the limitations of punishment approved by the President, it is provided that where the word "confinement" is used it includes hard labor during such confinement."

3. Proposed Navy Bill

No change

III. Differences

1. Differences between Army and Navy Provisions

The difference between the Army and Navy provisions is in that the Army provision is statutory while the Navy provision is in Naval Courts and Boards.

P. 3

IV. Recommendations

The McGuire, Ballantine, Keeffe, and Vanderbilt Reports do not comment on this rule, nor does the House Armed Services Committee Report on what is now P. L. 759.

The proposed Articles of Government for the Armed Services drawn up by Colonel Snedeker do not contain any rule of prejudicial error.

FEL - 1

Uniform Code of Military Justice

Subject: President May Prescribe Rules. A.W. 38.

I. Army Provisions

1. Articles of War

"ART. 38. President May Prescribe Rules.--The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually."

2. Manual for Courts-Martial

(Manual contains the rules of procedure, etc., set up by the President in accordance with Art. 38).

3. Public Law 759--80th Congress, Chapter 625--2D Session

"SEC. 218. Article 38 is amended to read as follows:

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.--The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules and regulations made in pursuance of this Article shall be laid before the Congress."

II. Navy Provisions

1. Articles for the Government of the Navy

(Contains no provision authorizing the promulgation of rules of procedure, etc., for general courts-martial).

"ART. 34. Proceedings and record of summary court.-- The proceedings of summary courts martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President, and all such proceedings shall be transmitted in the usual mode to the Navy Department, where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy."

"ART. 64 (c) Rules governing.--Deck courts shall be governed in all details of their constitution, powers, and procedure, except as herein provided, by such rules and regulations as the President may prescribe."

"The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner." E-Sec. 1547 Rev. Stat.; 34 U.S.C. 591.

2. Naval Courts and Boards

No comment.

3. Proposed Navy Bill

"SEC. 47

"ART. 48. The Secretary of the Navy is authorized to prescribe, and to modify from time to time, the rules of pleading and procedure, including modes of proof, in proceedings before naval courts martial, other naval tribunals, and fact-finding bodies as will insure the enforcement of discipline and the fair and impartial administration of justice in the United States naval service: Provided, That, insofar as applicable, such modes of proof shall follow the law of evidence prevailing in the district courts of the United States in the trial of criminal cases: Provided further, That nothing contrary to or inconsistent with these Articles shall be so prescribed."

III. Differences

The amended Articles of War require the President to promulgate rules of procedure for Army tribunals, while the proposed Navy bill will give like authority to the Secretary of the Navy. Under present Navy procedure the rules of procedure are drawn up by the Secretary of the Navy subject to approval of the President.

The amended Articles of War state that such regulations shall, insofar as practicable, apply the principles of law and rule of evidence generally recognized in the trial of criminal cases in United States district courts, while the proposed Navy bill provides that, insofar as practicable, such modes of proof shall follow the law of evidence prevailing in district courts in the trial of criminal cases.

Both bills provide that nothing inconsistent with the Articles shall be so prescribed.

The Army bill contains a proviso that all such rules and regulations be laid before Congress, while the Navy bill does not contain such a proviso.

(Under the Articles of War now in force there is a requirement that such regulations be laid before Congress annually).

IV. Recommendations

The McGuire Report recommended that the Secretary of the Navy be given the power to prescribe rules of practice, pleading, and procedure and that such rules be predicated on the Federal Rules of Criminal Procedure.

The White Report recommended that the Secretary of the Navy have the power to prescribe rules of practice, pleading, and procedure, and to make such rules with respect to any or all naval proceedings as will insure the enforcement of discipline and the fair and impartial administration of justice.

The Second Ballantine Report favored the clear delegation of full rule-making power to the Secretary of the Navy, and the elimination of any provisions or orders standing in the way of the full exercise of such power.

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The Keefe Report recommended the establishment of a permanent Advisory Committee similar to those set up by the U.S. Supreme Court and state legislatures to make a continual study of the workings of courts-martial system and to recommend changes as the council thought necessary to improve and to keep the functioning of the court-martial system up to date.

The Articles for Government of the Armed Services drawn up by Colonel Snedeker would vest the ruling-making power in the Secretary of Defense.

House Report 1034 states that A.W. 38 is amended to require the submission of rules only once, instead of annually and does not mention the insertion of "principles of law."

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Uniform Code of Military Justice

Subject: Limitations Upon Prosecution, As To
Time, Statute of Limitations.

I. Army Provisions

1. Articles of War.

"ART. 39. As To Time.-- Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: And provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law."

2. Manual for Courts-Martial.

Par. 67. "Statute of Limitations.-- Exemption from liability to be tried or punished by a court-martial for all but a few crimes or offenses may be claimed after two (or three) years with certain limitations. See A. W. 39, App. 1, and notes thereunder.

"The period of limitation begins to run on the date of the commission of the offense. Absence without leave (A. W. 61); desertion (A. W. 58); and fraudulent enlistment (A. W. 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself, or deserts, or first receives pay or allowances under the enlistment.

"In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the Article of War stated in the charge under which the specification is placed. Thus, where an offense properly chargeable under A. W. 93 is erroneously charged under A. W. 96, the limitation is three instead of two years.

"If it appears from the charges themselves that the statute has run against an offense charged or (in the case of a continuing offense), a part of an offense charged, the court may bring the matter to the attention of the accused and advise him (through the president, or the law member, if the president

so directs) of his right to plead the statute. This action should, as a rule, be taken at the time of arraignment.

"With respect to pleading this statute in bar of punishment, see 78a (Statute of limitations).

"The burden is not on the defense to show that neither absence nor other impediment prevents the accused from claiming exemption under A. W. 39. For example, if it appears from the charges in a peace-time desertion case that more than three years have elapsed between the date of the commission of the offense and the date of arraignment, the plea should be sustained, unless the prosecution shows by a preponderance of evidence that the statute does not apply owing to the existence of periods which under the second proviso of A. W. 39 are to be excluded in computing the three years."

3. Court Decisions and Other Legal Opinions.

The statute must be pleaded either by a special plea or by evidence of the statute and its applicability, introduced under a plea to the general issue, but without such evidence a plea of not guilty does not assert the bar of the statute, Dig. Ops. J.A.G. 1912, page 529. However, it shall be the duty of the court to advise the accused to his right to plead the statute in those cases where consideration of justice and fairness demand it. Failure to do so constitutes fatal error. J.A.G. Bull., Vol. V, No. 7, page 199, July-August, 1946.

4. Public Law 759--80th Congress, Chapter 625--2D Session.

SEC. 219. Article 39 is amended to read as follows:

"ART. 39. As To Time.-- Except for desertion or absence without leave committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before arraignment of such person: Provided, That for desertion in time of peace, rape or for any crime or offense punishable under articles 93 and 94 of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: Provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: And provided further, That in the case of any offense the trial of which in time of war shall be certified by the Secretary of the Department of the Army to be detrimental to the prosecution

of the war or inimical to the Nation's security, the period of limitations herein provided for the trial of the said offense shall be extended to the duration of the war and six months thereafter."

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 61. Limitation of trials; offenses in general.-- No person shall be tried by court martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period (R. S., sec. 1624, art. 61; Feb. 25, 1895, c. 128, 28 Stat. 680)."

"ART. 62. Desertion in time of peace.-- No person shall be tried by court martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States or by reason of some other manifest impediment shall not have been amenable to justice within that period, in which case the time of his absence shall be excluded in computing the period of the limitation: Provided, That said limitation shall not begin until the end of the term for which said person was enlisted in the service (R. S., sec. 1624, art. 62; Feb. 25, 1895, c. 128, 28 Stat. 680)."

2. Naval Courts and Boards.

"SEC. 407.-- The statute of limitations.--.....the burden falls upon the accused in every case in which he desires to avail himself of these articles, in addition to establishing that he comes within the provisions of them, affirmatively to establish that he is not within their exceptions. Since these statutes of limitation are matters of defense only, they may be waived by the accused....."

3. Proposed Navy Bill.

"ART. 5 (b) Except for desertion in time of war or absence from place of duty without authority in time of war, or for mutiny or murder, no person subject to these Articles shall be tried or punished by a court martial for any offense committed more than two years before the signing of charges and specifications to be preferred against him: Provided, That nothing in this section of this Article shall extend to any person fleeing from justice or in the custody of civil authorities or shall be

constituted to affect the provisions of the Act of August 24, 1942 (ch. 555, sec. 1, 56 Stat. 747), as amended by the Acts of July 1, 1944 (ch. 358, sec. 19 (b), 58 Stat. 667), and October 3, 1944 (ch. 479, sec. 28, 58 Stat. 781); Provided further, That before evidence is received on the general issue in any case involving any offense enumerated in this section of this article the judge advocate or, if the trial is before a deck or summary court martial, the court will cause to be noted in the record of proceedings whether the accused desires the court to plead the limitations on prosecution prescribed in this section in bar of any offense of which he might be convicted under article 28 (a) (2)."

III. Differences

1. PERIOD

<u>OFFENSES</u>		<u>PERIOD OF LIMITATIONS</u>	
<u>Army</u>	<u>Navy</u>	<u>Army</u>	<u>Navy</u>
Desertion in war	Desertion in war	None	None
A.W.O.L. in war	A.W.O.L. in war	None	None
Mutiny	Mutiny	None	None
Murder	Murder	None	None
Desertion in peace		3 years	2 years
Rape		3 years	2 years
A.W. 93		3 years	2 years
A.W. 94		3 years	2 years
All others	All others	2 years; unless barred by provisions of existing law.	2 years; 3 years after termination of hostilities in war fraud cases.

2. Measurement of Time.

The period of limitations in the Army operates from the date of the offense until the arraignment of the accused. Arraignment requires the physical presence of the accused. Therefore, the statute does not toll when charges are filed or an order for trial issued where the accused is still absent from military control. In the Navy, however, the period is measured from the date of the violation to the signing of charges and specifications.

This rule permits the statute to toll even though the accused has not been apprehended.

3. Tolling the Statute of Limitations.

Under the provisions of A. W. 39, as amended, the statute of limitations is tolled during the absence of the accused from the jurisdiction of the U.S., and also during the period the accused shall not have been amenable to justice by reason of some manifest impediment. A.G.N. 5(b), as proposed, tolls the statute during the period the accused is "fleeing from justice" or in the custody of the civil authorities.

The "manifest impediment" clause encompasses the "fleeing from justice" exception. The essential elements of the exception are: leaving one's residence or usual place of abode, or concealing one's self for the purpose of avoiding detection or punishment, Keeffe Report, page 267. On the other hand, although mere absence from the jurisdiction of the U.S. is sufficient to halt the running of the statute, there may be instances where the "fleeing from justice" exception may not be applicable under such circumstances because one or more of the elements constituting the exception is lacking. For example, it is questionable whether the statute would toll in a case involving one subject to the A.G.N., as proposed, under circumstances similar to that recently presented by the desertion of a sergeant stationed at the American embassy in Moscow. This example is applicable solely during the time of peace. The A.W. do not contain a proviso comparable to the Navy exception causing the statute to toll during the period the accused is in the custody of the civil authorities.

4. Right of the Accused.

The proposed Navy bill requires that the accused be advised of his right to interpose the statute in his defense. A.W. 39 does not contain a comparable proviso, However, MCM, 67, permits this practice at the discretion of the court; and it has been held that it is the duty of the court so to do "where consideration of justice and fairness demand it." Bull., J.A.G. Vol. V, No. 7, July-August, 1946.

5. Detrimental to Prosecution.

A.W. 39 authorizes the Secretary, Department of the Army, in time of war, to toll the statute for the duration and six months thereafter for the trial of any offense which would be detrimental to the prosecution of the war. Although A.G.N. 5 (b) does not contain this provision, the proviso is adopted by the Navy in its draft of proposed amendments to S. 1338 and designated 5 (b) (3), dated 17 May 1948. Attention is invited to the fact that this draft proposal has not been approved.

6. Burden of Proof.

The rule in the Army is that the burden of proof is upon the prosecutor to establish that absence or other impediment bars the accused from claiming exemption under A. W. 39, MCM, sec. 67. The Navy causes the burden of proof to be upon the accused, NC&B, sec. 407.

IV. Recommended Provisions1. McGuire Draft Articles.

Art. 1 (b) recommends a two year period between the offense and the filing of the charge except for desertion in time of war, mutiny and murder and excepting period of time of fleeing from justice, absence from the U.S. or naval service, or being in civil jail.

2. The Keeffe Report, page 265-270.

A. Discussion.

1. "The Navy rule that the issuing order for trial is the date for determining whether the statute of limitations has run is similar to the 'John Doe' indictment of the civil law under which the running of the statute may be stopped, even though the accused has not been apprehended. It should be pointed out that its result is to render the statute inoperative in any case in which such an order for trial is promulgated, even though the accused is then beyond naval control and is not apprehended until long afterward. If, as suggested, [and adopted in the proposed Navy bill] the statute of limitations is abolished in case of murder, mutiny and war time desertion, the principal occasions for the exercise of this power will have been eliminated. The proposed McGuire Articles, the White and Judge Advocate General drafts do not propose any amendment which would substantially change the present rule.

2. "Consideration of A.G.N. 61 and 62 fails to show any compelling reason why the former should provide that the statute is tolled by 'absence', while the latter refers to 'absence from the U.S.' 'Absence' in this connection has been construed to mean absence from reach of naval authorities. In dealing with this situation the White and Judge Advocate General draft articles, as well as the revised articles proposed by the McGuire Committee, provide that 'absence from the jurisdiction of the U.S.,' rather than 'absence' alone, shall toll the statute.

"Articles 61 and 62 also provide that the statute is tolled if the accused by reason of '.....some other manifest impediment.....shall not have been amenable to justice within that period.' This has been construed as encompassing the 'fleeing

from justice' exception contained in 18 U.S.C. 583. The essential elements of 'fleeing from justice' are: leaving one's residence or usual place of abode or concealing one's self for the purpose of avoiding detection and punishment /scoring supplied/. Clearer language than 'not amenable to justice' is highly desirable. The Articles proposed by the McGuire Committee, Commodore White and the Judge Advocate General would toll the statute during the period in which the accused was a 'fugitive from justice.' The Judge Advocate General draft uses the language 'fugitive from or not otherwise amenable to justice.' Either proposal seems acceptable.

B. Recommendations.

"1. That Article 1(b) of the McGuire draft articles be adopted in substantially its present form.

"2. That the Advisory Council consider whether any change should be made in the rule that the issuing of the order for trial, rather than the arraignment, is the date for determining whether the statute of limitations has run."

3. Judge Advocate General (Navy) Recommendations:

"Follow McGuire -- but omit 'or naval service'....."

4. Vanderbilt Report.

Suggests excepting unauthorized absence in time of war from statute of limitations. Adopted by the Army and Navy.

Uniform Code of Military Justice

Subject: Limitations Upon Number of Prosecutions - Prohibited
Return of Record for Revision. A.W. 40.

I. Army Provisions

1. Articles of War

"ART. 40. As to Number.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

"No authority shall return a record of trial to any court-martial for reconsideration of

- "(a) An acquittal; or
- "(b) A finding of not guilty of any specification; or
- "(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or
- "(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"And no court-martial in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited."

2. Manual for Courts-Martial

Par. 68, COURTS-MARTIAL--PROCEDURE--.....

"A person has not been "tried" in the sense of A.W. 40 if the proceedings were void for any reason, such as a lack of jurisdiction to try the person or the offense.

"The same acts constituting a crime against the United States can not, after acquittal or conviction of the accused

in a civil or military court deriving its authority from the United States, be made the basis of a second trial of the accused for that crime in the same or in another such court without his consent. The civil courts in the Territories and in Puerto Rico, the Canal Zone, and the Phillipine Islands, as well as the district and other courts of the United States, derive their authority from the United States. The same acts when committed in a State may constitute two distinct offenses, one against the United States and the other against the State. In such a case trial for either does not bar trial for the other.

"In general, once a person is tried in the sense of A.W. 40 for an offense, he can not without his consent be tried for another offense if either offense is necessarily included in the other. Thus, a trial for manslaughter may be pleaded in bar of trial for the same homicide charged as murder, and the trial of an enlisted man for absence without leave (A.W. 61) bars trial for the same absence charged as desertion and vice versa if the same enlistment is involved in both cases. Thus, when a soldier deserts and reenlists, trial for absence without leave or desertion from the second enlistment does not bar trial for desertion from the first enlistment although the same period of time may in part be involved in both cases."

Par. 69, "~~COURTS-MARTIAL--PROCEDURE--Pleas--~~Miscellaneous pleas in bar of trial.--

"a. Pardon.--A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. A pardon may be pleaded in bar of trial. The usual rules as to documentary evidence apply to a written pardon, whether in the nature of an individual pardon, or of a general amnesty, or the like. If the document is not sufficiently explicit to determine whether or not the plea should be sustained other evidence must be introduced to fill the gap. In the case of a constructive pardon, facts and circumstances constituting such pardon must be proved.

"b. Constructive Condonation of Desertion.--An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates.

"c. Former Punishment.--Punishment under the 104th Article of War may be pleaded in bar of trial. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under A.W. 104 for reckless driving would not bar trial for manslaughter where the reckless driving caused a death."

Par. 72.....

"A nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and is not a ground of objection or of defense in a subsequent trial.".....

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

No provision.

2. Naval Courts and Boards

Sec. 338.--"Same act not an offense both against naval law and Federal civil law.--

"When an act, prohibited both by naval and the civil law of the Federal Government, is committed within Federal jurisdiction, and the offender is tried either by a court martial or a Federal civil court, both of which derive their jurisdiction from the same source--The Federal Government--then the same act constitutes but one offense, namely an offense against the United States, and trial by either is a bar to trial by the other on the ground of former jeopardy."

Sec. 408. "Same: Former jeopardy.--

"The fifth amendment to the Constitution of the United States provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' A person is twice put in jeopardy if he is twice put on trial for the same offense. In order, however, to sustain a plea of former jeopardy, the accused must show that:

"(1) Upon a former trial, he had been actually acquitted or convicted; or

"(2) Upon a former trial, after he had been arraigned and the prosecution had rested its case, the convening authority entered a nolle prosequi (or withdrawal or discontinuance), over the

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objection of the accused, in order to prevent the court martial from arriving at a finding.

"In either case set above, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority. But the proceedings upon a 'fatally defective' specification do not constitute a former jeopardy."

Sec. 409.--"Pardon.--

"A pardon is an act of the President that exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed, and may be offered in evidence to sustain a plea in bar of trial.

"Promotion of an officer is not a constructive pardon, and if pleaded in bar of trial should be overruled."

Sec. 474. "Power of Reviewing Authority--when he is not to return record.--

"Unless specifically authorized by the Secretary of the Navy in each case, no authority will return a record of trial to any court for reconsideration of (a) an acquittal, (b) a finding of not guilty to any specification, or (c) the sentence originally imposed with a view to increasing its severity, and no court in any proceedings in revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited. In rare cases, where reviewing authorities consider that strict adherence to the provisions of this section would result in a miscarriage of justice, they may withhold action and report the circumstances to the Navy Department with request for authority to reconvene the court for any of the purposes above mentioned."

3. Court Martial Order 5-1945

"Aside from any legal question, as a matter of policy, a person in the naval service should not be tried a second time for the same act for which he has once been punished as a result of a conviction in a civil court."

4. Proposed Navy Bill.

"SEC. 39. Article 53 is renumbered as article 39 and amended to read as follows:

"ART. 39.....(i) No record of proceedings of a court martial shall be returned to the court for the purpose of reconsidering a finding of "not proved" or "not guilty" or for

reconsideration of a sentence with a view to increasing its severity."

III. Differences

1. Double Jeopardy.

The Articles of War provide that no person shall be twice tried for the same offense without his consent; the A.G.N. contain no such provision, but the same result is accomplished by administrative regulation (N.C.&B., Sec. 408).

A.W. 40 states that no proceeding in which an accused has been found guilty shall be held to be a "trial" until the reviewing and confirming authorities have taken final action on the case, while Naval courts and Boards provides that after the proceedings in a former trial have been carried to an acquittal or conviction, the jeopardy is complete and it matters not what action is taken by the reviewing authority. Thus, it would appear that unless there is a jurisdictional defect in the proceedings or none of the charges or specifications is sufficient to support the offense charged, the Navy reviewing authority may not order a new trial without the consent of the accused. (Rehearings are discussed in connection A.W. 50 $\frac{1}{2}$ and A.W. 52 as amended).

Under Army practice, punishment by the commanding officer under A.W. 104 is a bar to trial for the same offense, but does not bar trial for another offense growing out of the same act. Under Navy practice, a commanding officer is not a court-martial and mast punishment is not a bar to trial.

In both services, a nolle prosequi is not a bar to trial, except under Navy procedure where the nolle prosequi is entered after the prosecution has rested its case.

2. Prohibitions on Return of Record for Revision.

Both Army and Navy authorities are prohibited from returning the record for reconsideration of an acquittal, a finding of not guilty to any specification, or the sentence originally imposed with a view to increasing its severity. However, a record of an Army court-martial record may be returned for reconsideration with a view of increasing the severity of the

sentence when the sentence originally imposed is less than the mandatory fixed by law for the offense upon which conviction had been had. Under the proposed A.G.N. there are no mandatory sentences fixed by law.

A.W. 40 also forbids the return of the record for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; while the proposed A.G.N. prohibits the return of the record for reconsideration of a finding of not guilty without exception.

(Note in regard to above that it is the specification, not the charge, under Army practice which informs the accused of the nature and identity of the offense being tried, for an accused may be found guilty of a violation of an Article of War other than that charged, but the specifications can not be changed so as to change the nature or identity of the offense charged in the specifications. See MCM, par. 78 b, c.)

Similar limitations in case of a rehearing are included under A.W. 50¹ and A.W. 52 as amended by P.L. 759.

IV. Recommendations

1. Double Jeopardy.

The McGuire Articles propose that mast punishment be a bar to trial for the same offense.

The White Report recommended the inclusion of a catalogue of "constitutional guarantees", including double jeopardy in the A.G.N.

The Ballantine Reports do not comment on double jeopardy.

Referring to the court-martial order above (CM5-1945), the Keefe Report states:

"The 1945 statement of policy, quoted above, refers only to a case where the offender has been "..... punished as a result of conviction in a civil court." The question arised whether a person who has received a suspended sentence has been "punished". Another question is whether acquittal by a state court should

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bar a second trial. No department statement of policy has been discovered on these questions. Naval Courts and Boards sets forth only the law and contains no statement of policy in this regard."

"In civil jurisdictions there is a trend toward broadening the applicability of the principle against double jeopardy, as a matter of policy rather than as a rule of law.

"One text (16 A.L.R. 1243; 8 Ruling Case Law, Supp. 1929, p. 2200) states:

'There is authority to support the doctrine that punishment in the courts of each jurisdiction; even though not prohibited, should not, in practice, be imposed, unless in extraordinary cases, where there are aggravating circumstances or special considerations from the standpoint of public safety justifying or requiring it.'

"The Board believes that Department policy on this subject should be clarified and the apparent inconsistencies removed.

"Analogous to the problems of double jeopardy and double amenability is the question whether disciplinary punishment by a commanding officer should operate as a bar to subsequent trial by court martial for the same offense. Disciplinary punishment is presently not a bar to subsequent trial by court martial for the same offense. The reason given in support of this rule is that the investigation of a commanding officer at mast does not constitute a trial, that there has been no conviction or acquittal, and that the punishment imposed is not a sentence. The action of the commanding officer has been likened to the control of 'a parent over his child or of a master over his apprentice, or of a school teacher over his scholar.'

"The Board is of the opinion that this approach is questionable and that the rule that there is no double jeopardy in such cases is a dubious one. The Articles for the Government of the Navy confer jurisdiction upon commanding officers to impose punishments for minor offenses. The procedure leading to the determination of the offense and appropriate punishment, as described in Naval Justice, includes (a) a report of misconduct by the accuser, (b) examination of witnesses, (c) examination of documentary evidence, and (d) examination of the accused if he elects to speak. Thereafter, the commanding officer

weighs the evidence and determines whether, in his opinion, an offense has been committed. If he determines that the accused has committed a minor offense, he is authorized to impose punishment, including one of the following: (1) Reduction of any rating established by himself; (2) Confinement not exceeding 10 days; (3) Solitary Confinement on bread and water not exceeding 5 days; (4) deprivation of liberty on shore, and (5) extra duties. The offense and punishment are recorded in the Smooth Book of Records of Reports and Punishments. It will be observed that these characteristics partake of the nature of a trial by a more formal type of court.

"Wholly apart from the question whether punishment awarded as a result of such quasi-judicial proceedings should legally operate as a bar to trial by court martial for the same offense, it is believed that to impose disciplinary punishment and then proceed to trial is basically unfair. This has been pointed out in a semiofficial publication (Naval Justice):

'However, the same fundamental principle of fairness which precludes double jeopardy should be the basis for any determination of the commanding officer as to whether he will order the convening of a court martial for the trial of a man for an offense which has been properly punished by him, under Article 24, A.G.N.'

"From the cases it has reviewed the Board has no way of knowing in how many the prisoners had received mast punishment for the same offense for which they were later convicted by court martial. This is due to the fact that mast punishment is not considered a prior conviction and is therefore not admissible in evidence. Likewise, the court itself would not necessarily know about any prior punishment at mast."

The Keefe Board recommends:

"(1) Department policy be clarified in regard to the desirability of trying persons by court martial for offenses for which they have already been tried in state or foreign civil courts. A prior conviction, although resulting only in a suspended sentence, seems sufficient punishment and should, as a matter of policy, bar subsequent trial by court martial. A prior acquittal should ordinarily be regarded as evidence that the accused is not guilty of the offense charged and should, as a matter of policy, bar labeling the offense by a different name should not be allowed to defeat the basic intent of the policy recommended.

"(2) Consideration be given by the Advisory Council to a provision that punishment imposed by a commanding officer be a bar to trial by court martial for the same offense, but not a bar to trial for another offense growing out of the same act or omission."

The Vanderbilt Report recommended further study of "the extension of the doctrine of condonation where a soldier is committed to combat with knowledge of the pending charge." (There is no further discussion on this recommendation).

Who shall decide on pleas in bar of trial due to double jeopardy is treated as other interlocutory questions. See C.S., A.W. 31.

2. Prohibitions on Return of Record for Reconsideration.

(See amended A.W. 88 as to unlawfully influencing court).

The McGuire, White, and Ballantine Reports make no comment.

The Keefe Report points out that a Navy reviewing authority may theoretically return the record for reconsideration with a view to increasing the severity of the sentence, or reconsideration of a finding of not guilty with prior authority of the Secretary of the Navy, but that this is rarely, if ever, done.

The Vanderbilt Report makes no comment.

Uniform Code of Military Justice

Subject: Cruel and Unusual Punishments Prohibited

I. Army Provisions

1. Articles of War.

"ART. 41. Cruel and Unusual Punishments Prohibited.-- Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are prohibited."

2. Manual for Courts-Martial.

"PAR. 102. Courts-Martial -- Punishments -- General Limitations.--
.....

"Courts-martial will not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knapsack, wearing of irons, shaving the head, placarding, pillory, stocks, and tying up by the thumbs. Military duties, such as guard duty, drills, the sounding of calls, will not be degraded by imposing them as punishments. Solitary confinement, a bread-and-water diet, loss of good-conduct time, and the placing of a prisoner in irons will not be imposed as punishments by a court-martial."

3. Public Law 759--80th Congress, Chapter 625, 2D Session.

Article of War 41 was not changed by P.L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 49. Prohibited punishments.-- In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court martial or be inflicted upon any person in the Navy. The use of irons, single or double, is abolished, except for the purpose of safe custody, or when part of a sentence imposed by a general court martial."

"ART. 30. Punishments by summary courts martial.-- Summary courts martial may sentence petty officers and persons of inferior ratings to either a part or the whole, as may be appropriate, of any one of the following punishments, namely:

".....

"Second. Solitary confinement, not exceeding thirty days, on bread and water, or on diminished rations....."

(General courts-martial and deck courts martial are also authorized to inflict a punishment of solitary confinement on bread-and-water Cf. A.G.N. 35, 64b).

"ART. 24. Punishments by order of commander.-- No commander of a vessel shall inflict upon a commissioned or warrant officer; nor shall he inflict.....upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:

"....."

"Third. Solitary confinement, on bread and water, not exceeding five days....."

2. Proposed Navy Bill.

"SEC. 36. Article 49 is renumbered as article 31 and amended to read as follows:

'ART. 31. In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court martial or be inflicted upon any person in the naval service. The use of irons, single or double, is abolished, except for the purpose of safe custody.'

"SEC. 22. Article 30 is renumbered as article 20 and amended to read as follows:

'ART. 20(a) A summary court martial shall have power to impose either a part or the whole of any one of the following punishments:

'.....'

'Third. Solitary confinement on bread and water with full ration every third day for a period not exceeding thirty days, to run consecutively;''

"SEC. 47....."

'ART. 16(b) A deck court martial shall have power to impose either a part or the whole of any one of the following punishments:

'.....'

'Second. Solitary confinement on bread and water with full ration every third day for a period not exceeding twenty days, to run consecutively;''

(General courts-martial can still inflict all punishments that a summary court may).

"SEC. 16. Article 24 is renumbered as article 14 and amended to read as follows:"

(Punishment by commanding officer at Captain's Mast still includes sentence of solitary confinement on bread and water not exceeding five days, to run consecutively).

III. Differences

1. Navy provisions do not have a general clause prohibiting cruel and unusual punishments of every kind.
2. Army provisions prohibit punishments of solitary confinement, or of a bread and water diet (AMCM, Paragraph 102). Navy provisions permit any court-martial, or a commanding officer at Captain's Mast, to impose a sentence of solitary confinement on bread and water for a stated period, to run consecutively, with a full ration every third day.

Uniform Code of Military Justice

Subject: Places of Confinement--When Lawful.

I. Army Provisions

1. Articles of War.

"ART. 42. Places of Confinement-- When Lawful.-- Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary."

2. Army Manual of Courts-Martial.

"PAR. 90. Courts-Martial--Action--Place of Confinement

"(a) Penitentiary.-- A penitentiary may be designated as the place of confinement for the whole period of confinement imposed by the sentence as ordered executed, provided such period exceeds one year, and provided also that such sentence is wholly or partly based on one or more of the offenses listed below or was imposed by way of commutation of a death sentence:

Desertion in time of war.

Repeated desertion in time of peace.

Mutiny.

An offense involving an act or omission recognized as

an offense of a civil nature and made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, whether statutory or common. Sodomy, being recognized as an offense by the common law in force in the District of Columbia, is included.

"A penitentiary will not be designated as the place of confinement except as authorized above in this paragraph..... Instructions as to the particular penitentiary to be designated will be issued from time to time by the War Department.

"It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in addition to purely military offenses. In furtherance of this policy, reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement."

3. Public Law 759--80th Congress, Chapter 625--2D Session.

Art. 42, A. W., is not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

Articles 4, 5, and 6 list offenses which are punishable by death, or such other punishment as a court martial may adjudge.

Article 14 lists offenses which are punishable by fine and imprisonment, or such other punishment as a court martial may adjudge.

Articles 1, 3, 8, 16, 17, 19, 20 and 21 list offenses for which such punishment as a court martial may adjudge can be inflicted.

"ART. 7. Imprisonment in lieu of death.-- A naval court martial may adjudge the punishment of imprisonment for life, or for a stated term, at hard labor, in any case where it is authorized

to adjudge the punishment of death; and such sentences of imprisonment and hard labor may be carried into execution in any prison or penitentiary under the control of the United States, or which the United States may be allowed, by the legislature of any State, to use; and persons so imprisoned in the prison or penitentiary of any State or Territory shall be subject, in all respects, to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which the same may be situated (R. S., sec. 1624, Art. 7.)."

"ART. 51. Adequate punishment; recommendation to mercy.-- It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing (R. S., Sec. 1624, Art. 51)."

"ART. 63. Punishment for offenses in time of peace.-- Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe (R. S., Sec. 1624, Art. 63; Feb. 27, 1895, c. 137, 28 Stat. 689)."

2. Naval Courts and Boards.

"SEC. 642 (footnote (65)). Disignation of prison.-- Officers authorized to convene general courts-martial are empowered to designate prisons for the confinement of persons sentenced thereby. Prisons will be designated in accordance with instructions issued from time to time by the Secretary of the Navy.

"Where sentences as approved include confinement for six months or less, such confinement should be executed on the station in such place as may be suitable....."

Sec. 457 is a schedule of offenses and the limits of punishment for them, promulgated under the authority of Art. 63.

3. Proposed Navy Bill.

Arts 5 and 6 are repealed; Art. 4 is renumbered as Art. 8 and amended to include all offenses for which a punishment of death, or such other punishment as a court martial may adjudge, may be inflicted.

Art. 14 is renumbered as Art. 9 and amended to include all offenses for which such punishment other than death as a court martial may adjudge may be inflicted.

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Arts. 1, 20, and 21 are amended; they no longer provide specifically for a punishment. Arts. 3, 8, 16, 17, 19, and 22 are repealed.

Art. 7 is renumbered as Art. 32; its text is unamended.

Arts 51 and 63 are repealed.

"ART. 28(b) It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."

"ART. 33(b) The President is authorized to prescribe a limitation of the punishment which may be inflicted under any of these Articles; and thereafter, such limitation while in force shall not be exceeded."

4. Laws Relating to the Navy, Annotated, in force January 1, 1945.

A case note found in Volume 1, P. 447, states that a person convicted of a violation of art. 8 and art. 22, A.G.N., may be sentenced to imprisonment at hard labor for a stated term. Article 7, A.G.N. does not preclude a sentence of imprisonment at hard labor in cases where the death penalty is not authorized.

A case note found in Volume 1, P. 449, states that the inclusion in art. 14, A.G.N. of the words "fine and imprisonment" does not preclude a court from imposing a sentence of imprisonment for an offense under art. 8.

III. Differences

1. A. Army: A Federal penitentiary may be designated as the place of confinement in the following cases only:

1). Where the period of confinement authorized and adjudged by the court is more than one year, and,

- a) the offense is desertion in time of war.
- b) the offense is repeated desertion in time of peace.

c) the offense is mutiny.

d) the offense is an act or omission which is also an offense of a civil nature and is made punishable by

penitentiary confinement for more than one year by a Federal statute of general application throughout the United States, excepting Sec. 289, Penal Code of the United States, 1910 (Sec. 289 relates to the adoption of penal laws of a State, territory or District to punish acts not made penal by Federal statute, when the acts are committed on a Federal reservation within the territorial limits of the State, territory, or District); or by the law of the District of Columbia, whether statutory or common.

2). Where a sentence of death has been commuted by the President.

Whether or not a penitentiary is designated as the place of confinement is within the discretion of the reviewing authority; it is not mandatory in any case, except insofar as Department of the Army policy makes it so. (Cf. AMCM, Par. 90a.)

B. Navy: There are no statutory limitations of any kind which restrict the cases where a Federal prison may be designated as the place of confinement for a Naval prisoner. The language of present Art. 7 (Art. 32 under the proposed Navy bill) seems to limit the power of a court martial to adjudge a punishment of imprisonment to cases where it is authorized to adjudge the punishment of death, but Art. 7 has been construed otherwise. Cf. par. 4 of Sec. II of this paper.

As a matter of practice, the Navy itself limits its power to designate a Federal prison as a place of confinement. Sec. 642, footnote (65), NC&B, provides that where a sentence as approved includes confinement for six months or less, such confinement should be executed on the station where the court martial was held. Arts. 51 and 63 of the present A.G.N. (Arts. 28(b) and 33(b) under the proposed Navy bill) restrict the court in the sentences it can impose; insofar as these Articles serve to prevent sentences of over six months confinement they would prevent imprisonment in a Federal prison.

(The Navy actually goes beyond the above provisions in its practice. A man is not usually sent to a Federal prison in any case where the sentence adjudged is less than a year's confinement, or in any case where the offense was not a serious civil offense).

The power to designate a prison as the place of confinement is given to the convening authority of a general court-martial (NC&B, Sec. 642, fn (65)), but its exercise is actually controlled by BuPers. Current practice is to send all prisoners to a Retraining Command initially; after an investigation is made

of each case by BuPers, the permanent place of confinement is designated.

IV. Recommendations

None.

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ARTICLE OF W.R. 43

See C.S., A.W. 31.

Uniform Code of Military Justice

Subject: Reduction to Ranks - Officers. A.W. 44

I. Army Provisions

1. Articles of War.

(A.W. 44 deals with the publication of the conviction of an officer of cowardice or fraud, but has been repealed by P.L. 759).

2. Manual Courts-Martial

(Par. 103h) "Only provision for loss of rank is that an officer may be reduced a certain number of files or he be placed at foot of list of officers of his grade." No mention is made of reduction in grade. These punishments are no longer to be adjudged. 6 Bull. JAG 280-1 (Dec. 1947).

3. Public Law 759--80th Congress, Chapter 625--2D Session.

"SEC. 221. Article 44 is amended to read as follows:

"ART. 44. OFFICERS--REDUCTION TO RANKS.-- When a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private."

II. Navy Provisions

1. Articles for the Government of the United States Navy.

"ART. 9. Any officer who absents himself from his command without leave may, by the sentence of a court-martial, be reduced to the rating of seaman, second class."

2. Naval Courts and Boards.

Does not mention loss of rank, other than loss of file numbers. Loss of numbers is the maximum punishment prescribed for officers for a number of offenses. N.C.&B. Sec. 457.

3. The Military Justice Division of the Army JAG held that a court-martial has no authority to impose a sentence reducing an officer from a higher temporary grade to a lower grade in the Regular Army or otherwise. (SPJGJ 1943/10454, 16 July 1943 noted in Bulletin of JAG of Army, Vol. II, No. 11 (Nov. 43) p. 425.)

The President also disapproved a sentence of a court-martial reducing an Army officer to a lower grade and rank because it could not be carried into effect by the Executive

alone, but would require a nomination by the President and confirmation by the Senate, and then only in the case of an existing vacancy. (Swain v. U.S. 165 U.S. 553, 563 1 Mar. 1897--noted in Laws Relating to Navy, Supplement 1/1/45, Vol. I, p. 457).

Held also that reduction to rank of officers under A.G.N. 9 applied only to the offense therein stated (A.W.O.L.) and to no other. (CMO 34-1918--noted in Laws Relating to Navy (1929) p. 988).

4. Proposed Navy Bill.

SEC. 7. Changes "without leave" to "without authority" and renumbers Art. 9 as Art. 10.

III. Differences

1. Differences in Army and Navy provisions.

Under the amended Articles of War, an officer may be reduced to grade of private in lieu of dismissal in time of war under such regulations as the president may prescribe. The only Navy provision relating to reduction in rank is that an officer who absents himself without authority may be reduced to seamen second class.

IV. Recommendations

2. Discussion.

The House Armed Services Report (1034) infers that this provision was inserted to provide greater equality in the treatment of officers and enlisted men.

The Vanderbilt Report recommended:

"In time of war a general court-martial should be authorized in its discretion to inflict as officer punishment, loss of commission, and reduction to the ranks. In numerous instances officers would prefer it and we see no reason why this should not be left to the discretion of the general court."

The Keeffe, McGuire, and Ballantine Reports do not make any recommendation as to reduction in rank of officers.

ADDENDA

Uniform Code of Military Justice

Subject: Pay of Suspended Officer. AGN 34.

I. Army Provisions

1. Articles of War.

No similar provision.

2. AR 35-1800

Par. 11a. When an officer is under stoppage of all pay by sentence of general court-martial or otherwise, or is suspended from rank and pay, it is to be understood as depriving him of all his salary and increase for the time.

II. Navy Provisions

1. Articles for the Government of the Navy.

"Article 48. Suspension of pay.--

"Whenever a court martial sentences an officer to be suspended, it may suspend his pay and emoluments for the whole or any part of the time of his suspension."

2. Naval Courts and Boards.

Sec. 622, n.24, states that sentences of suspension, with full or reduced pay, are not favored.

3. Proposed Navy Bill.

Article 48 is renumbered as Article 34.

III. Differences

There is no similar Article of War. However, an Army general court-martial can of course sentence an officer to suspension from command, duty or rank, and to forfeiture of pay during such suspension.

There is no provision in either service that provides that a suspended officer shall not receive pay.

IV. Recommendations

The McGuire, White, Ballantine, Keefe, and Vanderbilt Reports make no recommendations on this provision.

Uniform Code of Military Justice

Subject: Maximum Limits of Punishment. A. W. 45.

I. Army Provisions

1. Articles of War

"ART. 45. Maximum Limits.--Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: Provided, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses."

2. Manual for Courts-Martial

Sets forth limitations as prescribed by the President.
Par. 104.

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 63. Punishment for offenses in time of peace.--

"Whenever, by any of the articles for the government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

2. Naval Courts and Boards

Sets out limits as prescribed by the President. Sec.
451-457.

3. Proposed Navy Bill

"SEC. 47.

"ART. 33. (a) No court martial shall adjudge a sentence of imprisonment upon conviction of an offense under the laws specified in article 5 (d), First, of these Articles, in excess of the period prescribed for that offense in such laws, but such limitations upon the period of imprisonment shall not affect the power to impose additional or other types of punishment authorized by these Articles.

"(b) The President is authorized to prescribe a limitation of the punishment which may be inflicted under any of these Articles; and thereafter, such limitation while in force shall not be exceeded."

III. Differences

Both A.W. 45 and proposed A.G.N. 33 give the President authority to prescribe the maximum punishment for offenses under the respective articles during both times of war and peace. The Articles of War, however, except the punishments for certain offenses, which are mandatory. The proposed A.G.N. have no mandatory punishments.

Both Articles also restrict sentences of imprisonment for offenses which are also offenses against the civil laws of the United States, to the maximum prescribed by such federal laws. However, this latter restriction under the Articles of War only applies to times of peace, while under the proposed Navy bill, there is no such limitation.

The Navy bill adds that such limitation on the period of imprisonment shall not affect the power to impose additional or other types of punishment authorized by the articles, while A.W. 45 does not contain such a provision.

Present provisions as to maximum punishments are found in Manual for Courts-Martial, Par. 104 (applies only to enlisted personnel) and Naval Courts and Boards, Sec. 457 (applies only in time of peace.)

IV. Recommendations

The first Ballantine, McGuire, White, and Koeffe Reports and the Navy JAG recommend establishment of limitations in time of war as well as peace.

The McGuire Articles recommend changes in the capital crimes and that all offenses punishable by death under federal criminal laws be declared punishable by death by courts-martial.

The Keeffe Report contains the following discussion:

"MAXIMUM PUNISHMENTS.

"The present Articles do not make any sentence mandatory. Article 63 provides that whenever, by any Article, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment shall not, in time of peace, '.....be in excess of a limit which the President shall prescribe.' Pursuant to Article 63, the President has prescribed a schedule of offenses and limitations of punishment applicable, in time of peace, to both officers and enlisted men. The schedule includes punishment for military offenses and also lists punishments which are prescribed by statute for the more common offenses against the United States Criminal Code.

"Article 63, by its own terms, has no application in time of war and therefore the schedule prescribed by the President is inapplicable in war time. As a result, naval courts during World War II were, for the most part, without any official guidance as to sentences. In a report submitted to the Secretary of the Navy, by the Disciplinary Policy Review Board, dated 1 May 1945, that Board found that many inequalities existed in punishments awarded in different commands for comparable offenses, particularly in cases involving unauthorized absence, which then comprised over 80% of all disciplinary infractions. In the present review of general court martial cases this Board has found some disparity in sentences, especially as originally imposed by courts. However, substantial uniformity has been achieved by the processes of review.

"Prior to the 1920 revision, the Articles of War provided that, in time of peace, maximum punishments for offenses would be as prescribed by the President, whenever by the Articles, punishment was left to the discretion of courts martial. A table of maximum punishments was prescribed by the President, applicable only in time of peace. During World War I, the fact that Army courts were without substantial guidance as to sentences resulted in wide disparities. After World War I there was much criticism of the severity of the sentence of Army courts martial. As a result, the Articles of War were amended to provide for limitations upon punishments,

to be prescribed by the President, for offenses committed either in time of war or peace, whenever the Articles provided for punishment at the discretion of courts martial.

"The Manual for Courts-Martial sets forth a Table of Maximum Punishments for both military and civil offenses, applicable in both peace and war, but limited to offenses by enlisted men. Punishment of officers, where not made mandatory by the Articles, is left to the discretion of courts martial. Certain offenses which carry mandatory punishment are not mentioned in the Table. Even though by the Articles of War certain offenses may be punished by death or such other punishment as a court martial may direct, the death penalty may not be imposed if the President has made the maximum limit less than death. Certain offenses not provided for in the Table remain punishable as authorized by statute or by customs of the service.

"Shortly after the entry of the United States into World War II, the President, by Executive Order, suspended the Army limitations upon punishment for desertion and certain offenses by sentinels. In November 1942, the maximum punishment for absence without leave was suspended. Subsequently, the War Department issued policy directives on uniformity of sentences, applicable in the United States, which, in general, established a term of 10 years confinement for desertion and 5 years for serious cases of absence without leave.

"Certain revisions of the Army rules of maximum punishments have been recommended since the cessation of hostilities. It has been suggested that Article of War 92 providing a mandatory punishment of death or life imprisonment for murder or rape, should be amended to provide for 'death or such other punishment as a court martial may direct.' It has been claimed that in some cases courts acquitted soldiers charged with murder or rape because they were unwilling to impose such severe punishment. The fact that the Army Table of Maximum Punishment applies only to enlisted men, and that officers escaped with lighter sentences than enlisted men for the same offenses, has been criticized.

"In combat zone desertion cases, the Army adopted a policy of imposing long sentences so as to punish severely 'slackers' who sought to avoid combat by short sentences of confinement, and to deter others who might be tempted to desert. The USFET General Report has suggested that in all such cases, the Table of Maximum Punishments should permit a sentence of confinement 'for the Duration' plus a term of years thereafter.

"The existence of discrepancies in the sentences of naval courts-martial in various commands for like offenses is not of itself a criticism of courts-martial or of naval justice. The Board does not consider that, in general, sentences have been excessive. A penal code which permits variance in sentences is desirable. Individual circumstances vary so widely that variation in sentences is perfectly natural. Sentences in civil jurisdiction vary according to the circumstances of each case, as well as according to the particular attitudes in the jurisdiction itself. It is well known for example, that sentences for certain offenses committed in some states will be substantially less than like offenses committed in other states. In early times, virtually every criminal code was noteworthy for the fixed rigidity of the punishment for various offenders. One of the great steps forward has been the introduction of greater variation in sentences. This has permitted courts greater freedom in adapting their sentences to the particular circumstances of each case. This approach is believed to be more just than one of fixed rigidity. This is not to say, however, there should be no maximum limits to the punishment which a court can impose, but rather that variation within limits is desirable and necessary. Nearly all civil penal codes place limits on punishments which courts may decree for various offenses.

"The first Ballantine Report noted that naval courts were substantially without the benefit of guidance in imposing sentences in time of war, and recommended the promulgation, as a matter of policy, of limitations upon punishments effective in time of war.

"In an attempt to obtain greater uniformity of sentences in absence cases, the Navy Department has issued several policy letters. These letters established policy as to appropriate sentences for absence cases. They did not establish maximum limits of punishment nor did they refer to other offenses, military or civil. Since these directives merely suggested appropriate sentences, courts were still free to impose longer terms of confinement.

"The articles proposed by the McGuire Committee recognize the weakness of present Article 63 and provide:

'Article 4 (c) (6): Limits of Punishment. The punishment imposed by a court-martial shall not exceed such limit or limits as the President may from time to time prescribe.

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Provided: The period of confinement shall in no event exceed the limits prescribed by an applicable federal criminal statute. The limits prescribed by such statute shall not affect the power to impose additional or alternative types of punishment.'

"Commodore White has recommended a provision to accomplish the same purpose, but in more specific language:

'Limitation of Punishment. Whenever the punishment for a crime or offense made punishable under these Articles is left to the discretion of the court-martial or if not specified, the punishment shall not exceed such limit or limits as the President may from time to time prescribe. Provided, the period of confinement shall in no event exceed the limitation prescribed by law. The limitation prescribed by law shall not effect the power to impose the additional or exclusive punishment or punishments of dismissal, discharge, loss of pay and loss of numbers in appropriate cases.'

"The Judge Advocate General has recommended the following articles:

'(6) Limitation of Punishment. Whenever the punishment for a crime or offense made punishable under these Articles is not otherwise limited or specified, the punishment shall not exceed such limit or limits as the President may from time to time prescribe. Limitations proscribed by law shall not affect the power to impose the additional or exclusive punishment or punishments of dismissal, discharge, loss of pay and loss of numbers in appropriate cases.'

"All these proposals have the merit of providing for limitations upon punishments, to be prescribed by the President, applicable in time of war as well as peace. The McGuire Articles specifically cover the subject of confinement in a federal penitentiary, restricting such confinement to offenses against the U.S. Criminal Code and limiting its duration to the maximum period provided therein for such offenses. This follows Article of War 45 and appears to be sound. The White and Judge Advocate General Articles, while intended to accomplish the same result, refer merely to limitations 'prescribed by law', which might be construed to refer to state, as well as federal, penal code.

"Specific reference, in all three proposals, to alternative punishments, other than as prescribed, is desirable in order to avoid doubt as to whether the punishments stated are exclusive.

"The Board is of the opinion that any of the proposed articles would result in improvement over the present situation. If, during time of war, it becomes desirable to suspend the limit of punishment for any offense, this can be accomplished by Executive Order. This was done during World War II in the case of certain offenses against the Articles of War.

"Great care should be exercised, however, in the preparation of a table of maximum punishments. The tables now used by the Army and Navy are objectionable in that some of the differences in the punishment for various offenses appear to be purely arbitrary. Many of the offenses listed are rarely alleged in practice. An eminent authority on military law, Colonel Winthrop, has criticized the fixing of maximum punishments by schedule of 'artificial, complicated, and embarrassing in practice,' and has suggested that such schedule 'would preferable be amended and restricted to acts of desertion and a few other perhaps of the great offenses.' It is believed that there is much merit in this criticism and that consideration should be given to the inclusion, in any such schedule, of only the more serious military and civil offenses, with punishment for other offenses left to the discretion of the courts, as guided by departmental policy.

"It is believed that punishment should not be made mandatory for any offense. The policy of the present Articles, in this regard, should be continued so as to avoid the situation presently faced by the Army in connection with offenses against the 92nd Article of War.

"The Board does not concur in a proposal, currently being made with regard to the Articles of War, that certain maximum punishment for civil offenses be limited to that prescribed by local law, even in foreign countries. For a time the Army, while in England, punished the offense of statutory rape according to English law. This practice was abandoned as a result of a ruling by the Assistant Judge Advocate General that Army courts could not judicially notice foreign law; that such law could not be applied, and that the penalty prescribed by the U.S. Criminal Code should be applied. American naval forces on foreign soil when tried by naval courts should not be subject to punishments prescribed by foreign penal codes. Foreign codes, ideas of justice, and moral concepts may, and do, differ from our own and should not be regarded as controlling in the administration of naval justice.

"On the other hand, consideration should be given to punishments authorized by the penal codes of the states of the United States, since the offenses against state penal laws may violate the Articles as well. If such an offense is not otherwise mentioned in the Articles, it is not an offense against the U.S. Criminal Code, and is not mentioned in the Table of Maximum Punishments, the punishment authorized by the State for that offence should at least be used by the court as a guide in imposing sentence. A naval court should not be bound by state limitations, however. A relatively trivial offense, by state standards of punishment could be a far more serious naval offense because of the discredit it might bring to the uniform of the naval service.

"RECOMMENDATIONS

"The Advisory Council should review the problem of maximum punishments. For purposes of such review, the following suggestions are made:

- "(1) Article 63 should be repealed. In its stead, a new article such as proposed by the McGuire Committee, Commodore White, or the Judge Advocate General draft articles in time of peace and war, in all cases where the Articles provide for punishment at the discretion of courts-martial.
- "(2) Such table of maximum punishments should include only the more serious military and civil offenses, punishment for other offenses to be limited only by departmental policy to be announced from time to time.
- "(3) Punishment for offenses against state laws should not be limited by the law of the particular state, but courts should use such law as a guide in determination of sentence. Punishments prescribed by foreign law should not be binding on courts-martial."

The Navy JAG also recommended:

"2. Limitations of punishment:

- "a. Where the offense committed consists of the violation of a federal statute, the period of confinement shall not exceed the maximum period of imprisonment provided for in that statute.
- "b. Where the offense committed consists of the violation of a state statute, the period of confinement provided for in that statute, if any, should serve as a guide and shall be exceeded only for special reasons."

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The Vanderbilt Report recommended further consideration of the elimination of all mandatory minimum punishments specified in the Articles of War or regulations so as to give wider discretion in passing sentences.

FEL - 1

Uniform Code of Military Justice

Subject: Action by Convening Authority.

See C.S., A.W. 70.

Uniform Code of Military Justice

Subject: Non-departmental Review.

I. Army Provisions

1. Articles of War

"ART. 46. Action by Convening Authority.--Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

"ART. 47. Powers Incident to Power to Approve.--The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilty; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

"(c) The power to remand a case for rehearing, under the provisions of article 50 $\frac{1}{2}$."

"ART. 48. Confirmation--When Required....."

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary."

"ART. 50. Mitigation or Remission of Sentences.--The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person

under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.....

"The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial."

"ART. 51. Suspension of Sentences of Dismissal or Death.--The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President."

"ART. 52. Suspension of Sentences.--The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the person under sentence is held, a court of the kind that imposed the sentence; may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension...."

2. Manual for Courts-Martial

"Par. 87. COURTS-MARTIAL--ACTION--Reviewing Authority.

"a. Who is reviewing authority.--The reviewing authority is the officer to whom the record is transmitted as provided in 85 and 86. The appointing authority In his absence, however, or where the command has been otherwise changed, 'the officer commanding for the time being.' (A.W. 46) is the reviewing authority.

"The 'officer commanding for the time being' is the officer who has succeeded to the command of the appointing authority by assignment or otherwise.....

"A reviewing authority can not delegate his functions as such to anyone.

"b. Powers and Duties.--General.--Approval of a sentence by the reviewing authority is one of the actions which must precede the execution thereof (A. W. 46), and such approval must be express, an approval of the findings only, for instance, not being sufficient. An approval of the findings and proceedings is unnecessary.....

"Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved.....Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial.....Upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced, unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceedings. (A.W. 50 $\frac{1}{2}$). Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense.

".....The effect of a particular error within the purview of A. W. 37 should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a finding or the sentence.....

"Par. 64a.....If the reviewing authority disagrees with the court, he may return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the reviewing authority does not wish to return the record he will take other appropriate action....."

"The disapproval of a sentence puts an end to it as a basis of punishment, and confirmation of a disapproval is not required in any case. A disapproval should be express. Neither an acquittal nor a finding of 'not guilty' requires approval or confirmation; and neither should be disapproved.....

"The staff judge advocate will submit a written review of the case. The review will include his opinion, both as to the weight of evidence and any error or irregularity and a specific recommendation of the action to be taken together with his reasons for such opinion and recommendation.....

"Revision and Correction of Record.-- A record of trial, which by reason of some apparent omission, error, or other defect appears to be substantially incomplete or incorrect, or which in the opinion of the reviewing authority shows improper action by the court as to a finding or sentence, may be returned to the president of the court (or to the summary court), directing that the court reconvene for such action as may be appropriate. See A. W. 40 for matters as to which a return of a record of trial for reconsideration is prohibited. [A. W. 40 'a. An acquittal; or (b) a finding of not guilty of any specification; or (c) a finding or not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or (d) the sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.....']

"Miscellaneous and Advisory Instructions.--Appropriate action should be taken where the court has imposed an unwarranted though legal punishment.....In every case the punishment should be graded according to the circumstances of the offense.....

"The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency (e.g., long confinement pending trial or the fact that an accomplice turned State's evidence), but any factors which properly should have been, but apparently were not, considered by the court in fixing the punishment.....

"The reviewing authority may properly weigh the evidence in determining his action.

"Ordering Execution of Sentence; Mitigation; Remission; Suspensions.--Upon approval of a sentence the reviewing authority may, subject to the provisions of A. W. 50 $\frac{1}{2}$, order the execution thereof unless confirmation is required. [However, 'when the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is required.' (A.W. 48)] The fact that a sentence involves a loss of files or rank or other punishment described in 103h [including loss promotion; suspension from rank, command or duty] does not of itself prevent the reviewing authority from ordering execution.....

"The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case.....

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the President or by a commanding general empowered by the President under A. W. 50.....

"The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

"The authority competent to order the execution of a sentence of dismissal of an officer, or a sentence of death, may suspend such sentence until the pleasure of the President be known. (A. W. 51.).....

"As to penitentiary confinement, 'the reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement.' (90a)

"Forms of Action and Related Matters.-- The reviewing authority.....will sign in his own hand the action taken by him on the proceedings, his rank, and the fact that he is the commanding officer appearing after his signature. So also any supplementary or corrective action pursuant to a holding of the board of review and The Judge Advocate General under A. W. 50¹/₂ must be signed by the reviewing authority personally.....

"d. Orders and related matters.-- An order promulgating the result of a trial by general or special court-martial, while not necessary to the validity of the trial, will be issued whether such result was an acquittal or otherwise.....

"The order will be of the date that the reviewing or confirming authority takes final action on the case. The order will state the date upon which the sentence was adjudged by the court.

"When a rehearing is directed, neither the action of the court at the former proceeding nor the action of the reviewing or confirming authority thereon will be published in orders, but the court-martial order promulgating the final action in the case will

in a separate paragraph publish such charges and specifications at the former hearing as may not have been referred for rehearing, together with the action of the court and reviewing authority thereon."

"Par. 89. COURTS-MARTIAL--ACTION--Ordering Rehearings.-- When the President or any reviewing or confirming authority disapproves or vacates a sentence, the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court. (See A. W. 50¹.)....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"SEC. 223. Article 47 is amended to read as follows:

"ART. 47. ACTION BY CONVENING AUTHORITY.--

"a. ASSIGNMENT OF JUDGE ADVOCATES; CHANNELS OF COMMUNICATION.-- All members of the Judge Advocate General's Department will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

"b. REFERENCE FOR TRIAL.-- Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.

"c. ACTION ON RECORD OF TRIAL.-- Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge

advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"d. APPROVAL.-- No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: Provided, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

"e. WHO MAY EXERCISE.-- Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

"f. POWERS INCIDENT TO POWER TO APPROVE.-- The power to approve the sentence of a court-martial shall include--

"(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"(2) the power to approve or disapprove the whole or any part of the sentence; and

"(3) the power to remand a case for rehearing under the provisions of article 52."

"SEC. 228. Article 51 is amended to read as follows:

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.--

"a. AT THE TIME ORDERED EXECUTED.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended..... The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. SUBSEQUENT TO THE TIME ORDERED EXECUTED.--

"(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or

suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army:.....

"(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension....."

"SEC. 229. Article 52 is amended to read as follows:

"ART. 52. REHEARINGS.--When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

"SEC. 210. Article 13 is amended to read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.--Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment"

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 32. Execution of sentence of summary court.-- No sentence of a summary court martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: Provided, That if the officer ordering the court, or his successor in office, be the senior officer present, such sentence may be carried into execution upon his approval thereof, subject to the provisions of article 54(b)."

"ART. 33. Remission of sentence.-- The officer ordering a summary court martial shall have power to remit, in part or altogether, but not to commute, the sentence of the court. And it shall be his duty either to remit any part or the whole of any sentence, the execution of which would, in the opinion of the surgeon or senior medical officer on board, given in writing, produce serious injury to the health of the person sentenced, or to submit the case again; without delay, to the same or to another summary court martial, which shall have power, upon the testimony already taken, to remit the former punishment and to assign some other of the authorized punishments in the place thereof"

"ART. 54. (a) Remission and mitigation of sentence.-- Every officer who is authorized to convene a general court martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm....."

"(b) Power of Secretary of Navy over proceedings and sentences of courts martial.-- The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order....."

"ART. 64. (d) Approval of sentence of deck court.-- All sentences of deck courts may be carried into effect upon approval of the convening authority or his successor in office, who shall have full power as reviewing authority to remit or mitigate, but not to commute, any such sentence and to pardon any punishment such court may adjudge; but no sentence of a deck court shall be carried into effect until it shall have been so approved or mitigated....."

"(f) Records of proceedings; filing and review.-- The records of the proceedings of deck courts shall contain such matters only as are necessary to enable the reviewing authorities to act intelligently thereon, except that if the party accused demands it within thirty days after the decision of the deck court shall become known to him, the entire record or so much as he desires shall be sent to the reviewing authority. Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall be filed in, the office of the Judge Advocate General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy or his action....."

2. Naval Courts and Boards

"SEC. 471. 'Reviewing authority' defined.-- Any officer to whom the proceedings of a court martial are regularly submitted for review in accordance with law is a reviewing authority."

"SEC. 458. Revision must be before same court.-- Upon the receipt of the record of a court martial the reviewing authority shall proceed at once to examine it in order that it may be returned for revision, if such course be necessary, before the dissolution of the court....."

"SEC. 459. Sentence not effective until approved.-- No sentence of a court martial may be carried into execution until the entire proceedings have been reviewed and the sentence duly approved in accordance with law.....The approval of the convening authority of a general court martial is sufficient, except for sentences extending to death or to dismissal of a commissioned or warrant officer. When the confirmation of a sentence requires the approval of higher authority, the record should be forwarded to the next higher reviewing authority by the convening authority with his approval endorsed thereon.

"Where confinement has been adjudged, it shall take effect from the date of approval of the sentence by the highest reviewing authority required by law to approve it, except that where the accused has been previously sentenced to confinement for another offense, the confinement shall not take effect until.....a former sentence has been served, nor shall a discharge, if adjudged, be executed until both sentences have been served....."

SEC. 472. Matters to be specially considered by the reviewing authority.-- In reviewing courts martial,.....the following should be considered:

- (a) Objections to jurisdiction of the court.
- (b) Objections to the charges or to the specifications unless made at the trial, except where a charge or specification fails to state an offense.
- (c) Sufficiency of evidence to sustain the findings of a court.
- (d) All objections made at the time of trial and rulings of the court thereupon, especially if adverse to the accused.
- (e) If there has been no miscarriage of justice the finding of the court should not be set aside or new trial granted because of technical errors or defects which do not affect the substantial rights of the accused.....

"SEC. 472 $\frac{1}{2}$. Action of reviewing authority on acquittal.-- No action shall be taken by a reviewing authority which purports to approve or disapprove an acquittal or finding of not guilty or not proved.....

"Where the case is deemed to be illegal because of a jurisdictional defect or a fatally defective specification, the reviewing

authority shall so state in his action upon the record for consideration of the Secretary of the Navy, who is empowered to set aside the entire proceedings."

"SEC. 473. Power of reviewing authority: Returning record.-- The power of a convening authority in returning any record to the court is limited to a revision of its findings or sentence or the correction of clerical errors or omissions in the record of proceedings, and, in the event of the court's adherence to its former conclusions, to disapproval of such action.....When the proceedings, findings, or sentence of a court are illegal, the convening authority should set them aside....."

"SEC. 474. Same: When he is not to return record.-- Unless specifically authorized by the Secretary of the Navy in each case, no authority will return a record of trial to any court for reconsideration of (a) an acquittal, (b) a finding of not guilty to any specification, or (c) the sentence originally imposed with a view to increasing its severity, and no court in any proceedings in revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited....."

"SEC. 475. Same: Remitting or mitigating sentences.-- In cases where the proceedings must be approved both by the convening authority and higher reviewing authority before the sentence becomes effective, and where the convening authority has mitigated the sentence imposed by the court, the action of the higher authority is limited to the sentence as mitigated....."

"Article 54 (a), A.G.N., extends only to such sentences as the convening officer is authorized to approve and confirm, and has no application where the punishment of dismissal or loss of life, requiring confirmation by the President, is adjudged. (Bishop v. U. S., 197 U. S. 341.)"

"SEC. 476. Same: Conditional remission [Probation].-- Sentences not involving death or dismissal may, in the discretion of the convening or reviewing authority, be conditionally remitted in lieu of being summarily executed,....."

"SEC. 477. Same: Ordering new trial.-- If the court was without jurisdiction or if none of the charges or specifications alleges an offense, the reviewing authority should disapprove the proceedings, findings, and sentence and convene a new court for the trial of the case. The new trial should be had upon the same charges and specifications, unless the disapproval is based on fatal defects therein, in which event, new charges and specifications should be drawn correctly setting forth the offenses intended to be charged at the

previous trial, provided that such new charges and specifications are not barred by the statute of limitations.

"....., if the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, the reviewing authority before acting upon the record should afford the accused an opportunity to request a new trial, provided the record irrespective of the errors disclosed is sufficient to sustain the findings of the court.....New trial being granted, the proceedings, findings, and sentence of the previous trial should be set aside."

"SEC. 478. Effect of disapproval.-- The disapproval of the sentence of a court martial by the reviewing authority is not a mere expression of disapprobation, but has the legal effect of entirely nullifying it....."

"SEC. 479. The reviewing power, as well as the convening power, of a court martial vests in the office, not in the person, of the authority so acting. Thus, when the reviewing power is vested in the convening authority and the officer who has ordered the court has been relieved or is absent, it is competent for his successor in office, whether temporary or permanent, to act as reviewing authority."

"SEC. 480. Same: May not be delegated to inferior.-- The reviewing authority cannot delegate to an inferior or other officer his function as reviewing authority as conferred by the Articles for the Government of the Navy....."

"SEC. 481. Commutation of sentences.-- The power to commute sentences, that is, to change the nature of the punishment, is vested in.....the Secretary of the Navy by Article 54 (b), AGN..... In summary courts-martial cases, the immediate superior in command has the same power as that vested in the convening authority by Article 33, AGN, which is in terms confined to remitting the whole or a part of the sentence adjudged by the court and does not include the power to commute a sentence;"

"SEC. 483. Superior authority may return record for revision, provided court has not been dissolved.-- The court cannot, after it has once duly completed and forwarded the record, recall it for modification, nor can the convening authority, after he has acted upon the record and forwarded it. But a superior authority, required by law to review the proceedings, may return the record to the convening authority, requesting that the court be reconvened. This may not be done, however, in contravention of Sec. 474."

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Article 39 and amended to read as follows:

"ART: 39. (a) Every punishment, except death, dismissal, discharge, or reduction in rank or rating, imposed by the sentence of a general court martial shall be executed upon announcement of the sentence by the court: Provided, That reduction in rank or rating shall be effective upon the date of the forwarding of the record of proceedings by the convening authority to the Navy Department without having remitted or suspended the reduction in rank or rating: Provided further, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him; that a dismissal shall be executed only after confirmation by the President or, when empowered by the President, by the Secretary of the Navy; and that a punishment of death shall be executed only after confirmation by the President.

"(b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

"(c) Every punishment imposed by the sentence of a summary court martial, except discharge or reduction in rank or rating; or of a deck court martial, except reduction in rank or rating, shall be executed upon announcement of the sentence by the court: Provided, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him: Provided further, That reduction in rank or rating shall be executed upon the date of forwarding of the record of proceedings by the authority exercising the power of legal review to the Navy Department without having remitted or suspended the reduction in rank or rating.

"(d) The officer empowered to convene general courts martial who is next senior in the chain of command to any convening authority of summary or deck courts martial shall be the reviewing authority as to legality of the proceedings, findings, and sentences thereof, if such reviewing authority be present or found by the convening authority to be reasonably available: Provided, That if such reviewing authority be not present or found to be so available, the convening authority shall review the records of such courts as to legality: Provided further, That the reviewing authority shall have the power to set aside the proceedings, findings, and sentence or to remit or mitigate, but not to commute, the punishment imposed by the sentence of any such summary or deck court martial: And provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been

convicted under Art. 28 (a) (2). [Lesser and included offense, or attempt of either or lesser but not included offense.]

"(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial: Provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been convicted under Art. 28 (a) (2).

"(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

"(i) No record of proceedings of a court martial shall be returned to the court for the purpose of reconsidering a finding of 'not proved' or 'not guilty' or for reconsideration of a sentence with a view to increasing its severity."

Articles 32, 33, 54, 64(d), and 64(f) are repealed.

III. Differences

1. Duties of The Judge Advocate General

Assignment of Staff Judge Advocates; Channels of Communications.

There is no provision in the Navy bill comparable to A.W. 47(a) which provides for the assignment of staff judge advocates by the Judge Advocate General and authorizes direct communications between the staff judge advocate and the convening authority, the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

2. Action by the Convening or Legal Reviewing Authority

A. Who May Exercise Reviewing Power

i. Distinction Between Clemency and Legal Review

The basic power vested by the new Articles of War in the convening

authority to review any case as to legality or clemency has remained substantially the same, except that no sentence of a special court martial including a bad-conduct discharge shall be executed until in addition to the approval by the convening authority the same shall have been approved by an officer exercising general courts martial jurisdiction who shall be vested with the same power as the convening authority to act upon the sentence. (A.W. 47 (d) (f)). Under the proposed Navy bill, the convening authority is divested of his power of legal review, but retains his right to clemency review. As proposed, the power to review the legality of all general courts martial sentences is vested in The Office of The Judge Advocate General; and in summary and deck courts martial cases, it is vested in the officer senior to the convening authority who exercises general courts martial jurisdiction. The latter's power includes clemency review. However, when the President or Secretary of the Navy is the convening authority, each shall also exercise the power of legal review.

ii. Absence of Reviewing Authority

Under the provisions of A.W. 47(e), any action that may be exercised by the convening authority may be taken by his successor in office, whether temporary or permanent, or by any person exercising general court-martial jurisdiction. Although there is no comparable provision in the Navy bill, Sec. 479, NC&B, provides a similar rule. However, when the legal reviewing authority of a summary or or deck cases is absent or unavailable, the convening authority shall also exercise the power of legal review. (Art. 39d.)

B. Pre-Trial Procedure

Action on Charges

It is provided in A.W. 47 (b) that before any charge will be certified to a general court martial for trial, the convening authority will refer the matter to his staff judge advocate for advice and consideration; ascertain that an investigation has been performed as prescribed by law, and that the report of the investigation establishes a prima facie case. There is no corresponding provision in the Navy bill. With respect to pre-trial investigations, Sec. 342, NC&B, requires a careful inquiry prior to any court martial proceeding. (See C.S., A.W. 70.) There is no requirement, however, that the charge shall be referred to a legal officer for advice.

C. Predepartmental Review

i. Action on Record of Trial

A.W. 47 (c) requires that no sentence shall be approved unless the conviction is established beyond a reasonable doubt and the

record has been found legally sufficient; nor shall the reviewing authority act upon any trial record of a general court martial, military commission, or a special court-martial in which a bad-conduct discharge has been approved by the appointing authority until he has referred the case to his staff judge advocate or The Judge Advocate General for consideration and advice.

Although there is no corresponding provision in the Navy bill, Art. 39 (d) and (e) requires legal review of all court martial sentences. Legal review, as herein required, may include review as to legal sufficiency of the trial record as well as examination of the record as to whether the evidence is sufficient to sustain the finding of the court. However, there is no requirement that the record shall be referred to a legal officer.

ii. Approval of Sentence

Under the new Army code, (A.W. 47 d), all sentences that do not require confirmation shall be carried into execution upon approval of the convening authority except that no sentence of a special court martial which includes a bad-conduct discharge shall be executed until, in addition to the approval by the convening authority, the same shall have been approved by an officer exercising general courts martial jurisdiction, and reviewed by The Judge Advocate General and appellate agencies in his office. (Art. 13.)

On the other hand, it is provided in Navy bill (Art. 39 (a) (c)), that all sentences shall be self-executory except in cases requiring confirmation or where a reduction in rank or rating has been adjudged; the latter shall take effect when the record is forwarded to the Navy Department by the proper authority.

iii. Powers Incident to the Power to Review

(a) Power to Approve

The power to approve or disapprove any sentence prior to departmental review rests solely in the convening authority, except that where a bad-conduct discharge has been adjudged by a special courts martial, additional approval shall be required by an officer exercising general court martial jurisdiction. Under the provisions of the proposed Navy bill, (Art. 39 (d) (e)), there is no substantial difference in how the power is exercised. However, it is not generally exercised by the convening authority. (See par. 2i above.)

(b) Power to Order a Rehearing

Under the provisions of A.W. 52, a rehearing may be ordered by the convening authority when he disapproves the sentence or when the sentence has been vacated by a superior power; and where a

bad-conduct discharge has been adjudged by a special court martial, the power to order a rehearing shall also vest in an officer exercising general courts martial jurisdiction. Although there is no comparable provision in the Navy bill exactly in point, it is presumed that the ability of the legal reviewing authority (Art. 39 (d) (e)) to "set aside the proceedings, findings, and sentence" includes the power to vacate the proceedings for the purpose of granting a new trial.

There is no substantial difference between an Army "rehearing" or a Navy "new trial", except that in the Navy, jeopardy may attach after the proceedings in a former trial have been carried to an acquittal or conviction, notwithstanding any action by the reviewing authority; whereas in the Army, jeopardy does not attach until the reviewing authority, and, if there be one, confirming authority shall have taken final action. (See C.S., A.W. 52.)

(c) Clemency Power

(1) Who may exercise

In the Army, the convening authority is empowered to grant clemency. However, it is believed that the power is limited to those cases not requiring confirmation. In the Navy, the power may be exercised by the convening authority and the initial legal reviewing authority of a summary or deck court martial. However, it is not clear whether clemency may be granted in cases requiring confirmation by the President or Secretary of the Navy. (39. (a) (d)).

(2) Mitigation, Remission, and Suspension of Sentence

Except as above stated, both systems provide that the power of clemency extends to mitigation, remission, and suspension of sentences, but does not include the power to commute except in cases wherein the President or Secretary of the Navy is the convening authority. However, neither the President nor any authority in the Army may suspend (probation) a sentence of death. This rule is probably true in the Navy, notwithstanding there is no provision to the contrary. (Sec. 476, NC&B.)

(3) When Clemency May be Exercised

In the Army, the authority competent to exercise clemency may do so at any time providing the person convicted has remained subject to the command of the person so acting. In the Navy, clemency may be exercised only when the trial record is in the possession of the authority competent to act in this regard. However, there are differences of opinion whether this rule is applicable to the Secretary of the Navy after he has acted upon the record. (33 Cornell Law Journal 226.)

(d) Revision of Proceedings

See C.S., A.W. 40 as to when proceedings of a court martial may or may not be returned for reconsideration.

Chart A

GENERAL COURTS MARTIAL

Predepartmental Review

CONVENING AUTHORITY

A.	<u>Action</u>	<u>Army</u>	<u>Navy</u>
1.	Charge	Orders trial; requires pre-trial investigation and advice from SJA prior to trial. SJA appointed by JAG.	Orders trial; does not require pre-trial investigation or advice from legal officer.
2.	Approval of Sentence	May approve or disapprove all or part; requires advice from SJA or JAG prior to acting on the record.	No power to set aside.
3.	Execution of Sentence	Upon approval unless confirmation required.	Self-executory unless confirmation required.
4.	Clemency	May mitigate, remit, or suspend, except suspend death sentence, at any time subject to retention of jurisdiction over person convicted. (?) whether he can do so when sentence requires confirmation.	May mitigate or remit only when in possession of record. (?) whether he can do so when sentence requires confirmation by President or SecNav.
5.	Rehearing; New Trial	Rehearing may be granted upon vacation or disapproval of sentence by C.A. or higher authority. Jeopardy may attach upon completion of final review.	No power to award new trial.

B.	<u>Action</u>	<u>REVIEWING AUTHORITY</u>	
1.	Who reviews	Usually convening authority.	J.A.G.
2.	Approval of Sentence	As above.	May set aside or approve all or part.
3.	Clemency	As above.	No power.
4.	Rehearing or New Trial	As above.	Substantially same, except entitled "new trial." Jeopardy may attach upon acquittal or conviction.

Chart B

SPECIAL, SUMMARY AND DECK COURTS-MARTIAL

Predepartmental Review

CONVENING AUTHORITY

A. <u>Action</u>	<u>Army</u>	<u>Navy</u>
1. Charge	Orders trial.	Orders trial.
2. Approval of Sentence	May approve or disapprove all or part. Will refer trial record of BCD to SJA prior to approval.	No power to set aside.
3. Execution of Sentence	Upon approval except sentence including BCD.	Self-executory except when sentence includes reduction in rank or rating, or BCD.
4. Clemency	May mitigate, remit or suspend, at any time subject to retention of jurisdiction over person convicted.	May mitigate or remit only when in possession of record. (?) whether he can do so when sentence requires confirmation by SecNav.
5. Rehearing; New Trial	Rehearing may be granted upon vacation or disapproval of sentence by C.A. or higher authority. Jeopardy may attach upon final review.	No power to award new trial.

B. <u>Action</u>	<u>REVIEWING AUTHORITY</u>	
1. Who reviews	The convening authority. When sentence includes BCD additional approval required by an officer exercising GCM jurisdiction.	Officer senior to C.A. exercising GCM jurisdiction.
2. Approval of Sentence	As above.	May set aside or approve all or part.
3. Clemency	As above.	As above.
4. Rehearing; New Trial	As above.	Substantially same, except entitled "new trial." Jeopardy may attach upon acquittal or conviction.

IV. Recommendations

The McGuire, White, Navy JAG, and Ballantine recommendations are covered by the Keefe Report.

Keefe Report:

"B. Comments on Present Procedure:

"Without question, the review by the convening authority under the present system affords substantial protection to the accused. It provides a means of detecting errors in the trial and of correcting excessive sentences. If the errors are substantially prejudicial, the proceedings can be disapproved or set aside and a new trial granted or offered. If the sentence is not excessive, the convening authority can reduce it by way of clemency, or he can extend clemency in other ways, such as by remitting the sentence conditionally on probation. If the sentence is excessive, the convening authority can reduce it. Furthermore, the review is obligatory and is therefore in the nature of an automatic appeal granted to every accused, regardless of whether he requests it.

"On the other hand, there are certain objections to the system of initial review by the convening authority which must be considered. These may be summarized as follows:

"(i) The reviewing authority is usually the same officer who convened the court and referred the case to trial. There is a certain anomaly in having the same officer review a case which he has considered at some length before it went to trial. It is humanly impossible for a person, no matter how high his purpose, to dissociate himself from his prior actions and opinions on a particular matter and to view it later as though he were seeing it for the first time. This is recognized in the rules which prescribe the qualifications for members of courts-martial, and in the rules followed everywhere with respect to disqualification of judges in civilian appellate courts. It is anomalous not to recognize it in the single case of the authority who reviews court-martial cases.

"This is not to imply that convening authorities in reviewing cases have acted unfairly. In over 2,000 cases reviewed by it, the Board found no evidence or indication that this was the case. If anything, naval reviewing authorities have probably leaned over backward in their desire to be scrupulously fair to the accused whose cases they reviewed. But it is a difficult position in which to place anyone, especially one who is in the position of a judge administering justice.

"The difficulty is not cured by requiring that the case be referred to a legal officer for his opinion. For exactly the same problem presents itself. The legal officer who reviews the case is usually the same officer who studied the case beforehand, drafted the charges, and recommended trial in the first place.

"(ii) The review of a court-martial case is not really analogous to an appeal. Although counsel for the accused has the privilege of submitting a brief, he does not often do so, and rarely, if ever, resorts to oral presentation of the case to the convening authority or his legal officer. Although theoretically each objection to evidence and rulings of the court is weighed as though on appeal, and the record is carefully scrutinized for jurisdictional or other error, it is difficult, on such a procedure, to detect all the errors which may exist, sometimes serious ones.

"(iii) The practical result of the present system is that the reviewing authority, rather than the court, fixes the sentence. Theoretically, the court can impose whatever sentence it deems fit. But it is directed to impose a sentence 'commensurate with the offense' and to leave matters of clemency to the reviewing authority. Of course the members of the court may, and frequently do, recommend clemency. Occasionally a court invades the reviewing authority's prerogative of clemency. But in the vast majority of cases the court merely fixes a maximum limit to the sentence, and the sentence is actually set by the reviewing authority, within that maximum. The clemency extended by the reviewing authority in most cases consists merely in reducing the sentence to something approaching what it should have been in the first place.

"(iv) The convening authority's power of review carries with it a large measure of indirect control over the court and its actions. If the convening authority does not agree with the findings of the court, or believes that the sentence is inadequate, even though he may be powerless to change the result in the particular case, he can express his opinion in his action or in a letter to the court. This cannot but have its effect on subsequent cases. The mere knowledge that it can take place is apt to influence a court, without any expression of disapproval or non-concurrence ever being made by the convening authority.

"C. Proposals by Others for Modification of Procedure on Initial Review:

"It is believed that the above are defects in the present system of review by the convening authority which deserve careful attention. They are not cured by subsequent departmental review, nor would they be cured by improving that review. For of necessity, subsequent departmental review leans heavily on the action of the court and the

initial reviewing authority. They are the parties closest to the accused, the offense, and the scene. A strong presumption in favor of correctness and regularity in the initial proceedings exists, and is bound to exist, under any system of higher appellate review. The same is true of the civilian courts. It is submitted that the true solution is to improve the initial processes, and not to rely on subsequent review to correct deficiencies therein.

"Nor will palliatives solve the problem. The proposal has sometimes been made that the reviewing authority be prohibited from criticizing a court for its action in a particular case. Obviously this deals with only a surface manifestation, and fails to get at the heart of the difficulty.

"In view of the difficulties which have been pointed out above, it is proposed to review briefly some of the suggestions which have been made for modifying the system of initial review. Among these are:

"(i) Retention of the present system of requiring approval or confirmation to make a sentence effective, but moving the process up on echelon, or otherwise separating the reviewing officer from the officer ordering trial.

"(ii) Abolishing the initial review altogether, and making the court's sentence self-executory, subject however to being set aside by a Board of Review or other higher authority.

"The first method is followed to a limited extent under the present Army and Navy systems. In those cases requiring confirmation, the convening authority's recommendation of approval is not sufficient to execute the sentence, but the sentence must also be confirmed by higher authority. The result is that in this important type of case a further review by another authority is superimposed on the review by the convening authority.

"However, the effectiveness of this is limited by the fact that only a limited class of cases is subject to extra review. Even in this type of case, the record is first reviewed by the convening authority, whose recommendations necessarily carry great weight. And in those cases in which the convening authority is also the confirming authority, the same objections made to review by the convening authority are equally applicable.

"The British have gone a little further along the path of separating the convening authority from the reviewing authority. Under the British Army system, every court-martial sentence must be confirmed before it is ordered executed. In a general court-martial case, the confirming authority may, but need not, be the

same officer as the convening authority. As a rule, warrants giving power both to convene and to confirm the findings and sentence of general courts-martial are issued only to certain officers in India, the colonies, and on active service.

"The other approach to the problem is to eliminate the review by the convening authority, and to make the sentence of the court self-executory, subject however, to higher departmental review. This was the proposal of the Chamberlain Bill, but it was not adopted. It is also the rule in the French system, under which the findings and sentence of the court are final, subject to a limited right of appeal to conseils de revision.

"The Report of the General Board, European Theater, on the Administration of Military Justice does not specifically discuss the question of review by the appointing authority. It does, however, make the following observations about command control of court-martial proceedings generally:

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

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

"Neither the Ballantine Reports nor the McGuire Report mention the important question of review by the convening authority, except insofar as the first Ballantine Report touches upon it in making its recommendations for decentralization. The first Ballantine Report did recommend that greater power and responsibility for the fixing of the sentence be granted to the court, but made no corresponding recommendation with respect to the powers and function of the reviewing authority.

"The revised Articles proposed by the McGuire Committee, by Commodore White and by the Judge Advocate General all propose retention of the present system, with certain modifications. For example, Article 5 (a) of the McGuire draft articles provides that every sentence of a naval court-martial not extending to death, dismissal, or discharge may be executed upon approval of the convening authority, who shall have power to remit or mitigate, but not to commute, such sentence. The excepted cases require confirmation by the President or by the Secretary of the Navy.

"D. Suggestions Regarding Present System of Initial Review.

"For reasons stated above, it is felt that the question of review by the convening authority is a basic one, which warrants exhaustive study by the Advisory Committee, despite the failure of the McGuire Report and the Ballantine Report to discuss it. Among other problems involved are:

"(i) The function of the judge advocate: There appears to be a certain inconsistency in providing for a judge advocate, independent of the convening authority, and representing only the Judge Advocate General, and then to have the court's proceedings subject to review by the convening authority.

"(ii) Sentencing power of the court: The proposal, concurred in by the McGuire and Ballantine Reports, to give the court greater power and responsibility in the imposition of the sentence, necessarily involves a corresponding reduction in the power and responsibility of the convening authority with respect to the sentence.

"(iii) Suspension of Sentence: Under present practice, convening authorities are empowered, except in those cases requiring confirmation by higher authority, to remit all or part of a general court-martial sentence on probation, and this power is frequently exercised in appropriate cases. Similar power is exercised by Army reviewing authorities. This power is similar to that of a civil judge, who may impose sentence and at the same time suspend its operation for a probationary period. This power is very important from a disciplinary and morale standpoint. The question whether the court should have greater control over the sentence, and the reviewing authority less,

inevitably raises the question whether the power or remission on probation should be transferred from the reviewing authority to the court. The court, having heard all the evidence in the case and having reviewed all the sentence factors, would seem to be in the better position to decide whether the accused deserves a suspended sentence and will be a good probation risk. On the other hand, the convening authority may well be in a better position to review the accused's record as a whole and evaluate it against the records of other accused and in the light of disciplinary and morale problems of the command as a whole.

"(iv) Legal review: The careful scrutiny of the record by the convening authority's legal officer is a valuable safeguard to the rights of the accused, and his advice to the convening authority on all aspects of the case is perhaps the most important single step in the entire proceedings. It may be questioned whether the placing of a skilled judge advocate in the court, of and by itself, would be an adequate substitute for the function performed by the convening authority's legal officer, were this to be eliminated.

"(v) Command control: Fundamental to the whole question of the court-martial system is the problem of command. A court whose proceedings are nugatory until approved by the officer who appointed it is not an independent tribunal in any true sense. Conversely, a court whose judgments are self-executory (subject only to higher departmental legal and clemency review) would be difficult to fit into the organization and structure of the Navy, and would be at variance with the basic concept of military command, hierarchy and discipline.

"The whole problem is extraordinarily difficult and no pat solution can be put forth. Several proposals, have, however, from time to time been made, which will be briefly reviewed:

"(1) Retention of the present system in substantially the same form. This is the proposal of the Ballantine Committee, and of the McGuire, Judge Advocate General, and White draft articles.

"(2) Some modification of the present system, such as moving the process of review up to a higher command than that of the convening authority (followed to some extent in the British Army), or depriving the convening authority of his power to comment on findings and sentences.

"(3) Abolition of the review by the convening authority and making the court's findings and sentence final and self-executory, subject however to higher departmental review. This is substantially the French Army system, and was proposed by the Chamberlain Bill in 1920 for the United States Army, but not adopted.

"The recent Report of the House Military Affairs Committee seems to adopt some combination of (2) and (3), but its recommendation in this respect (which is not opposed by the Army) is not very clear.

"Proposal (3) is far-reaching and under it the court-martial system, as it has existed for centuries, would be radically altered. Nevertheless, it does have certain advantages:

"(i) The anomaly of having the same authority pass upon the charges before trial and then review the case after trial would be eliminated.

"(ii) Responsibility for the findings and sentence will be placed squarely on the court.

"(iii) Control by the convening authority over the proceedings and actions of the court would be reduced to a minimum, if not eliminated altogether.

"(iv) The procedure would be simpler and more expeditious than the present rather cumbersome system.

"(v) On the other hand, serious objections can be made to this proposal, among which are the following:

"(i) Elimination of the review by the convening authority, and the corresponding elimination of his control over the sentence, might be destructive of discipline; and

"(ii) Elimination of the review by the convening authority might impair the rights of the accused.

"These are serious objections and should be carefully weighed by the Advisory Council. If true, they would constitute persuasive reasons why the present system should not be disturbed. The extent of their validity may, however, be questioned.

"As to (i), the exact relationship and balance between 'discipline' and 'justice' can probably never be discovered. In most cases they are perhaps perfectly reconcilable. In a few, perhaps, they are not. In the latter, certainly a good case can be made for the proposition that once a case has been referred to trial, it ceases to be a mere disciplinary matter; and that from then on, the processes of law should be paramount, and command control should cease. This is well expressed in the recommendations of the minority members of the Ballantine Committee:

"There have been various statements and comments, regarding 'tempering justice with discipline' and 'discipline being an integral function of command.' We disagree with the first as there can be no degrees of justice. We agree with the second quote but point out that the function of command ceases with the determination that a trial is necessary; thereafter the problem is legal." 313

"Moreover, as a practical matter, it may be seriously questioned whether, under present Navy policies, the convening authority, in reviewing a general court-martial case, actually does possess the command control originally contemplated in the basic theory of military organization. On legal matters he is bound to follow the law. If he makes a mistake, he will presumably be overruled by the Secretary, upon the advice of The Judge Advocate General, (unless indeed he errs in favor of the accused, in which case it may be too late to correct the error). He cannot increase the sentence, without getting the Secretary's permission to send the case back to the court for reconsideration, and this is rarely granted. He may reduce it, but in doing so he is bound by Departmental policy, which prescribes appropriate sentences for nearly all offenses. The same letter which is referred to above in Section V, in connection with referring cases to trial, also prescribes appropriate sentences for desertion and absence offenses, and directs convening authorities to mitigate sentences imposed by courts accordingly. These sentences are prescribed down to the last detail, and the policies announced have resulted in such sentences as 3 years, 1 month, and 77 days, (Review Board No. 97) or 3 years, 10 months, and 295 days (Review Board No. 134). If the convening authority does not take such action, it will be taken by the Secretary, upon the recommendation of the Bureau of Naval Personnel. It is true that the convening authority is authorized to remit part or all of a sentence on probation in worthy cases, but in the same paragraph of the above-mentioned letter it is stated that the 'practice of convening authorities of directing restoration to duty on probation on completion of a part of the sentence is a duplication of the efforts of the Clemency Board and it is not looked upon with favor. Finally, the power to order executed a dishonorable discharge or a bad conduct discharge has, by Departmental Policy, been taken away from convening authorities and vested in the Navy Department or the Commandant of the Marine Corps.

"It is evident that in practice the convening authority exercises little if any 'disciplinary' control over court-martial sentences in the one type of case where military and disciplinary considerations would appear to be paramount, namely, desertion and unauthorized absence.

"The other objection, that to eliminate the review by the convening authority would impair the rights of the accused, is also a serious one. Simply because a protective device has faults is a poor reason for abolishing it. However, the following suggestions, if adopted, would tend to compensate for any impairment of the accused's rights:

"Correction of Legal Errors:

"(i) A judge advocate would be on the court, a feature which should reduce greatly the number of legal errors;

"(ii) An improved system of departmental review is contemplated.

"Clemency:

"(i) Responsibility for an appropriate sentence would be placed squarely on the court;

"(ii) The power to order executed a sentence of death, dismissal, or discharge would be reserved to the President or the Secretary;

"(iii) There would be no impairment of the present clemency powers of the Secretary.

"RECOMMENDATIONS:

"The Board is convinced that the two most serious difficulties with the court martial system are the method of review and the control by commanding officers over court proceedings, and it is right here, at the stage of initial review by the convening authority that these two difficulties come most sharply into focus. The Board believes that no amount of minor reforms of the Articles for the Government of the Navy will solve this problem, and makes the following suggestions:

"(i) Control of the convening authority of a case should cease upon reference of the charges to trial. It is felt that up to this point the command responsibility of the convening authority is paramount, and his decision as to disposition of the charges; whether by summary punishment or by trial, is a command decision, which should properly be made by him, subject to the advice of his legal officer.

"(ii) Once the case has been referred to trial the proceedings, from the arraignment to the sentence, should be the entire responsibility of the court and the judge advocate. The details of this procedure are discussed above in Section VI.

"(iii) Every sentence imposed by a general court-martial should be self-executory, subject, in the event of conviction, to review in the Navy Department by a Board of Legal Review and a Board of Sentence Review.

"(iv) Every sentence imposed by inferior court-martial should be subject to automatic review by the officer exercising general court-martial jurisdiction over the command, unless he was also the convening authority, in which case the review should be by the next higher authority.

"(v) The execution of such portion of any sentence as extends to death, dismissal of an officer, or discharge of an enlisted man, should require the action of the President, or of the Secretary or Under-Secretary of the Navy, or other officer designated by them."

Vanderbilt Report:

"6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose.

"We realize that the officers of a division or command may have a special understanding of local conditions and be best qualified to try local offenders and also that officers must not be appointed to courts-martial duties if, in the opinion of the commander, they are unavailable. These requirements may be met by the establishment of a panel of available officers by the commander, subject to change

from time to time; from which the selection of members of the court may be made. The determination of the commander as to availability must, of course, be final. It is not meant that the selection of the members of the courts-martial shall be confined to the division or command in which the offense occurs.

"We have no fear that this arrangement will impair the proper authority or influence of the commander. The absolute right to refer the charge for speedy trial and to control the prosecution will satisfy the demands of discipline. Further than that the command should not go. The present Articles of War do not contemplate that the commander shall control the action of the courts. The members of the court take an oath under Article of War 19 to well and truly try and determine, according to the evidence, the matters submitted to them without partiality, favor, or affection, according to the rules and articles for the government of the armies of the United States. The right to fix the penalty in case of conviction is specifically lodged in the court and the surrender of this power to the commander is an act which the court has no legal right to perform, and the commander no legal justification to require.

"The need for the prompt appointment of a court and a speedy trial when the command refers a charge for trial must be recognized. Moreover, the deterrent effect of punishment must not be overlooked and the need for severe sentences under conditions prevailing in an army in a state of war cannot be denied. But there is no reason to think that the members of the Judge Advocate General's Department will not be keenly alive to all these necessities. They will be army men selected and trained by army men. In time of war they will be in the field in close association with the command and cognizant of all the considerations of safety and success which influence the command itself. The time is past when a court-martial might be deemed merely as an advisory council to the commander. The court-martial, as conceived by the Articles of War, is an independent tribunal; and if the commander controls the prosecution, the appointment and functioning of the court may be safely left to the legal department of the Army.

"7. The special understanding that officers of a division or command have of local conditions lead us also to recommend that the general or other officer who referred the case for trial should have the power to mitigate, suspend, or set aside the sentence. In order to effectuate this recommendation the record should be first sent by the court to the officer who referred the case for trial so that he may have an opportunity to act upon the sentence and it should be his duty to act promptly and forward the record to the reviewing authority for final action. The power of the command in this respect should be limited to the question of clemency.

"10. Special courts-martial should be governed as far as practicable by the same requirements as general courts-martial."

House Report 2722, 79th Congress, 2D Session (Committee on Military Affairs):

"Recommendation 1.

"....."

"That, after a special or general court has been held, the findings and sentences shall pass directly to the Judge Advocate General's Department for all further actions of review, promulgation, and confirmation, except for such final appellate review as may be made by the Judge Advocate General of the Army in accordance with recommendation 2 below and such final confirmation as may legally require action on the part of the President;"

FEL - 1 and 2

Uniform Code of Military Justice

Subject: Confirmation, A. W. 48-49.

I. Army Provisions

1. Articles of War.

(a) Under A. W. 48 confirmation by the President is required in addition to approval by the convening authority, in the following cases:

- (i) Any sentence respecting a general officer;
- (ii) Any sentence extending to dismissal of an officer in peacetime;
- (iii) Any sentence extending to suspension or dismissal of a cadet;
- (iv) Any sentence of death in peacetime;
- (v) Any sentence of death in wartime (except for murder, rape, mutiny, desertion, or spying).

(b) Confirmation is also required in the following cases, but may be made by the Commanding General of the Army in the field, or by the Commanding General of the territorial department or division:

- (i) In time of war, a sentence extending to dismissal of an officer below the grade of brigadier general;
- (ii) In time of war, any sentence of death for murder, rape, mutiny, desertion, or spying.

(c) Under A. W. 49 the power to confirm includes the power to confirm or disapprove a finding, to confirm a finding of a lesser included offense, to confirm or disapprove the whole or any part of a sentence, and to remand the case for rehearing.

(d) Under A. W. 50, the Commanding General of the Army in the field, or the Commanding General of the territorial department or division, when empowered by the President so to do, may approve or confirm and commute (but may not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under the articles requires the confirmation of the President before the same may be executed.

2. Manual for Courts Martial.

(a) Par. 88: The power of confirmation of certain sentences in time of war, conferred by A. W. 48 upon the Commanding General "of the territorial department or division," cannot be exercised

by the Commanding General of a corps area or Army area.

It has also been held that such power may not be exercised by the Commanding General of a foreign expeditionary force consisting of two regiments of infantry and some special units (Dig. JAG, 1919, page 46; MCM, 1928, App. 1, page 213).

(b) Par. 88: The confirming authority will be guided by the principles and provisions of MCM, par. 87, (relating to the reviewing authority), as far as applicable.

3. Executive Order 9556, dated 29 May 1945.

This Executive Order, issued under the authority of Title I of the First War Powers Act, delegated to the Secretary and the Under Secretary of War the confirmation powers vested in the President under Article of War 48, together with the power of commutation and the other powers vested in the President by Articles of War 49 and 50, in all cases of sentences except those extending to death. This Order remains in effect until the termination of Title I of the First War Powers Act (i.e., six months after end of present war).

4. Public Law 759--80th Congress, Chapter 625--2D Session.

(a) Under A. W. 48 confirmation is required as follows:

(i) By the President with respect to any sentence:

- (1) of death, or
- (2) involving a general officer.

(ii) By the Judicial Council, with the concurrence of the Judge Advocate General, with respect to any sentence:

- (1) when the confirming action of the Judicial Council is not unanimous, or
- (2) when by direction of the Judge Advocate General his participation in the confirming action is required, or
- (3) involving imprisonment for life, or
- (4) involving the dismissal of an officer other than a general officer, or
- (5) involving the dismissal or suspension of a cadet.

(iii) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of A. W. 50. These cases are as follows:

- (1) Any case in which the Board of Review has held the record legally sufficient, but modification of the findings of guilty or of the sentence is deemed necessary to the ends of justice by the Judge Advocate General or by the Board of Review.
- (2) Any case in which the Board of Review holds the record of trial legally insufficient, in whole or in part, and the Judge Advocate General does not concur.

(b) Article 49 has been amended to read as follows:

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.-- The power to confirm the sentence of a court-martial shall be held to include-

"a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

"c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

"d. The power to order the sentence to be carried into execution;

"e. The power to remand the case for a rehearing under the provisions of article 52."

(c) ART. 51a. "MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.-- AT THE TIME ORDERED EXECUTED.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended..... The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

II. Navy Provisions

1. Articles for the Government of the Navy.

(a) Article 53:

"No sentence of a court martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court."

(b) Article 54(b):

"The Secretary of the Navy may set aside the preceding or remit or mitigate, in whole or in part, the sentence imposed by any Naval court martial convened by his order or that of any officer of the Navy or Marine Corps."

2. Naval Courts and Boards.

(a) Page 245, Sec. 475: "In cases where the proceedings must be approved both by the convening authority and higher reviewing authority before the sentence becomes effective, and where the convening authority has mitigated the sentence imposed by the court, the action of the higher authority is limited to the sentence as mitigated. Such higher authority cannot disapprove the mitigation of the convening authority and thus restore the original sentence."

In CMO 1-1944, page 63, however, it was held that in a confirmation case the convening authority's power to remit or mitigate is limited to such portion of the sentence as does not relate to death or dismissal. In other words, if the sentence involved confinement and dismissal, the convening authority could remit or mitigate the confinement but not the dismissal. The convening authority's power over a sentence of death or dismissal is limited to approval or disapproval.

(b) Page 247, Sec. 481: States that the power of mitigation conferred upon the Secretary by AGN 54(b) includes the power to commute a death sentence to life imprisonment, and a sentence of dismissal to loss of numbers or suspension from duty on one-half pay.

3. Executive Order 9556, dated 26 May 1945.

This Executive Order, issued under Title I of the First War Powers Act, delegates to the Secretary and Under Secretary of the Navy all confirmation powers vested in the President under AGN in all cases of sentences except those extending to the loss of life. The order remains in effect until the termination

of Title I of the First War Powers Act of 1941 (i.e., six months after end of present war).

4. Proposed Navy Bill.

SEC. 39:

"Article 53 is renumbered as Article 39 and amended to read as follows:

'ART. 39. (a) Every punishment except death, dismissal, discharge or reduction in rank or rating imposed by the sentence of a general court martial shall be executed upon announcement of the sentence by the court: * * * * Provided further, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him; that a dismissal shall be executed only after confirmation by the President or, when empowered by the President, by the Secretary of the Navy; and that a punishment of death shall be executed only after confirmation by the President.

'(b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

'(c) Every punishment imposed by the sentence of a summary court martial, except discharge or reduction in rank or rating or of a deck court martial, except reduction in rank or rating, shall be executed upon announcement of the sentence by the court: Provided, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him: * * * * *

'(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: * * * * *'"

III. Differences

1. Cases in which confirmation is necessary:

(a) The two agree in requiring confirmation by the President in respect of the death sentence.

(b) Under the Navy bill, a sentence of dismissal may be confirmed by the President or, when empowered by the President, by the Secretary of the Navy. Under the new Army law, a sentence of dismissal of a general officer must be confirmed by the President; a sentence of dismissal of an officer other than a general officer, and a sentence of dismissal of a cadet, may be confirmed by the Judicial Council with the concurrence of the Judge Advocate General.

(c) Under the Navy bill, a sentence of discharge must be confirmed by the Secretary or other authority duly appointed by him. There is no provision in the new Army law which exactly corresponds to this.

(d) The new Army law requires confirmation by the Judicial Council of a sentence involving imprisonment for life. There is no corresponding provision in the Navy bill.

(e) Under the new Army law there are certain other cases in which confirmation by the Judicial Council is required. The Navy bill has no provisions exactly comparable to these.

The proposed Navy bill (Sec. 39, Art. 39(f)), provides for a clemency board which would perform some of the functions assigned to the Judicial Council under the new Army law. Consequently, what might be treated as a "confirmation" case under the latter, might be handled as a matter of clemency review under the former. It follows that the above statement of differences may be somewhat misleading, unless reference is had to C.S., A.W. 50.

2. Powers incident to power to confirm:

The amended Articles of War set forth in detail the powers incident to the power to confirm; while the proposed Navy bill does not state what the powers of the confirming authority as such are.

Querie: Whether the powers of the SecNav as confirming authority would be greater than his reserve powers?

IV. Recommendations

1. McGuire Report, 21 Nov. 1945:

(a) Under article 5(c)(1) of the proposed McGuire Articles,

no sentence extending to death shall be executed until confirmed by the affirmative action of the President.

(b) Under article 5(c)(2), no sentence extending to dismissal of a commissioned or warrant officer shall be executed until confirmed by the President. In time of war, however, the President may delegate this power of confirmation to the Secretary of the Navy.

(c) Under article 5(b)(2), no sentence extending to discharge of an enlisted person shall be executed until confirmed by the Secretary of the Navy or his designated representative, and such discharge shall not be executed in a foreign country.

2. Commodore White's Studies (1946):

Identical (except for numbering of sections) with proposed McGuire Articles.

3. Keeffe Report:

(a) After review by the Board of Legal Review and the Board of Sentence Review, sentences extending to death, dismissal, or discharge, should be handled as follows:

- (i) Cases involving the death sentence should be forwarded to the Secretary, who would have power of commutation. If he did not commute, he would forward case to the President for final action.
- (ii) Cases extending to dismissal of a commissioned or warrant officer should be handled in the same way, except that the Secretary would have the power to suspend as well as commute. If the Secretary did not commute or suspend, he would forward the record to the President for final action. In time of war, the President would be authorized to delegate this confirming power to the Secretary.
- (iii) Sentences extending to discharge of an enlisted man should be referred to the Secretary or to his duly delegated representative for final action before execution of the discharge.

(b) Eliminate the present requirement for a complete review de novo by the President or Secretary of confirmation cases, except in extraordinary cases where such a review seems desirable. In other cases rely on comprehensive review already accomplished by the Board of Legal Review and the Board of Sentence Review.

4. JAG Navy:

Substantially follows recommendations of McGuire Report, Commodore White's Studies, and of Keefe Report.

RSP

Uniform Code of Military Justice

Subject: Powers Incident to Power to Confirm.

See C.S., A. W. 48.

Uniform Code of Military Justice

Subject: Departmental Review - A.W. 50.

I. Army Provisions

1. Articles of War

ART. 50 $\frac{1}{2}$:(a) Boards of Review

Provides for establishment, in the Office of the Judge Advocate General, of one or more boards of review, each consisting of not less than three officers of the J.A.G.D. Also authorizes the President to direct the J.A.G. to establish a branch office, under an Assistant J.A.G., in any distant command, and to establish in such office one or more boards of review.

(b) Presidential Confirmation Cases

In any case involving a sentence which requires confirmation by the President under A.W. 46, 48, or 51, the record shall first be examined by the board of review. The board shall, except as noted below, submit its opinion to the J.A.G. The J.A.G. shall transmit the record, the board's opinion, and his own recommendation directly to the Secretary of War for the action of the President. (Note: In addition to the Presidential confirmation cases discussed in C.S., A.W. 48-49, these cases include:

- (i) Cases in which the President is the convening authority, and therefore both reviewing and confirming authority. (A.W. 46);
 - (ii) Cases in which some authority other than the President is authorized to act as confirming authority, and the latter has suspended execution of the sentence until the pleasure of the President be known. (A.W. 51).
- (c) Other Cases Involving Sentence of Death, or of Dismissal or Discharge Not Suspended, or Penitentiary Confinement

(i) In any other G-C-H case; in which the sentence extends to death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, the sentence shall not be ordered executed unless the board of review, with the approval of the J.A.G., has held the record legally sufficient.

(ii) Exception: A sentence involving dishonorable discharge or penitentiary confinement may be ordered executed, without review by board of review, if based solely on a plea of guilty.

(iii) Procedure:

(A) If the board of review, with the approval of the J.A.G., holds the record legally sufficient, the J.A.G. notifies the reviewing or confirming authority, who may thereupon order the sentence executed.

(B) If the board of review, with the concurrence of the J.A.G., holds the record legally insufficient, or finds substantial error, the findings and sentence shall be vacated in whole or in part in accord with such holding and the J.A.G.'s recommendation thereon, and the record shall be transmitted to the reviewing authority for a rehearing or other appropriate action.

(C) If the J.A.G. does not concur in the holding of the board of review, he shall forward the case, including the board's opinion, and his own dissent, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part. These functions of the President may be performed by the Secretary or Acting Secretary of War. Where a branch office of the J.A.G. has been established with a distant command, with a board of review, such functions may be performed by the commanding general of such distant command, provided he is not the reviewing or confirming authority in the case, and provided the sentence does not require approval or confirmation by the President.

(d) Other GCM Cases:

All other GCM records shall be examined in the J.A.G. Office.

Procedure: (i) If found legally sufficient, the reviewing authority is so notified, and no further action need be taken. (Note: This is not expressly stated in A.W. 50 $\frac{1}{2}$).

(ii) If found legally insufficient, the record shall be examined by the board of review. If the latter also finds the record legally insufficient, it submits its written opinion to

the J.A.G., who transmits the record, the board's opinion, and his own recommendation to the Secretary of War for the action of the President, who may take the same action he could take under (c) (iii) (C) above, and, in addition, may restore the accused to all rights affected by the findings and sentence, or part thereof, held invalid. These functions of the President may be performed by the Secretary or Acting Secretary of War or by the commanding general of a distant command, under the same conditions as are set forth under (c) (iii) (C) above.

(iii) A.W. 50 $\frac{1}{2}$ is silent on the situation where the J.A.G. Office has found the record legally insufficient, and the Board of Review has found it legally sufficient. Presumably, the latter would be the final action on the case.

2. Manual for Courts-Martial, App. 1, pp. 216-7

(a) If the reviewing authority has reduced the sentence before forwarding the record for review under A.W. 50 $\frac{1}{2}$, and the Board of Review and J.A.G. has found the record legally sufficient, only the sentence as reduced can be ordered executed; the original sentence cannot be reinstated. (Dig. JAG, 1922, p. 71).

(b) If the Board of Review and the J.A.G. have held a record legally insufficient, the finding or sentence is vacated and cannot be reconsidered for the purpose of reconsidering such holding. (Dig. JAG, 1923, p. 52).

(c) Except where the President is the reviewing or confirming authority, it is not the function of the Board of Review or the J.A.G., in considering legal sufficiency under A.W. 50 $\frac{1}{2}$, to weigh evidence, judge the credibility of witnesses, or determine controversial questions of fact. (C.H. 152797).

(d) In a Presidential confirmation case, if the Board of Review and J.A.G. have held the record legally insufficient, it should not be forwarded to the Secretary of War for action of the President, but should be returned to the reviewing authority for rehearing or other appropriate action (Op. JAG, 29 Dec. 1922, CH 154185).

(e) When the JAG advises the reviewing or confirming authority of the holding of the Board of Review and his concurrence therein, he may by separate communication advise such authority that he deems the sentence unnecessarily severe, or that in his opinion one or more of the findings of guilty should be disapproved.

3. Executive Order 9556, 26 May 1945.

Issued under Title I of First War Powers Act and effective until six months after end of present war. Delegates to the Secretary and Under Secretary of War the power of commutation and all functions, duties, and powers vested in the President under A.W. 50 $\frac{1}{2}$ in all cases of sentences except those extending to death.

4. Public Law 759--80th Congress, Chapter 625--2D Session

Rescinds A.W. 50 $\frac{1}{2}$ and amends A.W. 50 to provide for the following:

(a) Board of Review and Judicial Council

The J.A.G. shall constitute, in his office, one or more Boards of Review, each composed of not less than three officers of the J.A.G.D., and one or more Judicial Councils, each composed of three general officers of the J.A.G.D., provided that under exigent circumstances the J.A.G. may detail to the Judicial Council officers of the J.A.G.D. below the rank of general for periods up to sixty days.

(b,c) Branch Offices

When the President deems necessary, he may direct the J.A.G. to establish with any distant command a branch office, under an Assistant JAG, who shall be a general officer of the J.A.G.D., and to establish in such office one or more Boards of Review and Judicial Councils. Such Assistant J.A.G., Board of Review, and Judicial Council, shall be empowered to perform for that command, under the general supervision of the J.A.G., the duties of the latter, and of the Board of Review and the Judicial Council in his office in all cases not requiring approval or confirmation by the President, Provided, That the power of mitigation and remission shall not be exercised by such Assistant J.A.G. or agencies in his office, but any case in which such action is deemed desirable shall be forwarded to the J.A.G.

(d) Presidential Approval or Confirmation Cases and Other Confirmation Cases

(1) In any case requiring action by the President, the Board of Review shall submit a written opinion, through the Judicial Council which shall also submit a written opinion, to the J.A.G. The J.A.G. shall transmit the record, with these opinions and his own recommendations, directly to the Secretary of the Army for the action of the President, unless the case comes under (3) below.

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(2) In any case requiring confirming action by the Judicial Council, when the Board of Review is of opinion that the record is legally sufficient, it shall submit its written opinion to the Judicial Council for appropriate action.

(3) In any case requiring confirmation by the President or the Judicial Council, in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General, and

(i) if the Judge Advocate General concurs therein, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted to the appropriate convening authority for a rehearing or such other action as may be proper.

(ii) if the Judge Advocate does not concur in the holding of the Board of Review, the holding and record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required.

(e) Action by Board of Review in Cases Involving Dishonorable or Bad-conduct Discharges or Confinement in Penitentiary.

No authority shall order the execution of any sentence involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed.

Every record of trial by court-martial involving a sentence to dishonorable or bad-conduct discharge, whether suspended or not, or confinement in a penitentiary, other than those falling under (d) of this article, shall be examined by the Board of Review which shall take action as follows:

(1) (50 e) "(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) (50 e) "(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) (50 e) "(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) (50 e) "(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action."

(f) Appellate Action in Other General Court-Martial Cases.

(50 f) "Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article."

Note: In any case not requiring approval or confirmation by the President, the JAG may direct that his concurrence in confirmation is required. This means that in cases where there is no provision for a confirming authority or where the confirming authority provided is the Judicial Council, the concurrence of both the JAG and the Judicial Council in the confirmation is necessary. If the JAG and Judicial Council do not concur, the Secretary of the Department of the Army becomes the confirming authority.

(50 g) "WEIGHING EVIDENCE.—In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."

(50 h) "FINALITY OF COURT-MARTIAL JUDGMENTS.--The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54(b) Power of Secretary of Navy over proceedings and sentences of courts martial.--

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621)."

2. Other

It shall be the duty to the JAG to receive, revise, and report upon the legal features of and have recorded the proceedings of courts-martial. 5 U.S.C. 428; Article 469 of Navy Regulations.

The records of all general courts-martial involving personnel of the Navy shall before final action be referred to the Bureau of Personnel for comment and recommendation as to disciplinary features. Art. 443, Navy Regulations.

3. Naval Courts and Boards

Does not comment on departmental review.

4. Other

"After the initial review by the convening authority, there is presently provided a departmental system of review of all court martial cases. Every record of trial by general court martial is reviewed as to legality in the Office of the Judge Advocate General. If there has been a conviction, and a sentence imposed,

the case is then reviewed as to disciplinary features in the Bureau of Naval Personnel (or the Discipline Branch of the Marine Corps). In a certain number of cases, further action is taken in the Office of the Secretary of the Navy, and, in cases where accused are serving prison terms, a further periodical clemency review was formerly provided by the Clemency and Prison Inspection Board.

"The legal review provided in the Office of the Judge Advocate General consists of a review of the entire record in Section A, Military Law Division, by one or more officers acting under the supervision of the Chief of the Section. Difficult cases, in which the reviewing officer has doubts as to legality, and cases involving controversial issues of law or fact are, after initial review in Section A, and after review by the Chief of the Military Law Division and by the Assistant Judge Advocate General, referred to a Board of Review which has been established within the Office of the Judge Advocate General. This board reviews the case much as a civilian court of appeal would do and submits its conclusions and recommendations to the Judge Advocate General. The Board, however, is not created by statute, and its recommendations are not binding upon the Judge Advocate General. The final responsibility for advice to the Secretary as to the legal sufficiency of every case rests upon the Judge Advocate General himself.

" All general court martial cases, after review by the Judge Advocate General, if found legally sufficient, and if there has been a conviction and sentence, are referred to the Chief of Naval Personnel or to the Commandant of the Marine Corps for comment as to the disciplinary aspects of the sentence. The latter examine the sentences from the standpoint of conformity with department policy and of uniformity with other sentences in like cases, and also consider any mitigating or extenuating circumstances which may be present. If the sentence is approved, the case is returned to the Office of the Judge Advocate General and is filed there.

"In the event that the Judge Advocate General questions the legal sufficiency of a case, or the Chief of Naval Personnel (or Commandant of the Marine Corps) recommends reduction or other action on the sentence, the case is transmitted to the Office of the Secretary of the Navy. Although the recommendations of the Judge Advocate General and of the Chief of Naval Personnel (or Commandant of the Marine Corps) are purely advisory, they are normally followed by the Secretary.

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"The Secretary's power to act on court martial sentences derives from Article 54(b) of the present Articles, which gives him the authority to set aside the proceedings or to remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or the Marine Corps. This section gives the Secretary almost complete reserve power over the sentences of all naval courts martial, except those appointed by the President.

"In addition, certain other cases, in which the sentence extends to death, or dismissal of a commissioned or warrant officer, require confirmation by the President before execution. During the war, the power of confirmation in dismissal cases was delegated to the Secretary and the Under-Secretary. The confirming authority has all the review powers of the convening authority, plus the power of commutation.

"The last phase of the departmental review formerly consisted of the parole function of the Naval Clemency and Prison Inspection Board. The purpose of this review was to re-appraise the records of accused who were confined in naval penal institutions. This Board, in addition to studying the record of trial, studied the recommendations of the local prison officials and examined the behavior and psychiatric reports of the accused. If the Board felt that further clemency should be extended, it so recommended to the Secretary of the Navy. Again, although its recommendations were purely advisory, they were usually followed."....
33 Cornell Law Quarterly 223-225.

5. Proposed Navy Bill

"ART. 39 (c)

"The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial: Provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been convicted under article 28 (a) (2)."

"(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided; That such clemency boards shall have the power to remit, mitigate, or commute the sentence, in

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whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy, or by the President, in which case like power shall repose in the convening authority."

"(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: Provided, That upon the request provided for in section (g) of this article, in cases convened by the Secretary of the Navy or by the President, the convening authority shall have the power to revoke his former action and to take any action which he could have taken at the time the case was first presented for confirmation: Provided further, That the effect of the remission of a dismissal shall have the same effect as provided in the last proviso of section (g) of this article."

Last proviso of section (g): "Provided further, That any officer dismissed shall, upon the setting aside or remission of the dismissal on such subsequent review, be restored, without further appointment or confirmation and without regard to the number of officers authorized or appropriated for, to the rank and precedence to which he would be entitled if he had not been dismissed; but no pay or allowances shall be held to have accrued from the date of his dismissal to the date of his restoration."

III. Differences

1. Departmental Review in General

a. Details of Review.

The Amended Articles of War fully details the review of every case and the procedure and agencies to review, while the proposed Navy bill sketches an outline to be followed, allowing departmental implementation.

b. Clemency and Legality.

The departmental review under the amended Articles of War allows each reviewing agency to review both as to law and facts, while under the proposed Navy bill, the review is separated into review as to law and review as to clemency.

c. Review in the JAG Office.

The first step of departmental review in both services is in the Office of the Judge Advocate General. However, the function of the agencies in the Navy JAG office would be to advise the JAG, as they are non-statutory and have no independent powers.

On the other hand, the Amended Articles of War closely define the powers and composition of the reviewing agencies in the JAG office - the Board of Review and the Judicial Council. However, neither of these two agencies can take any action without the concurrence or at least the acquiescence of the Judge Advocate General, for in order to return a case for lack of legal sufficiency or substantial error, the Board of Review must have the concurrence of the JAG. Similarly, the Judicial Council cannot return a case without the concurrence of the JAG except where it is the confirming authority, but in such a case the JAG may direct that his concurrence is necessary.

d. Review of by The Secretary of the Navy (Army).

The primary reviewing function of the Secretary of the Army is to settle disputes between the Judicial Council and the JAG, when they do not concur. The Secretary of the Army also has the function of controlling the mitigation, remission, and suspension powers of the JAG in cases requiring appellate review under A.W. 50 - that is, in all general court-martial cases except those involving sentences of death or of a general officer, and in special court-martial cases adjudging a bad-conduct discharge.

The Secretary of the Navy, on the other hand, has full powers as to both the clemency and legal aspects of any court-martial case except those convened by the President.

In addition, the proposed Navy bill provides for a clemency board in the Office of the Secretary of the Navy. This clemency review applies to all courts-martial cases. Such board has power to remit, mitigate, or commute the sentence, except in case of courts-martial convened by the President or Secretary of the Navy, in which cases the latter have such power.

As pointed out above, the legal and clemency reviews are not separated under the Amended Articles of War.

The proposed Navy bill does not specify the composition of the clemency board.

e. Review of Special (Navy summary) and Summary (Navy deck) Courts-martial.

The Amended Articles of War do not provide for either legal or clemency review of special or summary courts-martial, except where a bad-conduct discharge is adjudged. The proposed Navy bill, on the other hand, provides that summary and deck courts records may be reviewed as to legality in the Office of the JAG and that such deck and summary court records as are designated by the Secretary of the Navy, will be reviewed by the clemency board. However, as a summary court-martial sentence of discharge must be confirmed by the Secretary of the Navy, it presumably will be reviewed as to legality by the JAG and as to clemency by the clemency board.

f. Finality

The Amended Articles of War provide that the judgments of courts-martial after approval, review, or confirmation shall be final and binding on all agencies, departments, courts, and officers of the United States, subject only to a petition for a new trial. Presumably this would not take jurisdiction from federal courts to issue writs of habeas corpus, nor would this prevent the mitigation, remission, or suspension of a sentence under A.W. 51b. Query, whether this would preclude the reopening of a case on the merits if new evidence is discovered? As noted in C.S., A.W. 51, once the Secretary of the Navy has confirmed a case, he cannot later take different action on the same case, unless new evidence is discovered.

g. Review of Suspended Sentence

The amended Articles of War state that sentences to bad-conduct or dishonorable discharge will be reviewed, whether suspended or not, and that a death sentence may not be suspended. It is not made clear whether suspended sentences of dismissal or life imprisonment or involving general officers must be confirmed if suspended by an authority inferior to the confirming authority. Under the proposed Navy bill, the same situation exists as all sentences requiring confirmation.

The Navy bill provides (Art. 39(a)) that a discharge shall be executed only after confirmation by the Secretary of the Navy or other authority appointed by him, and that a dismissal shall be executed only after confirmation by the

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President or, when empowered by the President, by the Secretary of the Navy.

It is not clear under either bill what happens when a suspension previously made is vacated.

2. Departmental Review as to Certain Sentences.

a. Death

ARMY

NAVY

- | | |
|---|---|
| <p>(1) Board of Review - renders opinion as to legality - may return to convening authority for legal insufficiency or substantial error, if JAG concurs. Recommendation of modification of findings or sentence.</p> | <p>(1) Judge Advocate General - reviews as to legality - may set aside.</p> |
| <p>(2) Judicial Council - same as Board of Review.</p> | <p>(2) Clemency Board - reviews as to clemency - may remit, mitigate, or commute.</p> |
| <p>(3) JAG - same</p> | <p>(3) SecNavy - may remit, mitigate, commute, or set aside.</p> |
| <p>(4) President - Army confirming powers.</p> | <p>(4) President - Navy confirming powers.</p> |

b. Sentences involving general officers.

Army - same as death sentence.

Navy - no provision.

c. Dismissal of Officer or Life Imprisonment.

ARMY

NAVY

(Applies to dismissal and suspension of cadets. Query, whether applies to reduction to ranks of officers in lieu dismissal?)

(Applies to cadets and warrant o's. No Navy provision as to life imprisonment.)

- | | |
|---|---|
| <p>(1) Board of Review - same as in <u>a</u> above.</p> | <p>(1) JAG same as in <u>a</u> above.</p> |
| <p>(2) Judicial Council - confirming powers.</p> | <p>(2) Clemency board - as in <u>a</u> above.</p> |

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JAG may direct that his concurrence necessary and if does not concur in action of Judicial Council, SecArmy becomes confirming authority.

JAG also has power under direction of SecArmy to mitigate, remit, or suspend.

(3) SecNavy - as in a above.

(4) President - as in a above or can delegate to SecNavy.

d. Discharge

ARMY

(Applies to Warrant O's)

- (1) Board of Review - review as to law and clemency. (i) Can return to convening authority for legal insufficiency or substantial error if JAG concurs. (ii) If holds legally sufficient and JAG concurs, review ends. (iii) If thinks modification or confirming action necessary or if JAG does not concur in opinion sends to Judicial Council.

- (2) Judicial Council - confirming powers.

JAG may direct his concurrence necessary and if does not concur in action of Judicial Council, SecArmy becomes confirming authority. JAG also has power under direction of SecArmy to mitigate, remit, or suspend.

NAVY

- (1) JAG - as in a above.

- (2) Clemency board - as in a above.

- (3) SecNavy - as in a above.

e. Penitentiary Confinement.

Army as for discharges.
Navy - no provision.

f. Other General Court-Martial Cases.

ARMY

- (1) JAG - if holds legally sufficient end of review; if not same as for discharges.

NAVY

- (1) JAG - same as in a above.

- (2) Clemency board - as in a above.

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- (3) SecNavy - as in a above.
(Permissive)

g. Other Court-Martial Cases.

ARMY

NAVY

No provision.

- (1) JAG - as in a above.
(Permissive)
- (2) Clemency board - as in a above for those cases designated by SecNavy.
- (3) SecNavy - as in a above.
(Permissive)

h. Cases Convened by President or Secretary of the Navy.

Under the Amended Articles of War, review of a court-martial case convened by the President is the same as in the case involving a death sentence. Under the proposed Navy bill, the review is the same as in the case of a death sentence, except that the Secretary of the Navy has no reviewing powers.

Cases convened by the Secretary of the Navy are reviewed in the same manner as a case involving a discharge. The Secretary of the Army (and Air Force) have no convening powers.

IV. Recommendations

McGuire Articles:

"Article 6. Boards of Review.

"(a) Scope. The provisions of this article are exclusive of all other provisions for review of courts-martial set out in these articles.

"(b) Constitution. (1) There shall be established in the executive office of the Secretary of the Navy one or more boards for review of courts-martial.

"(2) Each board shall be composed of three (3) members of whom at least one shall be a civilian.

"(c) Duties and Powers. (1) The Secretary of the Navy shall, prior to final action, submit to a board of review the record of

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every court-martial in which a conviction followed a plea of not guilty and the final action contemplated extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for any period in excess of twelve (12) months.

"(2) Each board of review shall review all records of cases submitted to it by the Secretary of the Navy, both as to legality and as to disciplinary features, and shall submit recommendations thereon to the Secretary of the Navy via the Judge Advocate General.

"(3) The recommendation of every board of review shall be determined by a majority vote.

"(4) Boards of review may, with the approval of the Secretary of the Navy, prescribe their own rules of procedure.

"(d) Action of Judge Advocate General. The Judge Advocate General shall, on each recommendation of a board of review, endorse his concurrence, or his non-concurrence and reasons therefor, and shall transmit the entire record to the Secretary of the Navy for his decision."

The White Articles are substantially the same as the McGuire.

First Ballantine Report:

Review procedures should be re-examined in the interest of unifying and expediting operations of office of JAG and Bureau of Personnel.

Second Ballantine Report:

"C. Boards of Review

"Review of all sentences of naval courts, particularly General and Summary Courts, in the Department is now provided for and practiced. As a further means for assuring the attainment of justice to all individual defendants the Board recommends that there be established in the Navy Department, Boards of Review, each of which would be composed of at least one civilian with legal background, one naval lawyer, and one or more general service officers of mature judgment. The function of the boards would be to review such cases as the Secretary of the Navy might deem appropriate. Such cases might be those in which heavy sentences are imposed, those which are highly complicated, those which are the subject of appeal by brief or otherwise. Should a board disagree with the review of the case already made by the Judge Advocate General or by the disciplinary activity involved, the record would be

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returned to the appropriate office for reconsideration and further recommendation before being presented to the Secretary of the Navy for final approval."

Keefe Report:

1. Departmental Review.

a. administrative control to be in Office of JAG.

All matters pertaining to the administration of naval justice should be concentrated in one office under the direction of the JAG, responsible directly to SecNav. Purpose to eliminate present division of control and responsibility among offices of JAG, BuPers (DiscSec), MarCorps and Exos in GCM cases.

- (1) whether the JAG is officer or civilian is immaterial if JAG has full responsibility in control of administration.

b. board of legal review

This board is to be created by statute to review court-martial cases; to be established in office of SecNav.

(1) membership of board

- (a) civilian member to be well-qualified lawyer or judge of long experience; not a naval officer or civilian officer who has been retired for age; appointed for term of 6 years by the President, as commander-in-chief of the Navy, on recommendation of SecNav; salary equal to or more than a Federal district or circuit judge.
- (b) officer members to be certified as qualified by JAG; 5-10 years active legal experience; appointed by SecNav on recommendation of JAG; tenure of office semipermanent; alternate retirement and succession to insure continuity and presence of experience; no less than 3 or more than 5 members.

- (2) additional boards of legal review in Washington or overseas as needed.

(3) cases to be reviewed by the board of review

- (a) all convictions by GCM, any conviction by inferior court appealed to board.

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- (4) subject matter of review by board of legal review
 - (a) legal sufficiency of proceedings, findings and sentence in cases of not guilty pleas.
 - (b) legal sufficiency of proceedings and sentence in cases of guilty pleas.
 - (c) findings of not guilty should not be subject to review.
 - (d) power to review issues of fact should be granted
 - (1) to maintain finality of decision against subsequent and collateral attack.
 - (2) to cure a case of obvious injustice.
 - (e) board should consider errors in record regardless of failure of accused or his counsel to object thereto.
 - (5) decisions of board of legal review should be by majority vote.
 - (6) board of legal review determination of matters of law should be final and conclusive, subject to the reviewing power of the SecNav to set aside any conviction at a later date within a stated time limit.
 - (7) in any event, SecNav power to order new trial in any case which has been found legally insufficient (for such reasons as a federal appellate court would remand a case for retrial) should be legally conferred by statute.
- c. Relationship of JAG to board of legal review.
- (1) JAG should select, furnish and certify from his office legal officers to prepare cases and present them to boards of legal review.
 - (2) where no controversial questions, before board of legal review, such reviewing officer prepares short summary of facts together with recommendation as to disposition by board.

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- (3) where there are arguable issues before board of legal review JAG to assign legal officers who represent each side and prepare briefs in same manner as appellate counsel do in civilian courts.
- (4) briefs should be submitted to board of legal review prior to oral arguments.
- (5) regularly assigned defense counsel, or counsel of accused's choice, if he desires, should be permitted to represent accused before the board of legal review.
- (6) If board of legal review is not to be final, and JAG disagrees with findings, both opinions should be submitted to SecNav.

d. Office of Chief Defense Counsel.

- (1) a legal officer or civilian of at least 10 years active practice with substantial court experience appointed by SecNav.
 - (a) duty to follow all cases having contested legal problems when argued before board of legal review.
 - (b) his discretion in assigning an officer for defense counsel to argue case before board of legal review.
 - (c) may argue a case himself before board of legal review on behalf of accused.
 - (d) duty to notify accused of his opinion that board of legal review has improperly decided a jurisdictional or constitutional question, and to perfect appeal to the U.S. Supreme Court unless the accused desires his own counsel or withholds his consent.

e. Board of sentence review.

This board to be established by order of SecNav in office of SecNav.

- (1) President to be a civilian lawyer with qualifications similar to head of board of legal review.

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- (2) Other members should be:
 - (a) outstanding psychiatrist with prison experience from Bufiled.
 - (b) Rep. from BuPers.
 - (c) high-ranking naval officer familiar with discipline problems.
 - (d) Mar Corps officer experience in discipline problems.
 - (e) Coast Guard officer familiar with discipline problems.
 - (f) outstanding civilian penologist.
- (3) Impartial reviewers selected, furnished and certified by JAG from his office legal officers to prepare cases for consideration by board of sentence review as Clemency and Prison Inspection Board is now doing.
- (4) All sentences imposed extending to death, dismissal, or discharge, or confinement for 12 months or more, and all other sentences, whether imposed by GCM, or inferior courts appealed by accused or his counsel or referred by JAG, should be reviewed as they now are in the Navy Dept.
- (5) Recommendations to be made to SecNav or Under SecNav but not be binding on them. If no change or modification recommended, then court's action final; case filed.

2. Review by President and Secretary.

- a. as to sentence of death or dismissal unchanged.
- b. suggested that statutory authority of President to delegate power to SecNav in other than death cases be made permanent.
- c. sentences extending to discharge of enlisted men should be referred to SecNav or to duly appointed representative before execution.
- d. sentence not extending to death, dismissal or discharge to be referred to SecNav only where change in sentence is recommended.

- e. power of SecNav to disapprove a finding of not guilty or to reconvene court for imposition of more severe sentence should be eliminated.
3. Second and subsequent clemency review by President and SecNav.
 - a. power of President and SecNav as to clemency after initial Department review should be continued. Board of sentence review should take over functions presently exercised by Clemency and Prison Inspection Board and GCM sentence review board.
 4. Reserve power of SecNav over findings and sentences.
 - a. SecNav's power to set aside proceedings, findings and sentence of naval court martial convened by his order or by that of any officer of the Navy or MarCorps should be continued. A statute should provide that clemency action by SecNav does not affect his power to set aside proceedings, findings and sentence in whole or in part within a stated time limit.
 5. Statutes should authorize a petition for review of the findings and decisions of the board of legal review to be filed directly to the U.S. Supreme Court, provided that such petition be filed only after final Dept. action. Review should be limited to consideration of the following questions:
 - a. Whether the court martial was competent.
 - b. Whether it had jurisdiction over the accused and the offense, and had power to impose the sentence and
 - c. Whether the accused had been denied any of his constitutional rights and whether he had been afforded due process of law in the proceedings.

Navy JAG:

FIRST ALTERNATIVE RECOMMENDATION for Review of GCM Cases

1. Except as modified under A below, infra, retain present law and practice as to review in Navy Department of all GCM cases after they are forwarded by the CA to the Department, Provided, that after conviction, the accused shall have the right to request further review within one year.

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2. A Board of Review shall be established in Exos and its members appointed by SecNav. There shall be further established, in Exos, the Office of the Chief Defense Counsel, and the Chief Defense Counsel appointed by SecNav.
3. If the accused shall request further review within the one-year period, the Board of Review--after giving the Chief Defense Counsel an opportunity to make recommendations in this respect--shall decide whether the request appears to have merit and shall be granted.
4. If the request is granted, a hearing shall be held before the Board of Review, in which hearing the JAG and the accused are present or represented and in which the Chief Defense Counsel may support the accused.
5. The hearing may result in such actions by the Board of Review as are being taken on first review in the Navy Department, Provided, that where the otherwise appropriate action would be to grant the accused an opportunity to request a new trial, the case shall be set aside if the accused is no longer subject to naval jurisdiction.
6. After the end of this further review or after the expiration of the one-year period without request by accused for such further review or after the Board of Review has denied the accused's request, the case is legally closed.
7. Nothing that has been said heretofore shall hamper the over-all-power--as under existing law--of SecNav and President as to setting aside, pardoning, etc.

SECOND ALTERNATIVE RECOMMENDATION for Review of GCM Cases

1. Except as modified under A below, retain present law and practice as to review in Navy Department of all GCM cases after they are forwarded by the CA to the Department, Provided, that after conviction, the accused shall have the right to request further review within one year.
2. A Board of Review shall be established in the Office of the Judge Advocate General and its members be appointed by the Judge Advocate General. There shall be further established, in the Office of the Judge Advocate General, the Office of the Chief Defense Counsel, and the Chief Defense Counsel appointed by the Judge Advocate General.
3. If the accused shall request further review within the one-year period, the Board of Review--after giving the Chief Defense

Counsel an opportunity to make recommendations in this respect--shall decide whether the request appears to have merit and shall be granted. If JAG agrees with Board's decision, the decision is final; if JAG disagrees, SecNav to make decision.

4. If the request is granted, a hearing shall be held before the Board of Review, in which hearing the JAG and the accused are present or represented and in which the Chief Defense Counsel may support the accused.
 5. The hearing may result in such actions by the Board of Review as are being taken on first review in the Navy Department, Provided, that where the otherwise appropriate action would be to grant the accused an opportunity to request a new trial, the case shall be set aside if the accused is no longer subject to naval jurisdiction. If JAG agrees with Board's action, this action is final; if JAG disagrees, SecNav to make decision.
 6. After the end of this further review or after the expiration of the one-year period without request by accused for such further review or after the Board of Review or JAG have denied the accused's request, the case is legally closed.
 7. Nothing that has been said heretofore shall hamper the over-all-power--as under existing law--of SecNav and President as to setting aside, pardoning, etc.
- A. (applies to both alternatives above).

1. There shall be established under the Under Secretary of the Navy, a Discipline and Clemency Board.

2. All sentences extending to death, dismissal, discharge or confinement for one year or more, and all sentences appealed by accused or referred by JAG shall be forward to this board for clemency review. This board is to make recommendations to SecNav or Under SecNav but not to be binding. If no change or modification recommended, then court's action final. This board will take functions now exercised by Clemency and Prison Inspection Board and GCM sentence review board.

3. This board shall consist senior naval officers. JAG, Bureau Personnel, Medical Bureau, Marine Corps, Corps of Chaplains and (in time of war) the Coast Guard to appoint one member. These officers would have collateral duty of keeping their Bureau chiefs informed of the general disciplinary situation in the naval service.

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4. After re-review on appeal, record should be re-submitted to Discipline and Clemency Board.

Follow Keefe recommendations as to:

1. Review by President and Secretary of the Navy.
2. Second and subsequent clemency by President and SecNav.
3. Reserve power of SecNav over findings and sentence.

Vanderbilt Report:

"5. The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by The Judge Advocate General or by the Assistant Judge Advocate General for a theater of operations, or by such board or boards as shall be designated by The Judge Advocate General or the Assistant. This reviewing authority shall have the power to review every case as to the weight of the evidence; to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentences and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.

"In order to make this recommendation effective, Article of War 50 $\frac{1}{2}$ should be amended. In its present form it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clearer and more definite. There seems to be no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended."

Keefe Report:

"(5) The termination of probation by the commanding officer should be effective to return the prisoner immediately to the appropriate naval prison. However, no termination of probation should be effective to give the probation violator a discharge from the service. The record of termination of probation should be sent to the Department for review by the disciplinary activity involved and by the proposed Sentence Review Board for determination, on the basis of the prisoner's entire naval record and social and psychiatric background, whether a discharge should be recommended, and if so, what form of discharge should be awarded."

Uniform Code of Military Justice

Subject: Mitigation, Remission, and Suspension of
Sentences by Departmental Reviewing
Agencies, A. W. 51.

I. Army Provisions

1. Articles of War.

"ART. 51. Suspension of Sentences of Dismissal or Death.-- The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President."

"ART. 52. Suspension of Sentences.-- The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War, the commanding officer holding general court-martial over any such offender, or the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the person under sentence is held, a court of the kind that imposed the sentence, may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

"ART. 53. Execution or Remission--Confinement in Disciplinary Barracks.-- When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War."

2. Manual for Courts-Martial.

"Par. 87b. Powers and duties of Reviewing Authority.....

"The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case. Thus a sentence as mitigated should not provide for confinement in excess of six months without dishonorable discharge.

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the President or by a commanding general empowered by the President under A. W. 50.

"A sentence imposing dishonorable discharge only can not be mitigated. Forfeiture of pay may be mitigated to detention of pay for a like period, or less. Confinement at hard labor may be mitigated to hard labor without confinement for a like period, or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment, for example, to confinement at hard labor and a forfeiture of a specified portion, for example, two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence, or to hard labor without confinement for a definite period not exceeding the period prescribed in the sentence, and forfeiture of any portion not exceeding two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence.

"The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

"The authority competent to order the execution of a sentence of dismissal of an officer, or a sentence of death, may suspend such sentence until the pleasure of the President be known. (A.W. 51).

"The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. (A.W. 52.) The reviewing authority should suspend the whole of a sentence when it appears to him that such action will promote the discipline of his command.

"As to penitentiary confinement, see 90a." (This applies to the convening authority, but presumably would also apply to superior authority as well.)

3. Public Law 759--80th Congress, Chapter 625, 2D Session.

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.--

"a. At the Time Ordered Executed.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of the Department of the Army. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. Subsequent to the Time Ordered Executed.--

"(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army; Provided, That no sentence approved or confirmed by the President, shall be mitigated, remitted, or suspended by any authority inferior to the President: And provided further, that no order of suspension of a sentence to dishonorable discharge or bad conduct discharges shall be vacated unless and until confirming or appellate action on the sentence has been completed as required by articles 48 and 50.

"(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.

"(3) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a

penitentiary shall be exercised by the Secretary of the Department of the Army or by the Judge Advocate General under the direction of the Secretary of the Department of the Army."

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 54(b) Power of Secretary of Navy over proceedings and sentences of courts martial.--

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621)."

2. Naval Courts and Boards.

No discussion of mitigation, remission, or suspension by other than convening or reviewing authority.

3. Other.

Once the Secretary of the Navy has taken definite action on a case, that case is closed and may not be subsequently reopened. Opinion Atty. Gen. 137(1865).

However, such a case may be reopened on the ground that new evidence has been discovered. CMO 1-1944, p. 92.

4. Proposed Navy Bill.

"ART. 39 (f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

"....."

"(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President....."

III. Differences

(As to powers of convening or "reviewing authority" to mitigate, remit, or suspend, see C.S., A.W. 47.)

1. At the Time the Sentence is Ordered Executed.

The departmental reviewing agencies with the power to mitigate, remit, or suspend under the amended Articles of War are the confirming authority or the JAG under the direction of the Secretary of the Army, while under the proposed Navy bill, the clemency board or the Secretary of the Navy may mitigate, remit, or commute.

As pointed out in C.S., A.W. 48-49, the powers of the Navy confirming authority, as such, are not stated in the proposed Navy bill.

Under the amended Articles of War, no reviewing authority, other than a confirming authority may commute a sentence, while under the proposed Navy bill, both the clemency board and Secretary may commute any sentence.

2. Subsequent to the Time Ordered Executed.

See C.S., A.W. 53 as to mitigation, etc. on the petition of accused.

The JAG of the Army, under the direction of the Secretary of the Army, is given power to suspend, remit, or mitigate a sentence after it has been ordered executed. The proposed Navy bill makes no provision for clemency action after the sentence has been ordered executed, except in that every sentence, not requiring confirmation, is executed upon announcement by the court and review is had while the sentence is being executed.

However, after review is completed in the Navy, the Secretary of the Navy, if he has not previously taken action on the case, may remit, commute, or mitigate. (The power of suspension is included as conditional remission). However, it is not clear under the proposed articles whether the Secretary may act if he had previously taken any action.

3. Vacation of Suspension.

The Army JAG, under the direction of the Secretary of the Army, is given the power to vacate the suspension of a sentence "subsequent to the time ordered executed"

The proposed Navy bill does not mention the vacating of suspension. It is also not clear whether a suspension of a sentence can be vacated by an authority other than that which originally suspended the sentence.

As to the differences between mitigation, remission, suspension, and commutation, see C.S., A.W. 47.

IV. Recommendations

See C.S., A.W. 47; C.S., A.W. 48-49; and C.S., A.W. 50.

Keeffe Report:

"RECOMMENDATIONS:

"It is recommended that the subject of termination of probation be carefully reviewed by the Advisory Council.

"The following suggestions are made:

"(1) Prior to termination of probation the commanding officer should order an investigation of the alleged violation similar to that of an investigation prior to a general court martial, including the taking of statements of witnesses, and the statement of the probation violator if he desires to make one. The alleged probation violator should be represented by counsel, if available, and if not available, by an experienced naval officer of his personal choice. The record of this hearing should be transcribed.

"(2) A hearing at mast should be held, based on the investigation previously made, at which the probation violator should be similarly represented.

"(3) Probation should be terminated by a written order based on the hearing at mast in which the commanding officer states in detail his reasons for termination.

"(4) All the above papers should be filed in the probation violator's record.

"(5) The termination of probation by the commanding officer should be effective to return the prisoner immediately to the appropriate naval prison. However, no termination of probation should be effective to give the probation violator a discharge from the service. The record of termination of probation should be sent to the Department for review by the disciplinary activity involved and by the proposed Sentence Review Board for determination, on the basis of the prisoner's entire naval record and social and psychiatric background, whether a discharge should be recommended, and if so, what form of discharge should be awarded."

Uniform Code of Military Justice

Subject: Mitigation, Remission, and Suspension
of Sentences.

See C.S., A.W. 47 -- Convening Authority -- Initial Review.

Uniform Code of Military Justice

Subject: Rehearings, A. W. 52 (in part).

I. Army Provisions

1. Articles of War

"ART. 50 $\frac{1}{2}$

"When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President."

"ART. 40. As to Number.-- No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

2. Manual for Courts-Martial.

"PAR. 89. COURTS-MARTIAL--ACTION--Ordering Rehearings.--.....

"A rehearing is not authorized where a part of the sentence has been approved.

"Where the accused is convicted at the first trial of a lesser included offense only, a rehearing on the offense originally charged can not properly be ordered; although even if convicted of the offense originally charged on such improperly ordered rehearing such conviction may be valid as far as concerns a conviction of such lesser included offense.

"The order directing a rehearing should be made at the time of disapproving or vacating the sentence and will ordinarily be included in the action on such sentence.

"When a rehearing is directed there will be referred with the charges to the trial judge advocate the record of the former proceedings and the accompanying papers which are pertinent, together with a copy of the holding of the board of review or the review by the staff judge advocate or such other holding or opinion as may inform him of the errors made at the former hearing which necessitated a rehearing."

3. Public Law 759--80th Congress, Chapter 625-2D Session

"SEC. 229. Article 52 is amended to read as follows:

"ART. 52. REHEARINGS.-- When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

A. W. 40 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54 (b). Power of Secretary of Navy over proceedings and sentence of courts martial.-- The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, Sec. 9, 35 Stat. 621)."

2. Naval Courts and Boards

"SEC. 471. 'Reviewing authority' defined.--

"Any officer to whom the proceedings of a court martial are regularly submitted for review in accordance with law is a reviewing authority. When, as is ordinarily the case, such officer is the convening authority, this latter term should, in order to avoid confusion, be used in referring to him, even while exercising the functions of a reviewing authority."

"SEC. 477. Power of Reviewing Authority: Ordering new trial.--

"If the court was without jurisdiction or if none of the charges or specifications alleges an offense, the reviewing authority should disapprove the proceedings, findings, and sentence and convene a new court for the trial of the case. The new trial should be had upon the same charges and specifications, unless the disapproval is based on fatal defects therein, in which event, new charges and specifications should be drawn correctly setting forth the offenses intended to be charged at the previous trial, provided that such new charges and specifications are not barred by the statute of limitations.

"In cases not covered by the foregoing paragraph, if the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, the reviewing authority before acting upon the record should afford the accused an opportunity to request a new trial, provided the record irrespective of the errors disclosed is sufficient to sustain the finding of the court. Should the accused decline or fail to apply for a new trial within the time allowed by the reviewing authority, the latter should take action upon the proceedings, findings, and sentence without regard to such errors.

"If the reviewing authority grant a new trial upon petition of the accused, he should order the accused before a new court on the same charges and specifications originally preferred against him unless the reasons for retrial were based on defects in the charges or specifications, in which case new charges and specifications should be prepared correcting the pleading previously objected to, if such new charges are not barred by the statute of limitations; but the accused should not be tried for any offense of which he was found not guilty by the first court. New trial being granted, the proceedings, findings, and sentence of the previous trial should be set aside."

"SEC. 408. Former Jeopardy.--

"The fifth amendment to the Constitution of the United States provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' A person is twice put in jeopardy if he is twice put on trial for the same offense. In order, however, to sustain a plea of former jeopardy, the accused must show that:

- "(1) Upon a former trial, he had been actually acquitted or convicted; or
- "(2) Upon a former trial, after he had been arraigned and the prosecution has rested its case, the convening authority entered a nolle prosequi (or withdrawal or discontinuance), over the objection of the accused, in order to prevent the court martial from arriving at a finding.

"In either case set out above, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority. But the proceedings upon a 'fatally defective' specification do not constitute former jeopardy.

"Likewise, to constitute former jeopardy, the court before which the former proceedings have been conducted must have been a duly constituted and legally competent court. A commanding officer is not a court martial and punishment inflicted by him is not a bar to trial."

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Art. 39 and amended to read as follows:

'ART. 39. (b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

'(d) The officer empowered to convene general courts martial who is next senior in the chain of command to any convening authority of a summary or deck courts martial shall be the reviewing authority as to legality of the proceedings, findings, and sentences thereof, if such reviewing authority be present or found by the convening authority to be reasonably available: Provided, That if such reviewing authority be not present or found to be so available, the convening authority shall review the records of such courts as to legality: Provided further,

That the reviewing authority shall have the power to set aside the proceedings, findings, and sentence or to remit or mitigate, but not to commute, the punishment imposed by the sentence of any such summary or deck court martial:

.....

'(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial:.....

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President:.....'"

III. Differences

1. Under the present A.G.N., the convening authority may disapprove the proceedings, findings, and sentence of any court martial and order a new trial* if he finds on review that the court lacked jurisdiction, that the charges or specifications were defective, or that the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, and the accused requests a new trial when it is offered to him. Under the proposed Navy bill, the convening authority (where he is other than the President or SecNav; see Par. 2 below) could not disapprove or set aside the proceedings, findings and sentence in acting originally in a case; therefore, he could not order a new trial directly. However, the JAG may set aside the proceedings, findings and sentence of any case he reviews, and the officer empowered to convene general courts martial who is next senior in the chain of command to the convening authority may set aside the proceedings, findings and sentence of any summary or deck court-martial case he reviews. If either of these two reviewing authorities

* The term "new trial" is used in NC&B, Sec. 477 to describe the retrial ordered by a reviewing authority. A. W. 52 uses the term "rehearing" to describe the retrial ordered by a reviewing or confirming authority, or by the JAG where the sentence has been vacated by action of the Board of Review or Judicial Council and the JAG. The proceeding in either case is the same. For the proceeding called a "new trial" under Army provisions, see C.S., A. W. 53, Petition for a New Trial.

set aside on grounds of lack of jurisdiction in the court, or a fatally defective specification, they could authorize the convening authority to order a new trial. If the record was found legally sufficient but containing errors prejudicial to the accused to which the accused had excepted at the trial, they could direct the convening authority to ascertain if the accused wanted a new trial; if he assented, the proceedings would be set aside by the reviewing authority and a new trial ordered by the convening authority.

2. Where either the President or SecNav is the convening authority, the procedure under the proposed bill will be for JAG to review for legality before the record goes to them. His power to set aside and to recommend a new trial is the same as in Par. 1 above. In addition, even though the JAG found the proceedings legal, the President or SecNav could set them aside for courts they convened and order or offer a new trial (Art. 39(h)). Also, under new Art. 39(h), SecNav may set aside the proceedings of any court martial in any case except one convened by the President, in which case the President has a like power. Under this provision, SecNav could take the same action the JAG could in Par. 1 above, in cases where he was not the convening authority, even where the JAG had already found the proceedings legal.
3. In either 1 or 2 above, the question of whether a man could plead former jeopardy in a new trial would affect the exercise of the power to authorize or order one. The Navy rule for former jeopardy makes the jeopardy complete when there has been a conviction or an acquittal unless the court was without jurisdiction or the specifications under which he was tried were fatally defective (Sec. 408, NC&B.) Thus, where the proceedings were set aside on the ground that the evidence was insufficient to support a finding of guilty, a new trial could not be authorized. Where the record was found legally sufficient, but containing prejudicial errors, the accused could not be tried again without his consent. In these cases, however, the proceedings would not be set aside until the offer of a new trial had been made and assented to. Under the Army rule there is no problem of double jeopardy arising where a rehearing is ordered or authorized, since jeopardy is not complete until the reviewing authority, and if there be one, the confirming authority, has taken final action upon the case (A. W. 40).
4. A. W. 53 provides that any confirming authority may authorize or direct a rehearing. Under the proposed Navy bill, such a power is not an incident to the power of confirmation. (The President, for example, could not set aside a case, and

authorize a rehearing, where he was the confirming but not the convening authority. He could only refuse to confirm. This case would probably never occur, however, since Sedlav would set it aside before it reached the President.)

5. Navy provisions are silent on whether, if there is a new trial, a man can be given a sentence in excess of or more severe than the original sentence unless the sentence is to be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

IV. Recommendations

Keefe Report, page 230: The Secretary's power to order a new trial, in any case which has been held legally insufficient, should be clearly conferred by statute. The Keefe Board believes this can be done without violating the rule against former jeopardy.

Uniform Code of Military Justice

Subject: Rehearings.

See C.S., A.W. 47 -- Convening Authority -- Initial Review.

Uniform Code of Military Justice

Subject: Petition for New Trial.
A.W. 53.

I. Army Provisions

1. Articles of War

"ART. 53....." (The subject matter of present A. W. 53 is unrelated to A. W. 53, as amended by P. L. 759).

2. Public Law 759--80th Congress, Chapter 625, 2D Session

"SEC. 230. Article 53 is amended to read as follows:

"ART. 53. PETITION FOR NEW TRIAL.-- Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the latter: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under Articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54 (b) Power of Secretary of Navy over proceedings and sentences of courts martial.-- The Secretary of the Navy may

set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, Sec. 9, 35 Stat. 621)."

2. Court-Martial Orders, Navy Department.

CMO No. 2-1943, page 145: Held, ".....Where the sentence of a legally constituted court martial in a case which is within its jurisdiction has been approved by the reviewing authority and carried into execution, the proceedings are then at an end and the action then had upon the sentence is, in contemplation of law, final. In such case there is no power by which such sentence can be rescinded, annulled, or modified. Furthermore, when the sentence, as in this case, has been lawfully confirmed and executed, the proceedings in the case are no longer subject to review by the President, or any lesser administrative officer; they have passed beyond supervision and are at an end. Therefore, the petition was denied. (File: 00- Aroff, Maurice N./A17-20, Apr. 26, 1943.)."

CMO No. 1-1944, page 92: Hold, where new evidence is produced, a case may be reopened although SecNav has previously approved the sentence.

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Art. 39 and amended to read as follows:

'ART. 39.....

'(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial.....

'(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

'(g) The proceedings, findings, and sentence of every court martial shall upon request by the convicted person made within one year after such person has been informed that the review of his case has been completed and under such regulations as the Secretary of the Navy may prescribe, be reviewed by a board of appeals appointed by the Secretary of the Navy to serve in his office: Provided, That such boards of appeals shall have the power to take any action which could have been taken by the Judge Advocate General under Sec. (e) of this article and by a clemency board under Sec. (f) of this article: Provided further, That any officer dismissed shall, upon the setting aside or remission of the dismissal on such subsequent review, be restored, without further appointment or confirmation and without regard to the number of officers authorized or appropriated for, to the rank and precedence to which he would be entitled if he had not been dismissed; but no pay or allowances shall be held to have accrued from the date of his dismissal to the date of his restoration.

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: Provided, That upon the request provided for in Sec. (g) of this article, in cases convened by the Secretary of the Navy or by the President, the convening authority shall have the power to revoke his former action and to take any action which he could have taken at the time the case was first presented for confirmation:.....'"

"SEC. 47....."

'ART. 38. In every court-martial proceeding in which the accused pleads not guilty, defense counsel, if there be one, shall, in the event of conviction, attach to the record of proceedings either a brief of such matters as he feels should be considered on behalf of the accused on review or a signed statement setting forth his reasons for not so doing.....'"

III. Differences

1. There are no limitations on what the Army JAG may consider in acting on the petition of a convicted person. He is authorized, under new A. W. 53, to grant a new trial or take other action, "upon good cause shown." The Navy Board of Appeals established under new Art. 39(g) of the proposed Navy bill is directed to review the proceedings, findings and sentence of every court martial upon the petition of a convicted person. It is not clear whether the Board may go beyond such review, and consider other

matters outside the record, such as new evidence, or whether the intent of Art. 39(g) is to restrict it to a review of matters in the record only, except for matters which the defense counsel may have appended to the record in accordance with new Art. 38 of the proposed Navy bill.

2. Where there is a petition made to the Board of Appeals under new Art. 39(g), proposed Navy bill, the President or SecNav, for cases where they were the convening authority, may revoke their former action and take any action which they could have taken at the time the case was first presented for confirmation. (Art. 39(h)). The meaning of this proviso is not clear. Under its authority, the President or SecNav may be able to give the same kind of additional review to a case where they convened the court as the Board of Appeals is empowered to give, but whether such a power is to be exercised instead of, or concurrently with, the power of the Board of Appeals over the same cases is not certain. Or the proviso may only be intended to give the President or SecNav additional power to exercise clemency in cases they convened, either before or after the Board of Appeals has reviewed the case. It is significant that the Board of Appeals can not exercise clemency in a case it reviews on petition, where the President or SecNav was the convening authority (See Art. 39(g)(f)). On the other hand, the fact that the President or SecNav can set aside the proceedings, findings and sentence in these cases indicates a power to give additional review. In this aspect, their power is comparable to the power of the Army JAG under new A. W. 53.

3. Under the first clause of new Art. 39(h), SecNav is given the power to set aside the proceedings, findings and sentence, or to exercise clemency, in any case except one convened by the President, in which case the President has a like power. Under this power, SecNav (or the President) clearly could consider matters outside the record, and he would not be limited to taking action only if a petition was filed by the convicted person within a year. On the other hand, in construing an identical power which is given to SecNav, or the President, under Art. 54(b) of the present A.G.N., it has been held that the President or SecNav could not take additional action in a case where the sentence had previously been confirmed by the President (CMO 2-1943, page 145); also, SecNav could not reopen a case where he had previously acted, as by awarding clemency, unless the ground was that new evidence had been discovered (CMO 1-1944, page 92). Within these limitations, however, the President or SecNav could take additional action in many cases, apparently without regard to whether the Board of Appeals had already acted in the same case on petition within a year. In this respect the Navy provisions under the proposed bill are broader than Army provisions, since new

A.W. 53 provides that only one application for a new trial may be entertained in a case, and that the action taken by the JAG on such application is final. (Additional clemency action could be taken by the JAG or others under new A.W. 51b(1), however. See C.S., A.W. 51).

4. Where the Board of Appeals reviews a case, or where SecNav reviews a case for which neither he nor the President was the convening authority, the action which can be taken (apart from clemency) is limited to setting aside the proceedings, findings, and sentence. A new trial could not be ordered or granted directly. However, the Board of Appeals or SecNav, in suitable cases, could advise the convening authority that a new trial could be held, and it would be virtually mandatory that one be granted by the convening authority. This procedure contrasts with that provided for in new A.W. 53, where the JAG himself is authorized to grant a new trial, although he would not convene the new court himself. An exception to the above is where the President or SecNav review cases convened by them, where they could grant and order new trials directly.

Other kinds of relief which the Army JAG can grant directly under new A.W. 53, as, vacating a sentence, restoring rights, privileges, and property affected by such sentence and substituting an administrative discharge for a dismissal, or dishonorable or bad conduct discharge previously executed, are not provided for in Navy provisions. The effect that the setting aside or remission of the dismissal of an officer is to have is spelled out in provisos in Arts. 39(g) and (h), but the restoration to officer status, as well as other relief, would probably be handled administratively in the Navy, rather than directly by the Board of Appeals, SecNav, or the President.

5. Under new A.W. 53, JAG is authorized to act under such regulations as the President may prescribe. The Board of Appeals will act under regulations proscribed by SecNav.
6. Under new A.W. 53, the application to the JAG must be made within one year after final disposition of the case upon initial appellate review, except where the case is one involving an offense committed during World War II, for which special provision is made. Under Art. 39(g), proposed Navy bill, the request for review must be made within one year after the convicted person has been informed that the review of his case has been completed. No special provision is made for World War II cases.
7. Under NC&B, Sec. 477, the convening authority of any court-martial is given the power to order a new trial under certain circumstances. This power is more like the power given under the Articles of War to order a rehearing and has been discussed as such. See C.S., A.W. 52, in part, Rehearings.

IV. Recommendations

1. Vanderbilt Report, page 9: JAG to have power to order new trial.
2. Keeffe Report, page 230: The Secretary's power to order a new trial, in any case which has been held legally insufficient, should be clearly conferred by statute. The Keeffe Board believes this can be done without violating the rule against former jeopardy.

Page 240: Revised articles should contain a provision which should be clearly worded to authorize the President, or the Secretary, to set aside the proceedings, findings or sentence of any naval court-martial, even though previously approved, and even though the sentence has already been executed. Consideration should be given to placing some time limit on the exercise of this power.

Uniform Code of Military Justice

Subject: Punitive Articles - Fraudulent Enlistment. A. W. 54.

I. Army Provisions

1. Articles of War

"ART. 54. Fraudulent Enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct."

"ART. 28.....Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.".....

2. Manual for Courts-Martial

Par. 129 "Discussion.—

"A fraudulent enlistment is an enlistment procured by means of either a willful—i.e., intentional—misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for enlistment, or a willful concealment in regard to any such disqualification.

"Misrepresentation and concealment include any act, statement, or omission, which has the effect of conveying what is known by the applicant to be an untruth or of concealing what he knows to be the truth concerning his qualifications or disqualifications for enlistment.

"Misrepresentation or concealment may be with respect to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting officer concerning the qualifications or disqualifications for enlistment, such as matters called for by questions as to previous service and previous applications for enlistment. Where a soldier again enlists without a discharge, he should be charged under A.W. 54 if he has received pay or allowances, otherwise he should be charged under A.W. 96.

"A person who procures himself to be enlisted by means of several willful misrepresentations and concealments as to his qualifications for the one enlistment so procured and receives pay and allowances under such enlistment commits but one offense under A. W. 54.

"Proof.—(a) The enlistment of the accused in the military service as alleged; (b) that the accused willfully—i.e., intentionally—misrepresented or concealed a certain material fact or facts regarding his qualifications for enlistment as alleged; (c) that his enlistment was procured by such intentional misrepresentation or concealment; and (d) that under such enlistment the accused received either pay or allowances, or both, as alleged.".....

Receipt of food and clothing is not receipt of allowances. Dig. Op. JAG (1920) p. 264.

Par. 152 "Ninety-Sixth Article of War.....

"Among the disorders herein made punishable is the fraudulent enlistment contemplated by A. W. 28, which differs from fraudulent enlistment under A. W. 54 in that the element of the receipt of pay or allowances is not present. The fact that at the time of the alleged fraudulent enlistment the accused was serving in a prior enlistment from which he had not been discharged may be proved, prima facie, by introducing authenticated records of a former unexpired enlistment. If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, prima facie, by the certificate of The Adjutant General or one of his assistants that the files and records of the office of The Adjutant General contain no record of the discharge of the accused from such enlistment."

3. Public Law 759—80th Congress, Chapter 625—2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 22. (a) Offenses not specified.—All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct."

"(b) Fraudulent enlistment.--Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial, under this article."

2. Naval Courts and Boards

"SEC. 103. Fraudulent enlistment.....

"Elements: The first essential of this offense is the wilful and knowing concealment of a fact which, if known to the recruiting officer, would cause the rejection of the applicant. Where the accused thus fraudulently enlists without a discharge from another enlistment in the Navy or Marine Corps, the first essential is all that is requisite. If, however, the accused has never previously been in the Navy or Marine Corps, or has been discharged therefrom, the second essential, the receipt of pay or allowances under the fraudulent enlistment is also requisite. But in either case it is a good rule, where there is any possible doubt as to the status of the accused, to allege and prove the receipt of pay and allowances.

"The misrepresentation or concealment may be in matters which are designed to open the door to inquiry concerning the qualifications or disqualifications for enlistment, such as questions as to previous service, previous applications for enlistment, etc.

"The qualifications or disqualifications may be prescribed by law, regulations, or orders.

"Answers to questions having no bearing on the applicant's qualifications for enlistment, such as questions as to the applicant's name, address, or immaterial statements as to age, are not sufficient.

"The concealment must be wilful, and thus mere mistake or forgetfulness will not make the offense.

"Lesser included offense: Conduct to the prejudice of good order and discipline."

3. Proposed Navy Bill

"SEC. 11. Article 14 is renumbered as article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject

to the Articles for the Government of the Navy--.....

"Thirty-fourth. Or fraudulently enlists in the naval service and receives any pay or allowance thereunder, or fraudulently obtains his discharge from the naval service."

III. Differences

1. Fraudulent Enlistment in General.

A. W. 54 and proposed A.G.N., Art. 9, Thirty-fourth, are substantially the same in this respect as both concealment and receipt of pay or allowance are required.

2. Where Outstanding Enlistment in Armed Forces.

The Army provision as to fraudulent enlistment when the accused has not been discharged from a prior enlistment in the armed services is not found in the punitive articles but in A. W. 28 and is not punishable under A. W. 54 (unless he has received pay or allowances) but under General Article A. W. 96.

These various provisions should be collected in one article. Both the present Army and Navy provisions in this respect also are substantially the same as only proof of enlistment without a prior discharge is needed to prove the offense.

Query: Whether the omission of the comma in the proposed A.G.N. necessitates the proof of the receipt of pay or allowances to constitute this naval offense, except in the case of an undischarged soldier, who enlists in the naval service.

3. Fraudulent Discharge.

Neither the present A. W. or A.G.N. contain a provision for fraudulently procuring a discharge. However, this offense is punished by both services under general articles relating to offenses against the military or naval service. The proposed Navy bill includes a provision for fraudulent discharge.

IV. Recommended Provision

Art.....Such punishment as a court-martial may adjudge, may be inflicted upon any person subject to these articles,

P. 5

(a) Who procures himself to be enlisted in any component of the armed services of the United States by willful misrepresentation or concealment as to his qualifications for enlistment, and receives pay or allowances under such enlistment; or

(b) Who, without having first received a regular discharge, again enlists in the same or any other component of the armed services of the United States; or

(c) Who fraudulently obtains his discharge from the armed services of the United States.

There is no comment in Ballantine, McGuire, White, Vanderbilt, or Keaffe Reports.

FEL - 1

Uniform Code of Military Justice

Subject: Officer Making Unlawful Enlistment. A.W. 55.

I. Army Provisions

1. Articles of War

"ART. 55. Officer Making Unlawful Enlistment.-- Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct."

2. Manual for Courts-Martial

The Manual does not discuss A. W. 55. Appendix 4, page 239, however, suggests the form for the preparation of charges and specifications for a violation of the Article, and lists therein persons who are not qualified by law or otherwise to be mustered into the service, i.e., persons who are insane, intoxicated, minors and have been convicted of a felony.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 19. Enlisting deserters, minors, etc.-- Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court martial may direct (R.S., sec. 1624, art. 19; May 12, 1879, c. 5, 21 Stat. 3; Aug. 22, 1912, c. 336, sec. 2, 37 Stat. 356)."

2. Proposed Navy Bill

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--

"Thirty-eighth. Or, being an officer, knowingly and without specific authority enlists in the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years;"

P. 2

III. Differences

A.W. 55 authorizes an officer to be penalized for enlisting any person contrary to law, orders, or regulations, while A.G.N. 9(38), as proposed, prohibits an officer from enlisting any person cited therein. It should be pointed out, however, that an officer who enlists any person who is otherwise disqualified by reason of law, regulations, or orders may be prosecuted for an offense against the A.G.N.

IV. Recommendations

No specific recommendations.

FEL - 2

Uniform Code of Military Justice

Subject: False Muster. A.W. 56.

I. Army Provisions

1. Articles of War.

"ART. 56. False Muster.-- Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the United States Navy.

"ART. 8. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--....."

"Fourteenth (False muster).-- Or knowingly makes or signs, or aids, abets, directs, or procures the making or signing of, any false muster;....."

2. Naval Courts and Boards.

"SEC. 70.Elements: Muster is the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command of persons or public animals.

"Lesser included offenses: Neglect of duty, conduct to the prejudice of good order and discipline....."

3. Proposed Navy Bill.

SEC. 11. ART. 9, Twenty-fourth: same as above.

III. Differences

The Navy provision applies to any person subject to the A.G.N., while the Army provisions apply only to officers.

The Army provision makes dismissal a mandatory punishment which makes this offense triable only by general courts-martial, while the Navy provision has no mandatory punishment.

The Army provision applies also to making false statements as to pay of a soldier or officer, while the Navy provision does not. (See false claims, C.S., A.W. 94).

The Army provision applies to wrongfully taking money on mustering an organization, while Navy provision does not.

Both provisions apply to making or signing a false muster. However, A.W. 56 uses the words "directs or allows" while proposed A.G.N. 9, twenty-fourth, uses "aids, abets, directs, or procures" the making of a false muster.

IV. Recommendations

The McGuire, White, Navy JAG, Keefe, and Ballantine studies make no comment.

The Vanderbilt Report favors abolition of all mandatory sentences.

It is questionable whether the use of the words "aids, abets, directs, or procures" in the Navy provision are necessary, as Art. 5(e) of the proposed A.G.N. provides that "whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal."

Uniform Code of Military Justice

Subject: False Returns - Omission to Render Returns. A. W. 57.

I. Army Provisions

1. Articles of War

"ART. 57. False Returns--Omission to Render Returns.--Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

No specific article.

2. Naval Courts and Boards

Not specifically mentioned.

3. Proposed Navy Bill.

No specific article.

III. Differences

There is no similar Navy provision. However, such offenses are punishable under Art. 9 of the proposed A.G.N. in the following paragraphs:

Nineteenth: Negligence or carelessness in obeying orders or culpable inefficiency in the performance of duty;

Thirtieth: Violation or refusal of obedience to general order or regulation issued by the Secretary of the Navy; or

P. 2

Fifty-ninth: Conduct unbecoming an officer - knowingly making false statement.

Under the Articles of War, knowingly making a false return is only punishable by a general court-martial as there is a mandatory sentence of dismissal.

IV. Recommendations

There are no specific recommendations as to this offense in the Ballantine, White, McGuire, Keefe, Navy JAG, or Vanderbilt Reports.

However, the Vanderbilt Report does not favor any mandatory sentence.

Uniform Code of Military Justice

Subject: Désertion.
A. W. 58, 28.

I. Army Provisions

1. Articles of War

"ART. 58. Desertion.-- Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

"ART. 28. Certain Acts to Constitute Desertion.-- Any officer who, having tendered his resignation and prior to due notice of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

2. Manual for Courts-Martial

"Par. 130. Fifty-Eighth Article of War

"a. Desertion

"Discussion.-- Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.

"Absence without leave with intent not to return.-- Both elements are essential to the offense, which is complete when the person absents himself without authority from his place of service (which is for him 'the service of the United States') with intent not to return thereto.

"Absence without leave with intent to avoid hazardous duty or with intent to shirk important service.--.....

The 'hazardous duty' or 'important service' may include such service of troops as strike or riot duty; employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster; embarkation for foreign duty or duty beyond the continental limits of the United States; and, under some exceptional circumstances such as threatened invasion, entrainment for duty on the border. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included.

"b. Attempting to Desert.

"Discussion.-- An attempt to desert in an overt act other than mere preparation to desert. The attempt to desert may be with the intent not to return, to avoid hazardous duty, or to shirk important service. Once the attempt is made, the fact that the soldier deserts, either of his own accord or otherwise, does not obliterate the offense."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 58 and A. W. 28 are not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4.....-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--.....

"Sixth. Or, in time of war, deserts.....;

"Seventh. Or, in time of war, deserts or betrays his trust,.....;"

"ART. 8.....-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--.....

"Twenty-first. Or, in time of peace, deserts or attempts to desert.....;"

"ART. 10. Desertion by resignation.-- Any commissioned officer of the Navy or Marine Corps, who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of such resignation, shall be deemed and punished as a deserter (R.S., sec. 1624, art. 10)."

"ART. 22 (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing article shall be punished as a court martial may direct (R. S., sec. 1624, art. 22)....."

2. Naval Courts and Boards

"SEC. 42. How to charge attempts.-- If an attempt is not provided for as a specific charge it should be alleged under the appropriate general charge."

"SEC. 49. Desertion in time of war.--

"Elements: The elements of (this offense) are the same as for the corresponding (offense) in time of peace.

"Desertion is consummated whenever the absence and the requisite intent concur....."

"There is no such charge as 'attempting to desert in time of war.' This offense should be charged as 'conduct to the prejudice of good order and discipline.'"

"SEC. 76. Desertion in time of peace.--

"Elements: Desertion consists of--intent to permanently abandon the service, or to permanently abandon the pending contract of enlistment, and A.W.O.L. or A.O.L.

"The desertion must be alleged to be from the naval service and not merely to be from a certain ship or station."

"SEC. 77. Attempting to desert.--

"Elements: To constitute an attempt to desert a specific intent must be proved."

3. Proposed Navy Bill

"SEC. 3. Article 4 is renumbered as article 8 and amended to read as follows:

'ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....'

'Third. Or, in time of war, deserts.....;'

'Fourth. Or, in time of war, deserts or betrays his trust.....;''

"SEC. 11. Article 14 is renumbered as article 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Thirty-first. Or, in time of peace, deserts or attempts to desert.....;

'Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

'Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles.....'"

"SEC. 6. Article 8 is repealed."

"SEC. 8. Articles 10 and 11 are renumbered as articles 11 and 12."

"SEC. 15. Articles 22 and 23 are repealed."

III. Differences

1. Desertion

a). Neither the present A.G.N. nor the proposed Navy bill has any specific provision to correspond to the third paragraph of A. W. 28: "any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter." In time of war, such an act might be deemed to be punishable under the provisions of proposed Article 8, paragraph 4 (proposed Navy bill, Section 3), in which case a punishment of death would be permissible, as it is under A. W. 58. In time of peace or of war, the act could be brought under the general provisions of proposed Article 9, paragraph 61 (Proposed Navy bill, Section 11), but in this case a sentence of death would not be permissible.

b) A.G.N. does not have a specific provision making it an offense of desertion to enlist again in a military organization without having first received a regular discharge from a prior enlistment. In practice, however, the Navy treats such

an act as a violation of its articles making desertion an offense. Section 76, NC&B, defines desertion in part as the intent to abandon permanently the pending contract of enlistment plus A.W.O.L. or A.O.L. Proof of this is absence and subsequent fraudulent enlistment.

2. Attempted Desertions.

a) Under its present articles, the Navy has no offense of attempted desertion in time of war. Such an act is now charged as "conduct to the prejudice of good order and discipline", and is tried as an offense against Art. 22(a), (NC&B, Sec. 49). Punishment under this article would not permit a sentence of death; under A. W. 58, a death sentence would be permissible for this offense.

Under the proposed Navy bill, attempted desertion is made a specific offense within new Art. 9, paragraph 62 (proposed Navy bill, Sec. 11). A sentence of death would not be permissible under this article, as it would be under A. W. 58, in time of war.

b) A. W. 28 does not cover the cases of attempted desertion in the three situations it deals with. If an attempt to commit the offenses specified in A. W. 28 is chargeable as attempted desertion, the differences already noted between the Army and Navy provisions for the offense of attempted desertion apply in these situations also. Note, however, that under either system, an attempt by a man to enlist without first having received a regular discharge from a prior enlistment is probably chargeable as desertion rather than attempted desertion. The attempt, though unsuccessful, could be used as evidence of an intent to abandon the first contract of enlistment permanently. This, plus absence without leave, constitutes desertion.

IV. Recommendations

1. Keefe Report

On pp. 269 ff., there is extensive comment on the need for better definitions of the offense of desertion, its elements and the mode of proof, and for it to be distinguished more clearly from A.W.O.L. and A.O.L. The report criticizes the tendency of courts to convict on proof of absence alone, without considering sufficiently whether the requisite intent to desert was present. This tendency was fostered by a Navy Department Directive which required that a man be charged with desertion after

an absence of 45 days; with this requirement in force, courts tended to assume that a man who had been gone for this length of time was automatically guilty of desertion. On the other hand, if absence were less than 45 days the man was usually not charged with desertion at all.

The report recommends that workable tests be established for distinguishing between desertion and mere unauthorized absence. If length of absence alone is to be the test, an intermediate offense of aggravated absence should be recognized, which would permit more severe punishment than A.W.O.L. or A.O.L., but not be a capital offense. Desertion would be reserved for a case of unauthorized absence, coupled with other evidence, of which prolonged absence would be one type, showing unmistakably an intent not to return to the service.

The report also recommends that the definition of offenses should continue to be made in Naval Courts and Boards; they should not be defined in the Articles themselves.

Uniform Code of Military Justice

Subject: Advising or Aiding Another to Desert.
A. W. 59.

I. Army Provisions

1. Articles of War

"ART. 59. Advising or Aiding Another to Desert.-- Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

2. Manual for Courts-Martial

"Par. 131. Fifty-Ninth Article of War. ADVISING, PERSUADING, OR ASSISTING DESERTION.

"Discussion.--

"The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

"It is not necessary that the accused act alone in giving the advice or assistance or in the persuasion; and he may act through other persons in committing the offenses.

"Proof.--

"b) if charged with persuading or assisting desertion, that such certain person deserted as alleged, and, where persuasion is alleged, that he was induced to do so by such persuasion;....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 59 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4..... -- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--....."

"Sixth. Or, in time of war, deserts or entices others to desert;

"Seventh. Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust;....."

"ART. 8.....Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Twenty-first. Or, in time of peace, deserts or attempts to desert, or aids and entices others to desert;....."

"ART. 22. (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct....."

2. Naval Courts and Boards

"Sec. 78. Aiding Desertion--....."

"Elements: Whereas by paragraph 6 of Article 4 of the Articles for the Government of the Navy, enticing desertion alone is an offense in time of war, in time of peace, by this article (Art. 8, paragraph 21), there must be both an aiding and an enticing. If either of these elements is lacking the offense should be laid under the general charges....."

"Sec. 22. General and specific charges.--"

"Scandalous conduct tending to the destruction of good morals, conduct to the prejudice of good order and discipline, and conduct unbecoming an officer and a gentleman constitute the general charges....."

"Sec. 41. Principals and accessories.--"

"In view of 18 U. S. Code 550 (Sec. 332, Criminal Code) no distinction is to be made in charging principals and accessories before the fact....." (Sec. 332, Criminal Code, makes any one who aids, abets, counsels, commands, induces or procures the commission of an offense a principal).

3. Proposed Navy Bill

"Sec. 3. Article 4 is renumbered as Article 8 and amended as follows:

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person

subject to the Articles for the Government of the Navy--.....

"Third. Or, in time of war, deserts or entices others to desert;

"Fourth. Or, in time of war,, or entices or aids others to desert or betray their trust;....."

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

"Thirty-first. Or, in time of peace,..... or aids and entices others to desert;

"Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

"Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles;....."

"Sec. 15. Articles 22 (and 23) are repealed."

"Sec. 47. Art. 5(e). Whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal....."

III. Differences

1. A. W. 59 can be violated by any of three offenses, either in time of peace or of war: 1) the offense of advising another to desert; 2) the offense of persuading another to desert; or 3) the offense of knowingly assisting another to desert. The offense of advising another to desert is complete when the advice is given, whether the person advised deserts or not, whereas if the offenses are persuading, or knowingly assisting another to desert, they are not complete unless the desertion actually occurs. (paragraph 131, ANCM).

a) Under Navy provisions, in time of war, it is an offense to entice another to desert, or to entice or aid another to desert

or betray his trust (Proposed Navy bill, Section 3, new Art. 8, paragraphs 3 and 4). There is no indication in Navy provisions whether the desertion must actually occur, or at least be attempted, before these offenses are complete. However, that actual or attempted desertion is an essential element to these offenses might be deduced from analysis of the meaning of the word "entice" as it is used in this context. The employment of the word is probably derived from chapter 321, section 42 of the U.S. Criminal Code (18 USCA 94), which reads in part: "whoever shall entice or procure, or attempt to entice or procure, any soldier.....or any seaman.....to desert....." From the fact that a distinction is made in the Criminal Code between "entices or procures" and "attempts to entice or procure", it might be concluded that the word "entice" when used in the Code is intended to have the same meaning that the word "persuade" has in offense number two of A. W. 59--i.e.--that the effort to entice has been successful, and the desertion has occurred or been attempted. When the same word is used in an identical context in A.G.N., the same conclusion may reasonably be drawn.

If the charge under A. W. 59 is "persuading another to desert", it must be proved that the deserter was actually induced to desert by such persuasion (AMCM, paragraph 131). Navy provisions do not contain a similar provision for proof where the charge is "enticing another to desert."

b) Navy provisions do not make it a specific offense to attempt to entice (i.e., to "advise"--cf. offense number 1 of A. W. 59) another to desert. Such an attempt might be punishable as a violation of Art. 22(a) of the present A.G.N.; or, under the proposed Navy bill, of new Art. 9, paragraph 62, as an attempt to commit an offense, or of paragraph 61, as conduct to the prejudice of good order and discipline. Under any of these Articles, the maximum punishment permissible would not include a sentence of death, whereas under A. W. 59, advising another to desert in time of war may be punished by a sentence of death. The offense would probably be complete whether or not desertion actually occurred or was attempted.

c) Navy provisions do not make it a specific offense to aid another to desert in time of war (Cf. offense number 3 of A. W. 59). However, Section 41 of NC&B provides that no distinction is to be made in charging principals and accessories before the fact. From this it appears that one who aids another to desert is chargeable as a principal to the offense. (See paragraph 2 of this section for further discussion of this point). It is implied that the offense would not be complete until desertion occurred or was attempted.

d) In time of peace, Navy provisions make it an offense to aid and entice another to desert (Proposed Navy bill, sec. 11, new Art. 9 (31)). If either of these elements is missing the

offense is laid under a general charge, as a lesser included offense (NC&B, Sec. 78). A. W. 59 makes separate offenses, which are of equal seriousness, of these two elements. Advising another to desert, also a separate offense in time of peace under A. W. 59, would probably be brought under a general charge in the Navy, again as a lesser included offense. The rules for when these offenses are complete in time of peace probably follow those for when they occur in time of war.

2. Art. 5(e), proposed Navy bill (Sec. 47) is a new article in the proposed A.G.N.; its substance is now stated as a rule of procedure in Sec. 41, NC&B. The Article is derived from Sec. 332, U.S. Criminal Code (18 USC 2). It is not clear what the effect of this article will be when the offense is being an accessory before the fact to a desertion. If a person charged with such an offense can be tried as a principal, the distinction made elsewhere in the Articles between the offense of enticing another to desert in time of war, and the offense of aiding and enticing another to desert in time of peace would not apply. However, it is probably that this article will not be invoked where there is a specific article to cover an offense.

Articles of War do not have any provision equivalent to Art. 5(e), but the principle of the Article was set forth in Army Court Martial Order 145106 (1942) as applicable to Army Courts-Martial. (Cf. JAG, Army, Digest of Opinions, 1912-1940, page 333).

IV. Recommendations

1. Proposed amendments to the proposed Navy bill, as prepared by Naval Law Manual Section, dated 17 May 1948:

The offenses of enticing another to desert in time of war, and enticing and aiding another to desert in time of peace have been eliminated. This indicates an intent either that the offender shall be tried as a principal under the authority of an Article identical to Art. 5(e) of the proposed Navy bill, or under a general article making it an offense to solicit the commission of any offense against the Articles. If the latter, the death sentence could not be imposed, although the solicitation occurred in time of war.

Uniform Code of Military Justice

Subject: Entertaining a Deserter. A. W. 60.

I. Army Provisions

1. Articles of War

"ART. 60. Entertaining a Deserter.-- Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct."

"ART. 96. General Article.-- Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

2. Public Law 759--80th Congress, Chapter 625, 2D Session

Article of War 60 and 96 were not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 8. Persons to whom applicable.-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--
.....

"Twenty-second (Harboring deserters).-- Or receives or entertains any deserter from any other vessel of the Navy, knowing him to be such, and does not, with all convenient speed, give notice of such deserter to the commander of the vessel to which he belongs, or to the commander in chief, or to the commander of the squadron
....."

2. Proposed Navy Bill

"Sec. 6. Article 8 is repealed."

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Thirty-second. Or receives or entertains any deserter from the military or naval service, knowing him to be such, and does not, without delay, give notice of such deserter to his commanding officer or higher authority in the chain of command;"

III. Differences

1. A. W. 60 applies to officers only; new Art. 9 of the proposed A.G.N. applies to any person subject to the A.G.N. (But cf. JAG Army Opinions, 1912-40, Sec. 417, page 281 stating that the offense of knowingly and willfully harboring and concealing a deserter is a violation of A. W. 96. A. W. 96 applies to all persons subject to the Articles of War).
2. In order for A. W. 60 to be applicable to an officer, the deserter must be a soldier in his command; new Art. 9 of proposed A.G.N. would apply to any person who received or entertained any deserter from the military or naval service.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Absence Without Leave.
A. W. 61

I. Army Provisions

1. Articles of War

"ART. 61. Absence Without Leave.-- Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 132. SIXTY-FIRST ARTICLE OF WAR.

"Discussion.--The article is designed to cover every case not elsewhere provided for where any persons subject to military law is through his own fault not at the place where he is required to be at a time when he should be there....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 61 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4.....The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--....."

"Ninth.....-- Or leaves his station without being regularly relieved;....."

"ART. 8.....Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Ninth.....-- Or is negligent or careless in obeying orders,.....;

"Nineteenth.....-- Or is absent from his station or duty without leave, or after his leave has expired;....."

"ART. 9.....Any officer who absents himself from his command without leave, may, by the sentence of a court martial, be reduced to the rating of seaman, second class....."

"ART. 22. (a) Offenses not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct"

2. Naval Courts and Boards

Willfully missing ship is charged under AGN Art. 22 (a). If there is no deliberate intent, it is charged as absence without or over leave with the fact of missing ship as a matter of aggravation.

3. Proposed Navy Bill

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Nineteenth. Or is negligent or careless in obeying orders,"

"Twenty-ninth. Or is absent without authority from his place of duty;

"Fifty-seventh. Or, without authority, deliberately and willfully misses his ship or mobile unit;

"Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline.....other than any disorder or neglect.....mentioned in these Articles;....."

"Sec. 7. Article 9 is renumbered as Article 10 and amended....."

(Art. 10 will read as amended: "Any officer who absents himself from his command without authority, may, by the sentence of a court martial, be reduced to the rating of seaman, second class.")

"Sec. 3. Article 4 is renumbered as Article 8 and amended....."

(Present Article 4, paragraph Ninth, is not included in the amended article.)

"Sec. 15. Articles 22 and 23 are repealed."

III. Differences

1. The present A.G.N. does not make it an offense of absence without leave to fail to repair at the fixed time to the properly appointed place of duty. Such an offense is now punishable under Art. 22(a), or, in many cases, could be brought within present Art. 8, paragraph ninth. New Art. 9, paragraph twenty-ninth, is worded more broadly than the present article and may be intended to cover all of the types of unauthorized absence specified in A. W. 61. If paragraph twenty-ninth is construed more narrowly than this, a failure to repair might be punished under new Art. 9, paragraph nineteenth, or paragraph sixty-first.
2. Navy provisions make a separate and more serious offense of unauthorized absence occurring in conjunction with a deliberate and willful missing of a ship or mobile unit. (Proposed Navy Bill, Sec. 11, New Art. 9, Fifty-Seventh.)
3. Navy provisions make a separate offense of the case where an officer absents himself from his command without authority. Punishment permissible for this includes a sentence of reduction to the rating of seaman, second class. A. W. 61 provides for this offense, but a sentence of reduction to the rank of private would be permissible only in time of war. Cf. C.S., A.W. 44.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Disrespect Toward President, Vice President, Congress, etc.
A.W. 62.

I. Army Provisions

1. Articles of War

"ART. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.-- Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

This offense was included under Art. 22 (a), offenses not specified, as conduct to the prejudice of good order and discipline.

2. Naval Courts and Boards

Only comment is specification for the offense of sending a contemptuous or disrespectful letter to the Secretary of the Navy.

3. Proposed Navy Bill

"SEC. 11.....

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy --

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"Forty-seventh. Or (who) is contemptuous or disrespectful in language or deportment to or concerning the President, Vice President, the Congress of the United States, the Secretary of the Navy, or the governor or legislature of any State, Territory, or other possession of the United States in which he is on duty or present."

III. Differences

The provisions of the Articles of War and the proposed Navy bill are substantially the same, except that A. W. 62 specifically provides that an officer may be dismissed for this offense and thus precludes the President from setting any maximum less than dismissal in such a case.

The Army and Navy provisions provide for disrespect toward the Secretary of the Army and Navy respectively. In the articles for the government of the armed services, the Secretary of Defense should be provided for or all the Secretaries of the various departments under the generic term of all cabinet officers.

IV. Recommendations

The Ballantine, Keefe, McGuire, White, and Vanderbilt Reports make no comment.

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Uniform Code of Military Justice

Subject: Insubordinate Conduct Toward Officers and Noncommissioned Officers.
A. W. 63-65.

I. Army Provisions

1. Articles of War

"ART. 63. Disrespect Toward Superior Officer.-- Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct."

"ART. 64. Assaulting or Willfully Disobeying Superior Officer.-- Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

"ART. 65. Insubordinate Conduct Toward Noncommissioned Officer.-- Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 133. DISRESPECT TOWARD A SUPERIOR OFFICER.

"Discussion.-- The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

"It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

"The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; but by superior is not necessarily meant a superior in rank, as a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a medical officer.

"Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. Disrespect by acts may be exhibited in a variety of modes-- as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop.)

"Where the accused did not know that the person against whom the acts, etc., were directed was his superior officer, such lack of knowledge is a defense.

"Proof.--(a) That the accused did or omitted to do certain acts or used certain language to or concerning a certain officer, as alleged; (b) that the behavior involved in such acts, omissions, or words was, under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; and (c) that the officer toward whom the acts, omissions, or words were directed was the accused's superior officer."

"Par. 134. a. ASSAULTING SUPERIOR OFFICER

"Discussion.-- The phrase 'on any whatsoever' is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined in A. W. 67.

"By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

"The word 'strikes' means an intentional blow with anything by which a blow can be given.

"The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word 'draw' is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol, and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether or not loaded) or of a club, or of any implement or thing by which a serious blow could be given, would be within the description, 'lifts up.' (Winthrop.)

"The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.' But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article. (Winthrop.)

"An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office.

"Proof.--(a) That the accused struck a certain officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (b) that such officer was the accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time.

"b. DISOBEYING SUPERIOR OFFICER

"Discussion.--The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A. W. 96. Where the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under A. W. 64, although carrying out such an intention may be.

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

"A person can not be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate. Disobedience of an illegal order might under some circumstances involve an act of insubordination properly chargeable under A. W. 96.

"That obedience to a command involved a violation of the accused's religious scruples is not a defense.

"Failure to comply with the general or standing orders of a command, or with the Army Regulations, is not an offense under this article, but under A. W. 96; and so of a nonperformance by a subordinate of any more routine duty.

"The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

"Proof.--(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command."

"Par. 135. a. ASSAULTING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER.

"Discussion.--.....The part of the article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application.

"Proof.--(a) That the accused soldier struck a certain warrant officer or noncommissioned officer as alleged, or assaulted or attempted or threatened to strike or assault him in a certain manner, as alleged; and (b) that such violence was done, attempted, or threatened while such warrant officer or noncommissioned officer was in the execution of his office.

"b. DISOBEYING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

"Proof.--(a) That the accused soldier received a certain order from a certain warrant officer or noncommissioned officer, as alleged; and (b) that such order was given while such warrant officer or noncommissioned officer was in the execution of his office; and (c) that the accused soldier willfully disobeyed such command. An order from a warrant officer or a noncommissioned officer in the execution of his office is presumed to be a lawful order.

"c. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER.

"Discussion.-- The word 'toward' limits the application

of this part of the article to language and behavior within sight or hearing of the warrant officer or noncommissioned officer concerned; the word not being used in the same sense as in A. W. 63.

"Proof.--(a) That the accused used language or did or omitted to do acts under certain circumstances, or in a manner, or with an intended meaning, as alleged; (b) that such language or behavior was used toward a certain warrant officer or noncommissioned officer; and (c) that such warrant officer or noncommissioned officer was in the execution of his office at the time."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 3. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--....."

"Sixth (Contempt of superior officer).-- Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office;

"Seventh (Combinations against commanding officer).-- Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

"Twentieth (Violating general orders or regulations).-- Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;"

"ART. 4. The punishment of death or such other punishment as a court-martial may adjudge may be inflicted on any person in the naval service--....."

"Second. (Disobedience of orders).-- Or disobeys the lawful orders of his superior officer;

"Third (Striking superior officer).-- Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;"

2. Naval Courts and Boards

"SEC. 63. Contempt of superior officer--.....

"Elements: It is essential that the superior officer be present and in the execution of his office at the time, but it is immaterial whether the words or acts be directed toward him in his official or private capacity.

"The accused must know that the person to whom the language or deportment was directed was, in fact, his superior officer.

"Disrespect by deportment may be exhibited in a variety of modes--as by neglecting the customary salute, by a marked disdain, indifference, impertinence, undue familiarity, or other rudeness in the presence of the superior officer."

"SEC. 47. Disobedience of orders.--.....

"Elements: No specific intent is necessary, but the order must be understood, the accused know that it is from his superior officer, and the disobedience wilful.

"'Superior officer' as here used includes petty and noncommissioned officers.

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. The accused cannot be convicted of this charge if the order was in fact illegal.

"The form of the order is immaterial so long as it is definite and positive, as is the method by which it is transmitted to the accused; but the communication must amount to an order.

"When the order is to be executed in the future, neglect to comply therewith is not, as a rule, chargeable under this article but under the charge of conduct to the prejudice of good order and discipline, and the same is true of a refusal to obey such an order before the time set for its execution.

"Failure to comply with the Navy Regulations or with general orders is not an offense under this charge, but under the 8th A.G.N., paragraph 20.

"Disobedience of a local order is an offense under the general charge. Nonperformance by a subordinate of routine duty is properly charged as neglect of duty."

"SEC. 48. Striking and assaulting his superior officer.--.....
.....

"Elements: To strike means to inflict an intentional blow.

"An assault is an unlawful offer or attempt with force or violence to do a corporal hurt to another. Rushing, aiming a blow, or pointing a weapon at another is an assault. It is the apprehension of hurt, not the real design of the offender, that constitutes the offense.

"There must be intent, actual or apparent, to inflict corporal hurt on another.

"There must be some overt act toward carrying out such intent as opposed to mere preparation.

"The force or violence must be physical; mere words, however threatening, or insulting gestures are not in themselves sufficient to constitute an assault.

"It is immaterial that the offender is not in a position to consummate the threatened injury, provided that the superior officer believes there is a present ability to injure him. Example: Although a weapon pointed at a person is unloaded, this may still constitute an offense.

"An officer may be in the execution of the duties of his office without being on duty in the strictly military sense. This phrase may properly be defined: In the performance of an act or duty either pertaining or incident to his office or legal or appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or usage of the service."

"SEC. 75. Violating general orders or regulations.--.....

"Elements: As a practical manner 'violation of' includes 'refusing obedience to' and the former term should be used in the charge. A regulation or general order issued by the Secretary of the Navy is lawful that is not in conflict with the Constitution or the provisions of an act of Congress. No specific intent need be shown."

3. Proposed Navy Bill

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--
.....

'Tenth. Or does not properly observe the orders of his commanding officer, and use his utmost exertion to carry

them into execution, when ordered to prepare for or join in, or when actually engaged in battle, or while in sight of an enemy; -

'Twelfth. Or does not use his utmost exertions to join in battle, when so ordered.'"

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

'Sixteenth. Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while such superior officer is in the execution of his office;

'Seventeenth. Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

'Thirtieth. Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;

'Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine.'"

III. Differences

1. Disrespectful Conduct.

Under the A.G.N. the term "superior officer" includes warrant officers and noncommissioned officers, while under the Articles of War, offenses against warrant officers and noncommissioned officers are triable under separate articles.

It is not necessary that the disrespect occur in the presence of an Army commissioned officer, but if the person offended is an Army non-commissioned officer or a Navy commissioned or non-commissioned officer, such person must be present and in the execution of his duty.

The A.G.N. makes combining to weaken the lawful authority of, or to lessen the respect due a commanding

officer a separate offense. The specification in NC&B, Sec. 64, deals with combining to lessen the respect due to his commanding officer.

2. Disobeying Orders.

Under the Articles of War, the offenses of disobeying commissioned officers and disobeying noncommissioned officers are treated separately, while under the proposed A.G.N. the offense is disobeying the order of lawful authority, which presumably continues the present Navy practice of not distinguishing between commissioned and noncommissioned officers insofar as this offense is concerned.

The offense of disobeying an Army commissioned officer is punishable by death, while under the proposed A.G.N. only certain battle disobedience offenses are punishable by death.

The A.G.N. makes disobedience to a general order or regulation issued by the Secretary of the Navy a separate offense, while under the Articles of War, such disobedience is tried under the general article, A.W. 96.

3. Assault

Assaults against commissioned and noncommissioned officers under the Articles of War are treated separately, while under the proposed A.G.N., all assaults are treated alike.

Assaults against superior commissioned Army officers are punishable by death, while assaults against Army non-commissioned and Navy superior officers are not.

Using threatening language is an offense against A.W. 65 (non-commissioned officers), or A.W. 96 (general article), or A.G.N. 9, Thirteenth.

IV. Recommendations

There are no comments on these offenses in the McGuire, Ballantine, White, Keefe, or Vanderbilt Reports or Navy JAG Recommendations.

Uniform Code of Military Justice

Subject: Assaulting or Willfully Disobeying Superior Officer.

See C.S., A.W. 63 - Insubordinate Conduct Toward Officers
and Noncommissioned Officers.

Uniform Code of Military Justice

Subject: Insubordinate Conduct Toward Noncommissioned Officer.

See C.S., A.W. 63 - Insubordinate Conduct Toward Officers
and Noncommissioned Officers.

Uniform Code of Military Justice

Subject: Mutiny or Sedition, A.W. 66.

I. Army Provisions

1. Articles of War

"ART. 66. Mutiny or Sedition.-- Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court martial may direct."

2. Manual for Courts-Martial

"Par. 136. SIXTY-SIXTH ARTICLE OF WAR

"a. ATTEMPTING TO CREATE A MUTINY OR SEDITION.

"Discussion.-- Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. Sedition implies the raising of commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

"The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent.

"An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt while material in extenuation is not a defense.

"The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny or sedition and so be guilty of an attempt to create a mutiny or sedition, alike whether he was joined by others or not, or whether a mutiny or sedition actually followed or not.

"Proof.-- (a) An act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States.

"b. BEGINNING OR JOINING IN A MUTINY OR SEDITION.

"Discussion.--See 136a. There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

"Proof.--(a) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and (b) that the accused began or joined in such certain collective insubordination.

"c. CAUSING OR EXCITING A MUTINY OR SEDITION.

"Discussion.--See 136a. As in 136b, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.

"Proof.--(a) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (b) acts of the accused tending to cause or excite the certain collective insubordination."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be

inflicted on any person in the naval service--

"First (Mutiny).--Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;"

"Article 8. Persons to whom applicable.--Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Eighth (Mutinous words).--Or utters any seditious or mutinous words;"

2. Naval Courts and Boards

"Sec. 46. Mutiny.--Charge:

- 1. (Making) a (mutiny.
- (Attempting to make) (mutinous assembly.
- (Uniting with)

"....."

"Elements: 1. Mutiny consists in an unlawful opposition or resistance to or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same. Simple violence without proof of purpose to usurp, subvert, or override authority is not mutiny. Specific intent is an essential element. To complete the offense an overt act of mutiny must occur. This may consist, however, of a persistent refusal or omission with the essential intent. To constitute mutiny it is not necessary that there should be a concert of several persons, though it will be rare that this is lacking.

"Uniting with a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do.

"A mutinous assembly differs from a mutiny in that, although the intent to commit a mutiny is entertained, no overt act has yet occurred.

"....."

"Lesser included offenses: Under charge 1, 'attempting to

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make' or 'uniting with' under the charge of 'making', and 'mutinous assembly' under 'mutiny'.

"Under any of the three charges, conduct to the prejudice of good order and discipline.

"Sample specifications:

"CHARGE I

"MAKING A MUTINY

"SPECIFICATION

"In that A _____, B. C _____, seaman second class, U. S. Navy, D _____ E. F _____, fireman third class, U. S. Navy, and G _____ H. I _____, private, U. S. Marine Corps, while serving as general court-martial prisoners in the U. S. naval prison at the navy yard, _____, _____, having conspired each with the other to mutiny against the lawful authority of and escape from the lawful custody of U _____ V. W _____, coxswain and X _____ Y. Z _____, seaman second class, U. S. Navy, stationed at said prison and on duty as sentinels over the aforesaid C _____, F _____, and I _____, did, on or about September 5, 19____, while in the said prison and while in the lawful custody of the said W _____ and the said Z _____, make a mutiny against the lawful authority of the said W _____, and the said Z _____, in that they, the said C _____, F _____, and I _____, did then and there by force and violence take from the said W _____ a Colt automatic pistol and a bunch of keys, and did tie, bind, fasten, and secure, and assist in tying, binding, fastening, and securing the feet and hands of the said W _____ and the said Z _____, and did therein and thereby escape from the lawful custody of the said W _____ and the said Z _____; the United States then being in a state of war."

"Sec. 65. Seditious or mutinous words.--....."

"Elements: Mutiny is against military authority; sedition against civil.

"Seditious words tend to degrade and vilify the Constitution, to promote insurrection and circulate discontent, to asperse justice and anyway impair the exercise of the functions of Government. The words must have been knowingly uttered and with seditious intent. Sedition implies a resistance to lawful civil power.

"Similarly mutinous words are words tending to have the same effect as regards military or naval functions."

3. Proposed Navy Bill

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--

'First. Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--

'Eighteenth. Or utters any seditious or mutinous words;

III. Differences

The definitions of mutiny in both the AGN and Articles of War are extremely broad. Under these definitions, it is possible to include many acts not ordinarily thought of as mutiny. For instance, the Navy sample specification for mutiny deals with a prison break using force.

Although the offenses under the AGN and A.W. cover the same acts in general, the Army provisions are broader in that the Army offense of attempting to create a mutiny or sedition includes more than the Navy offense of uttering mutinous or seditious words.

The use of the word "make" in the Navy offense of making a mutiny is ambiguous as it has the connotations of "creating", "causing", or "exciting." It is very doubtful whether these connotations are intended.

IV. Recommendations

There are no comments on these provisions in the McGuire, Ballantine, White, Keefe, or Vanderbilt Reports or the Navy JAG recommendations.

Uniform Code of Military Justice

Subject: Failure to Suppress Mutiny or Sedition.
A. W. 67.

I. Army Provisions

1. Articles of War

"ART. 67. Failure to Suppress Mutiny or Sedition.-- Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court martial may direct."

2. Manual for Courts-Martial

Par. 137

"a. FAILURE TO SUPPRESS MUTINY OR SEDITION

"Discussion. The article applies only to officers and soldiers. Similar acts or omissions by other persons subject to military law are chargeable under A. W. 96.

"One is not present at a mutiny unless an act or acts of collective insubordination occur in his presence.

"The article requires of an officer or soldier 'his utmost endeavor' to suppress a mutiny or sedition at which he is present. Where such extreme measures are reasonably necessary under the circumstances, the use of a dangerous weapon and the taking of life are required; but the use of more force than is reasonable necessary under the circumstances is an offense.

"Proof.--(a) The occurrence of an act or acts of collective insubordination in the presence of the accused; and (b) acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

"b. FAILURE TO GIVE INFORMATION OF MUTINY OR SEDITION

"Discussion. Where circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such 'reason to believe' as will render him culpable under the article.

"It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"'Delay' imports the lapse of an unreasonable time without action.

"Proof.--(a) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced, in a reasonable man, a belief that a mutiny or sedition was impending; and (b) acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief."

3. Public Law 759--80th Congress, Chapter 625, 2d Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

"First (Mutiny). Who.....being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer."

2. Naval Courts and Boards

"Sec. 46. Mutiny--.....

"Elements:.....

"2. The duty to suppress a mutiny may even extend in extreme cases to the taking of life. The word 'utmost' means the utmost that may properly be called for by the circumstances of the situation, and in view of the rank, command, and abilities of the individual. To convict one of this charge the fact that a mutiny existed must be proved.

"3. To convict of this charge (failing to report), it is essential that there be proof of the knowledge of the accused, the fact of a mutinous assembly or intended mutiny, and the neglect to give information."

3. Proposed Navy Bill

No change. This provision is included in Art. 8, First, of the proposed A.G.N.

III. Differences

As to failure to suppress a mutiny, the Army and Navy provisions are substantially the same.

As to failure to report knowledge of a mutiny, the Army provisions refer only to impending mutinies, while the Navy provisions refer to either a present or future mutiny or mutinous assembly.

As to knowledge, the Army uses a test of whether a "reasonable man" would have known, while the Navy provisions require actual knowledge.

A. W. 66 includes sedition as well as mutiny, while proposed AGN, Art. 8, First, only applies to mutiny.

IV. Recommendations

There is no comment on these provisions in the McGuire, White, Ballantine, Keefe, or Vanderbilt Reports or Navy JAG Recommendations.

Uniform Code of Military Justice

Subject: Quarrels; Frays; Disorders.
A. W. 68.

I. Army Provisions

1. Articles of War

"ART. 68. Quarrels; Frays; Disorders.--All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 138. SIXTY-EIGHTH ARTICLE OF WAR

"a. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT

"A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word 'fray' is thus seen to be somewhat restrictive, but the words 'quarrels' and 'disorders' include any disturbance of a contentious character from a mere war of words to a rout or riot.

"It is immaterial under the article whether the officer or other person who essays to part or quell a quarrel, fray, or disorder is on a duty status or not, as it is immaterial whether the persons engaged in the quarrel, etc., are superior to him in rank or not.

"It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or non-commissioned officer, or other person thereunto authorized by the article.

"b. The word 'threat' as here used includes any menacing action, either by gesture or by words."

Par. 134

"a. ASSAULTING SUPERIOR OFFICER

".....

"The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.'"

"b. DISOBEYING SUPERIOR OFFICER

"The willful disobedience contemplated is such as shows an intentional defiance of authority....."

The principles herein stated are applicable to all persons acting pursuant to authority prescribed in A. W. 68.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 68 -- no change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

"Second (Disobedience of orders).-- Or disobeys the lawful orders of his superior officer;

"Third (Striking superior officer).-- Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;"

"ART. 8. Persons to whom applicable.-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....

"Seventeenth (Refusing to apprehend offenders).-- Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;"

2. Naval Courts and Boards

The word "fray", "quarrels" and "disorders" as defined in par. 138(a), MCM, are similarly defined in sec. 92.

Sec. 47. 'Disobedience of orders.--.....No specific intent is necessary, but the order must be understood, the accused know that it is from his superior officer, and the disobedience wilful. 'Superior officer' as here used includes petty and noncommissioned officers. The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. The accused cannot be convicted of this charge if the order was in fact illegal."

"Sec. 48.....An assault is an unlawful offer or attempt with force or violence to do a corporal hurt to another....."

"An officer may be in the execution of the duties of his office without being on duty in the strictly military sense. This phrase may properly be defined: In the performance of an act or duty either pertaining or incident to his office or legal or appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or usage of the service." To constitute the offense of threats, the words of the charge must be taken in their usual acceptation, and the person to whom the threat was directed must be present.

3. Proposed Navy Bill

Sec. 11. "Article 14 is renumbered as Art. 9 and amended to read as follows:

"ART. 9. Such punishment, other than death, as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

"Twenty-seventh. Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

"Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine;"

III. Differences

All officers, including warrant officers and noncommissioned officers, and field clerks are authorized to order into arrest any person subject to military law under circumstances set forth in A. W. 68. Under the provisions of Art. 9(27), however, it is incumbent upon every person subject to the articles to apprehend and bring to punishment all offenders also so subject.

The provisions of A. W. 68 relating to punishment are applicable solely in cases wherein persons subject to military law were engaged in an affray, quarrel, or disorders; and did threaten, assault, or disobey an order of a person acting pursuant to authority prescribed therein. Although there is no comparable provision in the proposed Navy bill, art. 9(13) and 9(50) authorize punishment for the above offenses. The difference herein lies in the fact that the power conferred in the proposed bill is not restricted in its application to the prerequisite offenses of A. W. 68. See C.S., A.W. 69.

IV. Recommendations

No specific recommendations.

V. Comment

The term "Army field clerks, field clerks Quartermaster Corps" should be deleted from A. W. 68 since the Army no longer has them and the term has been stricken from A. W. 2(a), as amended.

Uniform Code of Military Justice

Subject: Arrest or Confinement.
A. W. 69.

I. Army Provisions

1. Articles of War

"ART. 69. Arrest or Confinement.— Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court martial may direct."

2. Manual for Courts-Martial

In general, the law with respect to arrest and confinement pending trial is set out in A. W. 69. The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. "In arrest the restraint is moral restraint imposed by the orders fixing the limits of arrest or by the terms of the article. Confinement imports some physical restraint", par. 139.

A person in arrest is restricted to his barracks, quarters or such larger limits as may have been specified in the order of arrest (A. W. 69). He cannot, if he is to remain in that status, be required to perform full military duty. A person who is confined pending trial is a garrison prisoner and subject to the provisions of AR 600-375, 17 May 1943. If he is a private or private first class, he will perform such hard labor and military duties as may be required in par. 20(b), AR 600-375. If he is of higher rank, he will not be required to perform military duties or hard labor, par. 20(d), AR 600-375. No greater restraint shall be imposed than is required by the circumstances of the particular case. No person will be placed in confinement or in arrest under the authority of A. W. 69 except on personal knowledge of, or inquiry into, his offense, par. 19.

Any commissioned officer, except a warrant officer unless he is serving as commander of a station or unit, has the power to order an enlisted man into arrest or confinement. The commanding officer of any company or detachment may delegate this authority to his noncommissioned officers. The delegated authority shall be applicable solely to enlisted personnel of the company or detachment, and enlisted men of other organizations temporarily in the company's jurisdiction. A commissioned or warrant officer may be placed in arrest or confinement only by order of a commanding officer, par. 20, MCM. The term "commanding officer" as used herein is one who, under A. W. 10, has power to appoint a summary court.

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A. W. 69. Any completed, even momentarily casting off of the restraint of confinement, before being set at liberty by proper authority is an escape from confinement, par. 139 (a) (b).

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 69 -- no change.

"SEC. 212. Article 16 is amended to read as follows:

"ART. 16. Persons in the Military Service--How Triable.--
.....No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4(2).-- Or disobeys the lawful orders of his superior officer;....."

ART. 24. No commander of a vessel is authorized to cause the arrest or confinement of any person subject to his command for more than ten days, unless further period is necessary to bring offender to trial by court martial.

"ART. 25. All officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial shall have the same authority.....as is conferred by law upon the commander of a naval vessel....."

"ART. 43. The persons accused shall be furnished with a true copy of the charges,.....at the time of his arrest....."

"ART. 44. Every officer who is arrested for trial shall..... confine himself to the limits assigned him....."

2. Naval Courts and Boards

In general, the A.G.N. provide for two arrests -- one, where necessary, in an emergency, and the other an arrest for trial, Sec. 343. A person under arrest is restrained within certain legal limitations by his moral and legal obligations to obey an order of arrest. An arrest in an emergency is employed to apprehend and restrain an offender in the first instance. A person in confinement is in a status of arrest and is physically restrained to certain limits, N.J., p. 76-77.

The commanders of vessels and all officers of the Navy and Marine Corps who are authorized to order either a general or summary courts martial possess the power to place in arrest or confinement pending trial by court martial any person under their command. N.J. p. 103-104.

Navy regulations provide that, in general, no greater restraint shall be imposed than is required by the circumstances of each particular case. However, in the case of trial by general court martial, it is provided that the accused shall be placed formally under arrest for trial at the time he is furnished with charges and specifications, N.J., p. 77. A person in arrest is restrained within certain limitations as may be specified in the order of arrest and should not be required to perform his full military duty. A person in confinement awaiting trial is subject to regulations prescribed in the Manual of Rules and Procedures for the Administration of Naval Places of Confinement. It is not intended that these rules be strictly administered to such persons. N.J., p. 77, 78.

No person should be placed in arrest unless the authority so ordering has personal knowledge of the offense or has made inquiry into it, N.J., p. 76.

The essential elements constituting a breach of arrest or an escape from confinement are substantially the same as stated in par. 139 (a) (b), MCM. Where the offense is committed by an officer or enlisted man prior to trial, the former may be prosecuted under the provisions of article 44 or 4(2); the latter under the provisions of article 4(2) or 22(a). However, where the violation occurs subsequent to trial, the proper authority may proceed against either under the provisions of article 22(a), Sec. 94, NC&B.

3. Legal Opinions

"Construing Art. 24, 43, and 44 together, it is my opinion, clear that there may be two arrests; first an arrest in an emergency or upon the discovery of the alleged wrongdoing, with a view to a preliminary examination, and if necessary the formulation and specification of charges; and second, in the language of Art. 44, 'an arrest for trial.' I think it equally clear that Art. 43, providing that 'the person accused shall be furnished with a true copy of the charges, with specifications at the time he is put under arrest' has reference to the second and formal arrest for trial, as referred to in Art. 44, Op. Atty. Gen. 472."

4. Proposed Navy Bill

"SEC. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine;.....'"

"SEC. 16. Article 24 is renumbered as Article 14 and amended to read as follows:

'ART. 14(a) No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement and such suspension, arrest or confinement shall not continue longer than ten days unless a further period is necessary to bring the offender to trial by a court martial; nor shall he inflict, or cause to be inflicted, upon any enlisted person, for a single offense, or at any one time, any other than one of the following punishments, namely:

'Third. Confinement not exceeding ten days, to run consecutively, unless further confinement be necessary, in the case of a prisoner to be tried by court martial;.....

'(b) All officers including commanding officers of naval vessels, Art. 17 who are empowered to convene summary courts martial shall have the same authority as that of a commander of a vessel to inflict punishments for minor offenses committed by persons regularly or temporarily under their command: Provided, That such officers may delegate to their

subordinate officers on separate or detached duty the authority to inflict the punishments set forth in article 14 (a)....."

"SEC. 33. Articles 43, 44,.....are repealed."

"SEC. 17. Article 25 is repealed."

III. Differences

1. In general, the law relating to arrest or confinement pending trial and subsequent to trial or sentence is set out in A. W. 69. In the proposed Navy bill references to this subject matter are contained in art. 14(a); 14(a) (3), concerning arrest or confinement of officers and enlisted personnel prior to trial; art. 14(b), conveying to all officers empowered to convene summary courts martial the same powers exercised by commanders of vessels; and art. 9(50), authorizing punishment for breach of arrest or confinement.
2. Only commissioned officers or warrant officers in certain instances or noncommissioned officers who have been authorized by their commanding officer may, under the provisions of A.W. 69, order an enlisted man into arrest or confinement except as provided in A. W. 68. The latter, however, may only exercise his authority over enlisted men who are either assigned to their organization or temporarily within its jurisdiction. A commissioned or warrant officer may be placed in arrest or confinement only by order of a commanding officer (par. 20, MCM) except as provided in A. W. 68. On the other hand, only commanding officers of vessels, all other officers empowered to convene summary courts martial, and their delegated subordinate officers on separate or detached duty, may order into arrest or confinement any officer or enlisted man under their command for trial, A.G.N. 14(a), 14(a)(3) and 14(b), as proposed. However, it is incumbent upon every person subject to the Articles to apprehend all offenders upon commission of an offense. (See C.S., A.W. 68.)
3. The status of persons placed in arrest or confinement is regulated by the provisions of A. W. 69; and A. W. 16, as amended. The former requires that persons in arrest shall be restricted to certain limits prescribed therein, unless such limits be enlarged by the proper authority. The latter prohibits the imposition of any punishment or penalties other than confinement while the accused is awaiting trial; and that no person subject to military law shall be confined with enemy prisoners or any foreign nationals outside the continental limits of the U. S. The question raised by the last restriction is: at what stage of the proceedings shall the restriction be applicable; prior

to or subsequent to trial or both? The Navy deals with this subject by administration action. Persons in arrest are subject to the same limitations of movement as provided in A. W. 69. With respect to confinement prior to trial, the requirement is that it shall not be more rigorous than circumstances may dictate, N.J., page 77,78. There is no restriction in the A.G.N. regulating confinement of naval prisoners with foreign nationals.

4. A. W. 69 provides the authority to punish any person subject to military law for breach of arrest or confinement committed prior to or subsequent to trial or sentence. A.G.N. 9(50), as proposed, authorizes punishment for resisting arrest, breach of arrest or confinement. The offense of resisting arrest in the Army is punishable under the provisions of A. W. 96.

IV. Recommendations

1. McGuire Draft Articles.

Art. 2. Every officer of the naval service, or of an organization serving as part of the Navy, who is authorized to convene either a general or summary courts martial, may order into arrest or confinement any person regularly or temporarily under his command for the purpose of trial by courts martial.

2. White Draft Articles.

Art. 7. Substantially the same as Art. 2, above, except that the authority to arrest and confine for trial by courts martial shall be vested in each officer in command or acting in the absence of the commanding officer.

"ART. 12(a) No persons subject to the jurisdiction of these articles shall:

"(3) be deprived of life, liberty or property without due process of military law;....."

3. JAG (Navy) Recommendations.

Recommends the inclusion of Art. 12 in the Naval Law Manual rather than in the A.G.N.

4. Navy Draft of Proposed Amendments to S. 1338 (Not approved)

Art. 13, as proposed, provides that all persons in the naval service, except as may otherwise be designated by the Secretary of the Navy or by officers to whom the Secretary of

the Navy has delegated his authority, shall be authorized to arrest any person subject to the A.G.N. and, in certain instances, persons not so subject. An arrest may only be made when the person making the arrest has reason to believe that the person arrested had committed an offense against these Articles.

In conjunction with the above, all references to the power to arrest or to confine pending trial by courts martial are omitted from the provisions of Art. 14, as further amended.

5. Neither the Keefe, Vanderbilt, or Ballantine Reports contain any recommendations touching upon arrest or confinement.

V. Comment

The term "arrest" as used in A. W. 69 and A.G.N. 14, as proposed, should be clarified and distinguished between formal arrest or moral restraint for the purposes of trial; and apprehension, which includes arrest, taking into custody, or seizure of any offender upon discovery of a wrongdoing.

Uniform Code of Military Justice

Subject: Charges: A. W. 70.

I. Army Provisions

1. Articles of War

"ART. 70. 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.

"No charge will be referred to a general court martial 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. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present 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.

"Before 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.

"When 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. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. 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 be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, 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. 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."

2. Legal Opinions

a. A record of trial showed affirmatively that no investigation of the charges had been made prior to the trial. Held, The provisions of A. W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred for trial. (C.M. 161728 -- 1924).

b. Under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. (250. 45, Jan. 10, 1929).

c. There is no provision of law or regulation by which an accused, or an officer or soldier under investigation, may demand, as a matter of right, counsel to represent him in an investigation of charges which have been preferred against him, and it is the custom of the service to conduct such investigation without the presence of counsel. The refusal to grant a request for counsel at such investigation does not prejudice the rights of an accused. (C.M. 199315 --- 1932).

d. The requirement of A. W. 70 that charges be supported by the oath of the accuser, being procedural, and for the benefit of the accused, does not affect the jurisdiction of the court and may be waived by the accused either explicitly or by failure to object to the irregularity. (C.M. 197674 --- 1932).

3. Public Law 759--80th Congress, Chapter 625--2D Session

Sec. 222 - Article 46.

"(a) SIGNATURE: Oath. 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.

"(b) INVESTIGATION. No charge will be referred to a general court martial 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. The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present 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) FORWARDING CHARGES; DELAYS; SERVICE OF CHARGES. 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 be not practicable, he will report to superior authority the reason for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be grounds for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. 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."

Sec. 231 - Article 70. "CHARGES; Action upon, Unnecessary delay.--

"When 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. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 43. Charges and specifications; arrest of accused.

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial in which case reasonable time shall be given to the accused to make his defense against such new charge."

2. Naval Courts and Boards

A.G.N. do not require a pre-trial investigation, but NC&B and Navy Regulations require careful inquiry prior to any court-martial action. (Navy Reg. 197; NC&B Sec. 342).

At mast the accused is without counsel. See also CMO No. 7, 1927 pp 5-6, as to duty of convening authority in conducting an adequate investigation prior to assigning a punishment at mast.

The investigation made by Navy JA in preparation of his case is, in effect, a pre-trial investigation. If he finds no adequate basis for trial, or for certain charges, he recommends to convening authority that charges be dropped. (NC&B Sec. 351).

A Naval Law Manual has been in course of preparation to replace Naval Courts and Boards. A tentative chapter has been drafted to prescribe the procedure to be followed for preliminary and pre-trial investigations which is designed to safeguard the rights of the accused during the period of investigation. The points concerning investigations contained therein are substantially analogous to those of the Army bill, A. W. 46.

3. Proposed Navy Bill

"ART. 37.--

"A court martial may, for reasonable cause, grant a continuance for such time and as often as may appear to be just. In time of peace no person shall, against his objection, be brought to trial before a general, summary, or deck court martial within the periods of five days, three days, and 24 hours, subsequent to the service of specifications upon him, respectively."

III. Differences

A. Army bill includes certain actions to be taken in A.W. 46 which Navy would cover by regulations and directives.

B. Preliminary investigations, pre-trial procedure, right of accused to counsel, and time allotted to defendant in preparation of the case would be essentially the same though the Navy would provide for these matters by regulation rather than by statute.

C. Navy makes no provision for "oath" on preferring charges whereas Army does.

D. System of preferring charges differs

(1) Army sets forth Article number which was violated.

(2) Navy sets forth the charge by naming the offense committed. (The proposed NIM contemplates setting out the charge by both naming the offense and giving the number of the article violated.)

E. Under Army system accuser signs charges whereas in Navy, the convening authority is responsible for personally signing the charges.

F. Chapter 10, Naval Courts and Boards (Courts of Inquiry and Investigations), provides:

Courts of inquiry and investigations, as the names signify, are primarily fact-finding bodies, and, unless

specifically directed by the convening authority, in the precept to express opinions or to make recommendations, will confine themselves to findings of fact. A court of inquiry has power to compel the attendance of civilian witnesses, and should be convened or requested where testimony of civilians will likely be desired; the proceedings of a court of inquiry may under certain conditions be evidence before a court martial; otherwise there is no vital distinction in the power or effectiveness of a court of inquiry and an investigation, and the question which to convene is entirely within the discretion of the convening authority. In important cases where the facts are various and complicated, where there appears to be reason for suspecting criminality, or where crime has been committed with uncertainty as to the perpetrator, or where serious blame has been incurred without certainty on whom it ought chiefly to fall, a court of inquiry or a board of investigation affords the best means of collecting, sifting, and methodizing information for the purpose of enabling the convening authority to decide upon the necessity and expediency of further judicial proceedings. (Sec. 720.)

A court of inquiry may be convened in accordance with the articles for the government of the Navy. (Art. 55, AGN). An investigation may be ordered by any officer empowered to convene a court of inquiry, by the commander of a division or larger force afloat, and by the senior officer present afloat or ashore. (Sec. 721.)

If there is no doubt as to the facts of any particular incident or occurrence, and no reason why sworn testimony to facts fresh in the minds of witnesses should be preserved, a complete administrative report by the commander concerned will be fully as satisfactory as the record of a court of inquiry or of an investigation could be. But ordinarily, owing to legal sequels, the following should be covered by a court of inquiry or board of investigation: (Sec. 722.)

Loss of life from accident or under peculiar or doubtful circumstances.

Serious casualties to or deficiencies in ships.

Accidental explosions in which ammunition or other explosives are destroyed.

Loss or stranding of a ship of the Navy.

Collision with a merchant ship.

A court of inquiry shall consist of not more than three commissioned officers as members and of a judge advocate.

A board of investigation shall ordinarily consist of three officers as members.

An investigation is composed of one officer. (Sec. 728).

A person whose conduct is the subject of investigation is a defendant. He shall be notified of the gist of the evidence that tends to implicate him and instructed that he will be accorded the rights of an accused before a court martial; namely, the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request, and to make a statement and argument. He has the right of any witness to refuse to answer incriminating or degrading questions. Conversely, should it become apparent at any time that a person who has been designated a defendant is involved in an insignificant degree, the court should inform him that he is no longer a defendant.

No person outside of the naval service or employ may be named a defendant.

If the rights of a defendant be not accorded when they should be, the court of inquiry or investigation, so far as concerns the person denied his rights, will be held of no evidential effect. Should a defendant waive his right to counsel, the president or senior member shall warn him that sworn testimony is admissible as evidence before courts martial, and again advise him to provide himself with counsel, informing him that counsel will be assigned him should he so desire. (Sec. 734).

IV. Recommended Provisions

Keeffe Report:

1. Allow any person in service to initiate complaint against another to his CO, but charges to be preferred by appropriate authority. (Oath to charges should not be required.)

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2. If trial ordered, accused to be given pre-trial psychiatric examination where practicable.

3. Material change in charges and specifications after first investigation to require another new investigation.

4. Only experienced personnel should be assigned the duty of investigating any reported offense.

5. Investigation should be commenced within 24 hours from the time the accused is put on report.

JEC

Uniform Code of Military Justice

Subject: Receiving and Keeping Prisoner.
A.W. 71, 73.

I. Army Provisions

1. Articles of War

"ART. 71. Refusal to Receive and Keep Prisoners.--No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct."

"ART. 73. Releasing Prisoner Without Proper Authority.--Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 140. SEVENTY-THIRD ARTICLE OF WAR

"a. Releasing a Prisoner Without Proper Authority.

"The words 'any prisoner' include a civilian or military prisoner.

"While a commander of the guard must receive a prisoner properly committed by any officer, the power of the commanding officer ceases as soon as he has committed the prisoner, and he is not, as such committing officer, a 'proper authority' to order a release.

"An officer may receive in his charge a prisoner not committed in strict compliance with the terms of A. W. 71 or other law, and such prisoner having been so received has been 'duly committed'

.....

"b. Suffering a Prisoner to Escape Through Neglect.

"The word 'neglect' is here used in the sense of the word 'negligence.'

"It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test looks

to the standard required of persons acting in the capacity in which the accused was acting.

"A prisoner can not be said to have escaped until he has overcome the opposition that restrained him and shaken off immediate pursuit. If he escapes, the fact that he returns, is taken in a fresh pursuit, is killed, or dies, is not a defense to a charge of having suffered him to escape through neglect.

"c. Suffering a Prisoner to Escape Through Design.

"In law a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no inference but that the act was contemplated as an extremely probable result of the course of conduct followed. Thus, on a charge of suffering a prisoner to escape through design, evidence of gross negligence may be received as probative of design.....

"It does not at all follow that such an escape is to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the gravity of the crime with which the prisoner is charged, the probability of his return, and the intention and motives of the custodian."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 8. Persons to whom applicable.--Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--
.....

"Eighteenth (Refusing to receive prisoners).--Or, when rated or acting as master-at-arms, refuses to receive such prisoners as may be committed to his charge, or, having received them, suffers them to escape, or dismisses them without orders from the proper authority;....."

2. Naval Courts and Boards

No comment.

3. Proposed Navy Bill

"Sec. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Twenty-eighth. Or, having a duty to receive or guard prisoners, refuses to receive such prisoners as may be committed to his charge, or, having received them, suffers them to escape, or dismisses them without orders from the proper authority;....."

III. Differences

1. Refusal to Receive or Keep Prisoners.

Under the provisions of A. W. 71, it shall be incumbent upon all officers and soldiers vested with the authority to receive and keep prisoners to accept prisoners upon presentation of an account, signed by an officer, of the offense charged. A.G.N. 9(28), on the other hand, provides that any person having a duty to receive or guard prisoners shall not refuse to receive any prisoner as may be committed to his charge. There is no requirement that a prisoner shall be committed unless accompanied by a statement, signed by an officer, of the offense charged. In practice, however, a prisoner will not be confined except by order, oral or written, of the officer of the day or the commanding officer.

2. Releasing Prisoner Without Proper Authority.

There is no substantial difference between A. W. 73 and A.G.N. 9(28).

IV. Recommendations

There are no specific recommendations.

Uniform Code of Military Justice

Subject: Report of Prisoners Received.

I. Army Provisions

1. Articles of War

"ART. 72. Report of Prisoners Received.-- Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

No comment.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

There is no article in the A.G.N. which corresponds with A. W. 72.

2. Naval Courts and Boards

No comment.

3. Proposed Navy Bill

No change.

III. Differences

Under the provisions of A. W. 72, the commander of a guard to whose charge a prisoner has been committed shall report in writing, within twenty-four hours or as soon as he is relieved from duty, to the commanding officer thereof, the name of the prisoner, the offense charged, and the officer committing him. Although there is no corresponding provision in the Navy bill, Art. 13(29), Navy regulations, 1920, provides a similar rule.

IV. Recommendations

No specific recommendations.

Uniform Code of Military Justice

Subject: Releasing Prisoner Without Proper Authority.

See C.S., A.W. 71 -- Receiving and Keeping Prisoner.

Uniform Code of Military Justice

Subject: Delivery of Offenders to Civil Authorities.
A. W. 74.

I. Army Provisions

1. Articles of War

"ART. 74. Delivery of Offenders to Civil Authorities.--When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence."

2. Manual for Courts-Martial

"Par. 11. Courts-Martial--Jurisdiction in General--Exclusive and nonexclusive.--

"Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to military law is, as a rule, subject to the municipal law applicable to persons generally, and if by one act or omission he violates an Article of War and the local criminal law, such act or omission may be made the basis of a prosecution before a court-martial or before the proper civil tribunal, and in some cases before both, the jurisdiction which first attaches in any case being in general

entitled to proceed. If in a case where an application under A. W. 74 for delivery to the civil authorities is anticipated, good reason exists for the primary exercise of military jurisdiction, charges should be promptly preferred....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 74 was not changed by P.L. 759.

4. Digest of Opinions, JAG, Army.

"Dig. J.A.G. 1912, pp. 134-36: When any civil official of the State of * * * attempts to arrest any person subject to military law upon the military reservation at Fort * * *, the person whose arrest is sought must inform the civil official that he is required to make the arrest through the post commander and that the person whose arrest is sought can not otherwise submit. If, after this, the civil official persists, the arrest will be prevented unless the procedure indicated under the 74th Article of War is followed." (The foregoing instruction by a corps area commander was held subject to no objection. (See Dig. J.A.G. 1925, p. 1.)")

Dig. J.A.G. 1912-40, p. 58: Civil rights, immunity from arrest:

"R. S. 1237 provides: No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted. R.S. 1237; 10 U.S.C. 610.

"A writ for the arrest of an enlisted man was issued by State authorities in a civil proceeding for debt under the laws of the state relating to absconding debtors, the enlisted man sought being about to leave the jurisdiction under military order.

"Held, that the writ of arrest, not being in a criminal action but being an auxiliary process in a civil proceeding, and therefrom mesne process, and the debt having been contracted after the soldier's enlistment, the arrest would be illegal in view of R. S. 1237, supra."

Dig. J.A.G. 1912-40, pp. 299 ff. contains a number of opinions interpreting A. W. 74: under what circumstances a man should be delivered up to civil authorities, and when he need not be surrendered. Cf. also the subsequent monthly J.A.G. bulletins.

II. Navy Provisions

1. Naval Courts and Boards

"APPENDIX C.-- Delivery of Men to Civil Authorities--Habeas Corpus Proceedings.

"C-1. Commanding officer must notify department and await instructions before delivering men to civil authorities.--In no case will commanding officers of vessels or shore stations of the Navy or Marine Corps deliver to the civil authorities, State or Federal, any person in their custody or under their control without first communicating with the Secretary of the Navy and awaiting his instructions. The Secretary of the Navy will promptly issue the necessary orders in the case or make request upon the Attorney General, in accordance with title 5, U.S. Code, to furnish such legal assistance to the commanding officer concerned as the interests of the United States involved in such case may demand.

"C-2. Same: Refers to all cases.--The words 'in no case', as used in the above section, are intended to refer to every case in which the civil authorities, Federal or State, request or demand the delivery to them of any officer or enlisted man in the Navy or Marine Corps, whether for the purpose of determining the legality of his detention by the naval authorities; or of trying him for a violation of the Federal or State laws, or of securing the testimony of a naval prisoner as a witness in a civil court. The instructions contained in the above paragraph accordingly apply to and include all cases in which writs of habeas corpus; requisitions of the governor or chief executive of any State, warrants ad testificandum, or other civil process of any kind are served on commanding officers of the Navy or Marine Corps, afloat or ashore, including navy yards where the State has retained jurisdiction for service of process, for the purpose of securing the delivery of any person under their control to such civil authorities.

"C-5. Foregoing applies to navy yards where State has retained jurisdiction.--The foregoing sections apply to cases where the delivery of a person in the Navy or Marine Corps attached to a navy yard or station, or serving on board a vessel at such yard or station, is demanded by the civil authorities of the State in which such navy yard or station is located, although such State has expressly retained jurisdiction to serve civil or criminal process within the limits of the navy yard or station in question.

"C-10. Naval prisoners wanted by civil authorities for trial.--In any case in which the delivery of a person in the Navy or Marine Corps for trial is desired by the civil authorities, Federal or State, and such person is a naval prisoner

(which includes any person serving sentence of court martial or in custody awaiting trial by court martial or disposition of charges against him), he will not, in general, be delivered to the Federal or State authorities until he has served the sentence of the naval court martial, or his case has otherwise been finally disposed of by the naval authorities. However, if the Federal or State authorities desire the surrender of the party under the above circumstances upon a serious charge, such as felonious homicide, and the interests of justice would be better served by his delivery, the Secretary of the Navy may, in his discretion, discharge the man from naval custody and from his contract of enlistment and deliver him to the civil authorities for trial.

"C-12. Men released by civil authorities on bail.--Where a person in the Navy or Marine Corps is arrested by the Federal or State authorities for trial and returns to his ship or station on bail, the commanding officer may grant him leave of absence to appear for trial on the date set upon an official statement by the judge, prosecuting attorney, or clerk of the court, reciting the facts, giving the date on which the appearance of the man is required, and the approximate length of time that should be covered by such leave of absence....."

(See also other sections in Appendix C).

III. Differences

1. Army commanding officers are directed to deliver persons charged with a civil offense to civil authorities on request, except in time of war, or except if the person is awaiting a court martial or is serving a court martial sentence. Navy commanding officers are forbidden to deliver a man to civil authorities under any circumstances until it has been authorized for the individual case by SecNav.
2. If a man who is serving a sentence of a court martial is delivered to the civil authorities by the Army, and such delivery is followed by conviction for a civil offense, the execution of the court-martial sentence is interrupted until the other sentence is served. The man is then returned to military authorities for completion of the court-martial sentence.

Under Navy provisions a person who is awaiting trial by court-martial or the disposition of charges against him, or who is serving sentence of a court-martial, will not in general be turned over to civil authorities until he has served the sentence, or his case is otherwise disposed of by naval

authorities. But, if the civil offense is a serious one, SecNav may order him to be turned over, in which case the man is discharged from naval custody and from his contract of enlistment. (Cf. Appendix C-10).

IV. Recommendations

No specific recommendations.

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Uniform Code of Military Justice

Subject: Misbehavior Before the Enemy
A. W. 75, 76.

I. Army Provisions

1. Articles of War

"ART. 75. Misbehavior Before the Enemy.-- Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

"ART. 76. Subordinates Compelling Commander to Surrender.-- Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 141. SEVENTY-FIFTH ARTICLE OF WAR

"a. MISBEHAVIOR BEFORE THE ENEMY

"Discussion.-- Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.

"'The enemy' imports any hostile body that our forces may be opposing, such as a rebellious mob, a band of renegades, or a tribe of Indians. Whether a person is 'before the enemy' is not a question of definite distance; but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire.

On the other hand, an organization some distance from the front, and which is not a part of a tactical movement then going on or in immediate prospect, is not 'before the enemy' within the meaning of this article.

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy.

"Proof.--(a) That the accused was serving in the presence of an enemy; and (b) acts or omissions of the accused as alleged."

"b. RUNNING AWAY BEFORE THE ENEMY

"Discussion.-- See 141a.

"Proof.--(a) That the accused was serving in the presence of an enemy; and (b) that he misbehaved himself by running away."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 4.The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

'Twelfth (Striking flag or treacherously yielding).-- Or strikes or attempts to strike the flag to any enemy or rebel, without proper authority, or, when engaged in battle, treacherously yields or pusillanimously cries for quarter;

'Thirteenth (Cowardice in battle).-- Or, in time of battle, displays cowardice, negligence, or disaffection, or withdraws from or keeps out of danger to which he should expose himself;

'Fourteenth (Deserting duty in battle).-- Or, in time of battle, deserts his duty or station, or entices others to do so;

'Fifteenth (Neglecting orders to prepare for battle).-- Or does not properly observe the orders of his commanding officer, and use his utmost exertions to carry them into execution, when ordered to prepare or join in, or when actually engaged in battle, or while in sight of an enemy;

'Sixteenth (Neglecting to clear for action).-- Or, being in command of a fleet, squadron, or vessel acting singly, neglects, when an engagement is probable, or when an armed vessel of an enemy or rebel is in sight, to prepare and clear his ship or ships for action;

'Seventeenth (Neglecting to join on signal for battle).-- Or does not, upon signal for battle, use his utmost exertions to join in battle;

'Eighteenth (Failing to encourage men to fight).-- Or fails to encourage, in his own person, his inferior officers and men to fight courageously;

'Nineteenth (Failing to seek encounter).-- Or does not do his utmost to overtake and capture or destroy any vessel which it is his duty to encounter;

'Twentieth (Failing to afford relief in battle).-- Or does not afford all practicable relief and assistance to vessels belonging to the United States or their allies, when engaged in battle.'" "

2. Naval Courts and Boards

There is no discussion of battle offenses in Naval Courts and Boards.

3. Proposed Navy Bill

These sections are renumbered Art. 8, Seventh through Fifteenth.

The word "aircraft" is added whenever the word "ship" appears in the present article.

III. Differences

In general, the naval offenses are more specific than the Army offenses, and although the offenses are not equivalents, they cover the same sort of conduct. The Army offenses of misbehavior before the enemy and endangering the safety of a command by misconduct, disobedience, or neglect probably would include all the naval offenses.

The AGN battle offenses do not cover the Army offenses of (1) quitting a post or colors to plunder or pillage, and (2) occasioning false alarms.

The naval offenses require more diligence than do A.W. 75 and 76, especially in regard to pursuit of the enemy.

IV. Recommendations

McGuire Articles:

"Misconduct before an enemy:

- "(i) Striking or attempting to strike the flag to an enemy without proper authority;
- "(ii) Displaying cowardice, negligence or disaffection in battle;
- "(iii) Treacherously yielding;
- "(iv) Failing properly to observe orders of his commanding officer or to use his utmost exertions to execute them when ordered to prepare for or join in or when engaged in battle, or when engagement is probable;
- "(v) Being a commanding officer, neglecting to prepare his ship, aircraft or command for action when engagement is probable;
- "(vi) Being an officer, failing to encourage, in his own person, his subordinate to fight courageously;
- "(vii) Being a commanding officer, failing to do his utmost to overtake and capture or destroy any enemy ship, aircraft or force;
- "(viii) Being a commanding officer, failing to afford all practicable relief and assistance to any United States ship, aircraft or command or that of an ally or allies, when engaged in battle."

The White Articles retain the present Navy battle offenses.

The Ballantine, Keefe, and Vanderbilt Reports make no comment on these provisions.

A.W. 76

Uniform Code of Military Justice

Subject: Subordinates Compelling Commander to Surrender.

See C.S., A. W. 75 - Misbehavior Before the Enemy.

Uniform Code of Military Justice

Subject: Improper Use of Countersign - Secret or Confidential Information.
A. W. 77.

I. Army Provisions

1. Articles of War

"ART. 77. Improper Use of Countersign.-- Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

2. Manual for Courts-Martial

No discussion of this offense.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

No similar provision.

2. Naval Courts and Boards

No comment.

3. Proposed Navy Bill

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Forty-eighth. Or divulges information of a secret or confidential nature to any person not entitled to receive the same;"

III. Differences

A. W. 77 forbids the disclosure of a countersign or parole to a person not entitled to it, while A.G.N. 9, forty-eighth, forbids the disclosure of any confidential or secret information to any person not entitled to it. Therefore, the Navy provision

is much broader and more comprehensive.

Disclosure of confidential or secret information probably would be tried under A. W. 96.

The AGN has no offense comparable to giving a parole or countersign other than that received (except perhaps negligently endangering life - AGN 9, Forty-ninth).

Violations of AGN 9, forty-eighth, are not punishable by death, while violations of A.W. 77 may be punished by death.

IV. Recommendations

There is no comment on these provisions in the McGuire, White, Vanderbilt, Ballantine, or Koeffe recommendations.

Uniform Code of Military Justice

Subject: Forcing a Safeguard.
A. W. 78.

I. Army Provisions

1. Articles of War

"ART. 78. Forcing a Safeguard.-- Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct."

2. Manual for Courts-Martial

No discussion of this offense.

Sample specification 57, p. 245.

"57. In that _____ did, at _____, on or about _____, 19____, force a safeguard, known by him to have been placed over the premises occupied by _____, at _____, by (overwhelming the guard posted for the protection of the same) (_____)."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

No comparable provision.

III. Differences

There is no similar offense in the A.G.N.

Presumably the Army in time of peace and the Navy would try this offense as assault or some other offense depending on the circumstances involved.

IV. Recommendations

There is no comment on this provision in the White, McGuire, Ballantine, Keefe, Vanderbilt, or Navy JAG Recommendations.

Uniform Code of Military Justice

Subject: Captured Property to be Secured for
Public Service, A. W. 79.

I. Army Provisions

1. Articles of War.

"ART. 79. Captured Property to be Secured for Public Service.-- All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct."

2. Public Law 759--80th Congress, Chapter 625--2D Session.

A. W. 79 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 8..... Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Ninth (.....)-- Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty;....."

"ART. 16. Removing property from a prize.-- No person in the Navy shall take out a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court martial may direct (R. S. Sec. 1624, Art. 16)."

"ART. 22 (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct (R. S., Sec. 1624, Art. 22)."

2. Proposed Navy Bill.

"SEC. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Nineteenth. Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty;

'Thirty-seventh. Or takes out of a prize, or vessel or aircraft seized as a prize, any money, plate, goods, or any part of the equipment thereof, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels, aircraft, or armed forces of the United States or its allies, before the same is condemned as a lawful prize;

'Sixty-third. Or is guilty of any violation which is an offense against the Articles for the Government of the Navy under Art. 5 (d).'"

"SEC. 47....."

'ART. 5 (d) The following shall be offenses against the Articles for the Government of the Navy:

'First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply,'"

3. Statutory Provisions.

"50 USCA 217: Trading in captured or abandoned property. All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this chapter, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than \$5,000, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. (R. S. § 5313.)"

III. Differences

1. It is not expressly stated in Navy provisions that all public property taken from the enemy is the property of the United States, but this idea is implicit in 50 USCA 217 in the clause reading "and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this chapter, and to turn the same over to such agent without delay." Neglecting to secure such property for the service of the U. S., or wrongfully misappropriating it, could, in view of this clause, be made an offense against Art. 8, Ninth, or Art. 22(a) of the present A.G.N., or new Art. 9, Nineteenth, or new Art. 5(d), First, of the proposed Navy bill.
2. Art. 16 of the present A.G.N, and new Art. 9, Thirty-Seventh, proposed Navy bill, deal with the wrongful appropriation of property out of a prize. Articles of War have no specific provision relating to prize property.

IV. Recommendations

None

Uniform Code of Military Justice

Subject: Dealing in Captured or Abandoned Property,
A. W. 80.

I. Army Provisions

1. Articles of War.

"ART. 80. Dealing in Captured or Abandoned Property.-- Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties."

2. Public Law 759--80th Congress, Chapter 625--2D Session.

A. W. 80 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 22. (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct (R. S., Sec. 1624, Art. 22)."

2. Proposed Navy Bill.

"SEC. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Sixty-third. Or is guilty of any violation which is an offense against the Articles for the Government of the Navy under Art. 5 (d).'"

"SEC. 47....."

'ART. 5 (d) The following shall be offenses against the Articles for the Government of the Navy:

'First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.'"

3. Statutory Provisions.

"50 USCA 217: Trading in captured or abandoned property. All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this chapter, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than \$5,000, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. (R. S. § 5313.)"

III. Differences

1. None. Trading in captured or abandoned property is not covered expressly in A. G. N., but is made an offense indirectly under Art. 22(a) of the present A.G.N., and Art. 5(d), First, of the proposed Navy bill.
2. Navy articles dealing with the wrongful appropriation of property out of a prize are also related to A. W. 80. See C.S., A. W. 79, Captured Property to be Secured for Public Service.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Relieving, Corresponding With, or Aiding the Enemy.
A. W. 81.

I. Army Provisions

1. Articles of War

"ART. 81. Relieving, Corresponding With, or Aiding the Enemy.-- Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

2. Manual for Courts-Martial

"Par. 142. EIGHTY-SECOND ARTICLE OF WAR.

"Discussion.....

"A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy, may be charged under A. W. 81 with communicating or giving intelligence to the enemy, but he may not be charged under this article with being a spy.
....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 81 and A. W. 96 were not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4.....The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--.....

"Fourth (Intercourse with an enemy).--Or gives any intelligence to; or holds or entertains any intercourse with, an enemy or rebel; without leave from the President, the Secretary of the Navy, the commander in chief of the fleet, the commander of the squadron, or, in case of a vessel acting singly, from his commanding officer;

"Fifth (Messages from an enemy).-- Or receives any message or letter from an enemy or rebel, or, being aware of the unlawful

reception of such message or letter, fails to take the earliest opportunity to inform his superior or commanding officer thereof;

2. Proposed Navy Bill

"Sec. 3. Article 4 is renumbered as Art. 8 and amended as follows:

'ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....

'Second. Or gives any intelligence to, or holds or entertains any intercourse with, an enemy or rebel, without leave from the President; the Secretary of the Navy, the commander in chief of the fleet, the commander of the squadron, or, in case of a vessel or aircraft acting singly, from his commanding officer;

"Sec. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Thirty-third. Or unlawfully receives any message or letter from any enemy or rebel, or, being aware of the unlawful reception of such message or letter, fails to take the earliest opportunity to inform his superior or commanding officer thereof;

'Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles;.....'

"Sec. 47. Art. 5. (a) The following persons shall be subject to the Articles for the Government of the Navy:.....

'In time of war or national emergency, in addition to the foregoing, the following persons shall be subject to the Articles for the Government of the Navy:.....

'Ninth. All persons alleged to be spies or saboteurs, or to have brought or delivered, or to have attempted to bring or deliver, any seducing letter or message from an enemy or rebel, or to have endeavored to corrupt any person subject to these Articles to betray his trust.

'Tenth. All persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy:.....'"

III. Differences

1. A. W. 81 lists six offenses specifically. New Art. 8, Second, proposed Navy bill, lists one corresponding specific offense (giving intelligence); the other Army offenses would have to be brought within the general clause in the Navy article "holds or entertains any intercourse with an enemy." There is doubt whether the Army offense of attempting to relieve the enemy with supplies, etc., can be brought within this clause. It might be charged instead as an attempt to commit an offense under new Art. 9, Sixty-second, proposed Navy bill, in which case the maximum sentence would be less than death. Under A. W. 81, a death sentence could be given for an attempt to relieve the enemy.
2. The offenses under A. W. 81 can be committed by direct or indirect actions. The Navy article does not specify whether actions must be direct or may be indirect.
3. A. W. 81 provides the offenses of harboring, or protecting, or holding correspondence with, or giving intelligence to the enemy must be committed knowingly. The Navy article is not specific on this point.
4. New Art. 9, Thirty-third, proposed Navy bill makes it an offense to receive unlawfully any message or letter from the enemy. This offense could possibly be brought within the clause "or holds correspondence with,.....the enemy" in A. W. 81 and charged under that article. If it were, a death sentence could be given, whereas under the Navy article a death sentence is not permissible for the offense. Such an offense might, however, be charged under A. W. 96 instead, in which case a death sentence could not be imposed.
5. New Art. 9, Thirty-third, also makes it an offense for one to fail to inform his superior or commanding officer at once if he knows of the unlawful reception of a message or letter from an enemy. Such an offense is not covered in A. W. 81, but could be charged under A. W. 96.

6. A. W. 81 makes it an offense to deal etc. with an enemy. The two Navy articles specify "enemy or rebel." These terms are not defined in either Manual.
7. A. W. 81 applies to "whosoever relieves etc." Under it, a person living in occupied territory who, without dissimulation, merely reports what he sees, or hears through agents, to the enemy, may be charged with communicating or giving intelligence to the enemy. (MCM, Par. 142). Such an offense would not be chargeable at all under Art. 4, Fourth, of the present A.G.N., since that article applies only to persons in the naval service. Article 8, Second, of the proposed Navy bill, applies to all persons subject to the A.G.N. Persons subject to the A.G.N., as defined in Art. 5(a), Tenth, proposed Navy bill, include "all persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy:....." The offense above could be charged under Art. 8, Second, only as to these persons.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Spies. A. W. 82.

I. Army Provisions

1. Articles of War

"ART. 82. Spies.— Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

2. Manual for Courts-Martial

"Par. 142. EIGHTY-SECOND ARTICLE OF WAR.

"BEING A SPY

"Discussion.— The words 'any person' bring within the jurisdiction of courts-martial and military commissions all persons of whatever nationality or status who may be accused of the offense denounced by the article.

"The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus, soldiers not wearing disguise, dispatch riders, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

"It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise in order to reach his own lines.

"It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

"'A spy, who, after rejoining the army to which he belongs, is subsequently captured by the enemy * * * incurs no responsibility for his previous acts of espionage.' (Rules of Land Warfare.)

"A person living in occupied territory who, with dissimulation, merely reports what he sees or what he hears through agents to the enemy, may be charged under A. W. 91 with communicating or giving intelligence to the enemy, but he may not be charged under this article with being a spy."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 82 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 5. Spies.-- All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court martial may adjudge."

2. Naval Courts and Boards

"SEC. 333. Conditions necessary to show jurisdiction: Jurisdiction as to persons.--....."

"In addition to the foregoing classes of persons, those named in the 5th (Spies),.....Article(s) for the Government of the Navy are subject to the provisions of the A.G.N. and amenable to trial by court martial....."

3. Proposed Navy Bill

"SEC. 3. Article 4 is renumbered as Art. 8 and amended as follows:

'ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--
....."

'Sixteenth. Or, in time of war, or of rebellion against the supreme authority of the United States, comes or is found in the capacity of a spy or saboteur, or who brings or delivers any seducing letter or message from an enemy or rebel, or endeavors to corrupt any person subject to these Articles to betray his trust;.....'"

"SEC. 47. Art. 5. (a) The following persons shall be subject to the Articles for the Government of the Navy:.....

'Ninth. Or persons alleged to be spies or saboteurs, or to have brought or delivered, or to have attempted to bring or deliver, any seducing letter or message from any enemy or rebel, or to have endeavored to corrupt any person subject to these Articles to betray his trust,'"

III. Differences

1. A. W. 82 applies only to spies, while A.G.N., Art. 8, paragraph Sixteenth, also applies to saboteurs and persons who carry seducing messages for the enemy or try to corrupt any person subject to the A.G.N. However, these additional offenses might be tried as relieving or corresponding with the enemy. See C.S., A. W. 81.
2. A. W. 82 applies only "in time of war" while the corresponding Navy article applies "in time of war or rebellion."
3. The Army provision requires the accused to be found in or about a fortification, post, quarters, or an encampment, while the Navy provision has no such requirement.
4. The Army carries a mandatory punishment of death, while the Navy provision provides for death or other punishment as a court-martial may adjudge.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Injuries to or Wrongful Disposal of Property.
A.W. 83,84, 89

I. Army Provisions

1. Articles of War

"ART. 83. Military Property--Willful or Negligent Loss, Damage or Wrongful Disposition.--Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States, shall make good the loss or damage and suffer such punishment as a court-martial may direct."

"ART. 84. Waste or Unlawful Disposition of Military Property Issued to Soldiers.--Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct."

"ART. 89. Good Order to be Maintained and Wrongs Redressed.--All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct."

As to Redress of Wrongs, see C.S., A.W. 105.

2. Manual for Courts-Martial

"Par. 143. EIGHTY-THIRD ARTICLE OF WAR

"Suffering Military Property to be Lost, etc.

"Discussion.--The loss, etc., may be said to be willfully suffered by one, who knowing the loss, etc., to be imminent or actually going on, takes no steps to prevent it, as where a sentinel seeing a small and readily extinguishable fire in a stack of hay on his post allows it to burn up. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc..

"The willful or neglectful sufference specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the

weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop.)

"Proof.--(a) That certain military property belonging to the United States was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged; (b) that such loss, etc., was suffered by the accused through a certain omission of duty on his part; (c) that such omission was willful, or negligent, as alleged; and (d) the value of the property, as alleged.

"Although there may be no direct evidence that the property was military property belonging to the United States, still circumstantial evidence such as evidence that the property shown to have been lost, spoiled, damaged, or wrongfully disposed of by the accused was of a type and kind issued for use in, or furnished and intended for the military service, might warrant the court in inferring that it was such military property."

"Par. 144. EIGHTY-FOURTH ARTICLE OF WAR

"a. Selling or Wrongfully Disposing of Military Property

"Discussion.--The article applies to any property issued for use in the military service, and the fact that the property sold, disposed of, lost, or injured was issued to someone other than the accused is immaterial. 'Clothing' includes all articles of clothing whether issued under a clothing allowance or otherwise.

"Proof.--(a) That the accused soldier sold or otherwise disposed of certain property in the manner alleged; (b) that such disposition was wrongful; (c) that the property was issued for use in the military service; and (d) the value of the property as alleged.

"Although there may be no direct evidence that the property was issued for use in the military service, still circumstantial evidence such as evidence that the property shown to have been sold or otherwise disposed of by the accused soldier was of a type and kind issued for use in the military service might warrant the court in inferring that it was so issued.

"b. Willfully or Through Neglect Injuring or Losing Military Property

"Discussion.--See 144a. A willful injury or loss is one that is intentionally occasioned. A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances.

"Proof.--(a) That certain property was injured in a certain way or lost, as alleged; (b) that such property was issued for use in the military service; (c) that such injury or loss was willfully caused by

the accused in a certain manner, as alleged; or that such injury or loss was the result of neglect on the part of the accused; and (d) the value of the property, as alleged.

"Where it is shown by either direct or circumstantial evidence that the property was issued to the accused, it may be presumed that the injury or loss shown unless satisfactorily explained was due to the neglect of the accused."

"Par. 147. EIGHTY-NINTH ARTICLE OF WAR

"a. Committing Any Waste or Spoil

"Discussion.--The terms 'waste' or 'spoil' as used in this article refer to such acts of voluntary destruction of a permanent damage to real property as burning down buildings, tearing down fences, cutting down shade or fruit trees, and the like.

"Proof.--(a) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed waste or spoil on certain property in the manner alleged; and (b) that such acts were not ordered by his commanding officer.

"b. Willfully Destroying Property

"Discussion.--To be destroyed it is not necessary that the property be completely demolished or annihilated. It is sufficient if it is so far injured as to be useless for the purpose for which it was intended.

"Proof.--(a) That the accused being with a certain command in quarters, camp, garrison, or on the march, destroyed certain property, as alleged; and (b) that such destruction was willful and was not ordered by his commanding officer.

"c. Committing Depredation or Riot

"Discussion.--The term 'any kind of depredation' includes plundering, pillaging, robbing, and any willful damage to property not included in the preceding specific terms of the article.

"A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful.

"Proof.--That the accused being with a certain command in quarters, camp, garrison, or on the march, committed certain acts of depredation on certain property, or certain acts of rioting, as alleged."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

Art. 83. No change.
Art. 84. No Change.

"ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.--

"All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or wrongfully destroys any property whatsoever or commits any kind of depredation or riot, shall be punished as a court-martial may direct."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 8.....Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--

'Tenth (Preventing destruction of public property).--Or does not use his best exertions to prevent the unlawful destruction of public property by others;

'Sixteenth (Plundering on shore).--Or, when on shore, plunders, abuses, or maltreats any inhabitant, or injures his property in any way;!'"

"ART. 4.....The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

'Eleventh (Unlawful destruction of public property).--Or unlawfully sets on fire, or otherwise unlawfully destroys, any public property not at the time in possession of any enemy, pirate, or rebel;....!'"

2. Naval Courts and Boards

"Sec. 52. Destruction of public property.--This is provided for in the 4th A.G.N., paragraph 11.

"Charge:

"Unlawfully setting on fire)
"Unlawfully destroying) public property

"Elements: The intent to set on fire or destroy must be proved. The word 'unlawfully' is necessary in the specification because it appears in the statute."

"Sec. 68. Preventing destruction of public property.--This is provided for in the 8th A.G.N., paragraph 10.

"Charge: Not using his best exertions to prevent the unlawful destruction of public property.

"Elements: 'Best' in this charge means most likely to succeed in the prevention. It must be shown that the accused knew that the destruction was unlawful and that he failed to take any steps to prevent it, or that he knowingly took steps which he knew or should have known were not the most likely to succeed in preventing the destruction"

"Sec. 71. Waste or public property.--This is provided for in the 8th A.G.N., paragraph 15.

"Charges:

"1. Wasting (ammunition
(provisions
(public property

"2. Having the power to) ammunition)
prevent waste of) provisions) knowingly
public property) permitting it.

"Elements: Waste may consist in not taking proper care of the ammunition, etc., and thus allowing it to be lost or damaged; in recklessly expending in firings; giving it away, etc."

"Sec. 72. Plundering, etc., on shore.--This is provided for in the 8th A.G.N., paragraph 16.

"Charges:

"1. When on shore (plundering)
(abusing) an inhabitant.
(maltreating)

"2. When on shore injuring the property of an inhabitant.

"A person or corporation resident or incorporated within the state or country where the act is committed is an inhabitant. If the person or corporation is not an inhabitant the offense must be laid under one of the specific charges, or, if no appropriate one can be found, under scandalous conduct. In any case, the specific charge, if there be one, is to be preferred."

"Sec. 111. Wilful destruction of property.--This is provided for under the 22nd A.G.N. If the property is of the United States, the offense is charged as shown in section 52. If the property is not of the United States but the conditions of the 8th A.G.N., paragraph 16, are satisfied, the offense should be laid thereunder, as shown in section 72.

"Charge.

"Wilfully destroying property.

"Elements:

"This offense consists of any wilful physical injury to property of another from ill will or resentment toward the owner or from wantonness.

"Lesser included offense:

"Conduct to the prejudice of good order and discipline."

"Sec. 92. Affray or disorder, riot, rout, and unlawful assembly.--
This is provided for under the 22nd A.G.N.

"Elements: An affray is the fighting of two or more persons, by mutual consent or otherwise, in a public place, to the terror of the people. A disorder is any conduct of such a character that it disturbs and annoys the peace and quiet of the community. Instances are, loud crying out or singing or other noisy conduct, swearing, or cursing, indecent exposure of the person, etc.

"An unlawful assembly is an assembly of three or more persons with intent to commit a crime by open force, or with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons reasonable grounds to apprehend a breach of the peace.

"A riot is an unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public; or a lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the public, although they had not that purpose when they assembled.

"A rout is an unlawful assembly which had made a motion towards the execution of the common purpose of the persons assembled."

3. Proposed Navy Bill

"ART. 9. Such punishment, other than death, as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Twentieth. Or unlawfully sets on fire, or otherwise unlawfully destroys, any public property not at the time in possession of an enemy, pirate, or rebel, or does not use his best exertions to prevent the unlawful destruction of such public property by others;

'Twenty-fifth. Or wastes any ammunition, provisions, or other public property, or having power to prevent it, knowingly permits such waste;

'Twenty-sixth. Or, when on shore, plunders, abuses, or maltreats any inhabitant;

'Forty-first. Or embezzles, or willfully or maliciously injures or destroys, private property not his own."

III. Differences

1. The proposed A.G.N. differentiates between public and private property, while the Articles of War distinguish military property from other property.

Wrongful sale, disposal, stealing, or misappropriation of military property of the U.S. is also covered by A.W. 94 and A.G.N. 9, Eighth, so that there is an overlap in the Articles of War. See C.S., A.W. 94.

2. The proposed A.G.N. do not specifically cover injuries to public property other than destruction or setting it afire, while A.W. 89 covers injury to any property.

3. The proposed A.G.N. provides for the prevention of the destruction of public property, while the Articles of war provide for the prevention of injury to military property.

4. A.W. 83 provides for reparation for the loss or damage of military property suffered to be lost or damaged, while the A.G.N. do not.

5. Proposed A.G.N. Article 9, paragraph Twenty-sixth, covers only "inhabitants" while A.W. 89 covers depredations against any person.

6. A.W. 89 specifically provides for riots and disorders, while the A.G.N. punishes these offenses under the general articles.

IV. Recommendations

There is no comment on these provisions in the McGuire, White, Ballantine, Keefe, Vanderbilt, or Navy JAG recommendations.

Uniform Code of Military Justice

Subject: Waste or Unlawful Disposition of Military
Property Issued to Soldiers.

See C.S., A. W. 83 -- Injuries to or Wrongful Disposal of Property.

Uniform Code of Military Justice

Subject: Drunkenness - A.W. 85.

I. Army Provisions

1. Articles of War

"ART. 85. Drunk on Duty.-- Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 145. EIGHTY-FIFTH ARTICLE OF WAR

"BEING FOUND DRUNK ON DUTY

"Discussion.-- Under this article it is necessary that accused be found to be drunk while actually on duty, but the fact that he became drunk before going on duty while material in extenuation is immaterial on the question of guilt. A person is not found drunk on duty in the sense of this article, 'if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all.' (Winthrop) But the article does apply although the duty may be of a merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.

"The term 'duty' as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. (Winthrop.)

"The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers, or of enlisted men, the term 'on duty' relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as 'off duty.' (See Davis.)

"In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

"So, also, an officer of the day and members of the guard are on duty during their entire tour within the meaning of this article, but a sentinel found drunk on post should ordinarily be charged under A.W. 86.

"The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article.

"Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article.

"Proof.--(a) That the accused was on a certain duty, as alleged, and (b) that he was found drunk while on such duty.

"On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"ART. 85. DRUNK ON DUTY.--

"Any person subject to military law, who is found drunk on duty, shall be punished as a court-martial may direct."

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 8. Persons to whom applicable.-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--

'First (Scandalous conduct):--Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals;!'

2. Naval Courts and Boards

"Sec. 55. Drunkenness.-- This is provided for in the 8th A.G.N., paragraph 1.

"Charge: Drunkenness.

"Elements: Any intoxication from alcoholic liquor which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties to a degree that will incapacitate for the proper performance of any duty which a person of the rank or rate of the accused could properly be called upon to perform, constitutes drunkenness.

"If the drunkenness occur on duty this must be alleged as an aggravation, as a greater limit of punishment is provided in such a case."

3. Proposed Navy Bill

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Fifty-third. Or, while under the influence of alcoholic liquors or narcotic drugs, operates any vehicle;

'Fifty-fifth. Or is incapacitated for the proper performance of duty by the use of, or previous indulgence in, alcoholic liquors or narcotic drugs,.....!'

III. Differences

A. W. 85 makes drunkenness on duty an offense, while A.G.N. 9, fifty-fifth, makes being incapacitated for duty due to the use of intoxicants an offense. The Army offense applies only when a person is on duty, while the Navy offense comprehends being intoxicated at any time. However, the Navy treats drunkenness on duty as an aggravation of the offense.

A.G.N. 9, fifty-third, provides for operating a vehicle while under the influence of alcohol or drugs, while the Articles of War contain no such specific offense.

Other drunkenness offense in the Army are treated under A.W. 96.

An Army sentinel found drunk on post is punished under A. W. 86.

IV. Recommendations

White Study, No. 2, would make "drunkenness" an offense.

Vanderbilt Report:

"4. Article of War 85 should be amended so that it will read as follows:

"Art. 85. Drunk on Duty. Any person subject to military law who is found drunk on duty shall be punished as a court-martial may direct."

"The purpose of this amendment is to eliminate a motive for the unwarranted acquittal of an officer charged with drunkenness on duty. As the article is now written an officer convicted of drunkenness in time of war, must be sentenced to dismissal."

House Representatives Report No. 1034, 80th Congress, 1st Session. (Committee on Armed Services):

"A lesser punishment than dismissal from service for officers drunk during time of war has been provided."

Uniform Code of Military Justice

Subject: Misbehavior of Sentinel, A. W. 86.

I. Army Provisions

1. Articles of War

"ART. 86. Misbehavior of Sentinel.-- Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct."

2. Manual for Courts-Martial

"Par. 146. EIGHTY-SIXTH ARTICLE OF WAR

"a. BEING FOUND DRUNK ON POST

"The term 'sentinel' does not include a watchman or an officer or a noncommissioned officer of the guard unless posted as such.

"A sentinel is on post within the meaning of this article not only when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but also, for example, when he may be stationed in observation against the approach of the enemy, or on post to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

"A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article.

"The fact that the sentinel was not posted in the regular way is not a defense.

"Proof.--(a) That the accused was posted as a sentinel, as alleged; and (b) that he was found drunk while on such post.

"b. BEING FOUND SLEEPING ON POST

"Discussion.--See 146a. The fact that the accused had been

previously overtaxed by excessive guard duty is not a defense, although evidence to that effect may be received in extenuation of the offense.

"Proof.--(a) That the accused was posted as a sentinel, as alleged; and (b) that he was found sleeping while on such post.

"c. LEAVING POST BEFORE BEING RELIEVED

"Discussion.--Sec 146a. The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was proscribed as his post.

"Proof.--(a) That the accused was posted as a sentinel, as alleged; and (b) that he left such post without being regularly relieved."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 4, Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--.....

'Eighth (Sleeping on watch).-- Or sleeps upon his watch;

'Ninth (Leaving station).-- Or leaves his station before being regularly relieved;'"

2. Naval Courts and Boards

No discussion of elements of above offenses.

3. Proposed Navy Bill

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....

'Fifth. Or sleeps upon his watch;

'Ninth. Or, in time of battle, deserts his duty or station, or entices others to do so;'"

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Twenty-ninth. Or is absent without authority from his place of duty;"

III. Differences

The A.G.N. does not specifically provide for drunkenness of a sentinel; therefore drunkenness on watch during time of war would not be punishable by death, unless it is included in betrayal of trust. AGN, Art. 8, par. 4. See C.S., A.W. 85.

The Army offense of sleeping on post is punishable by death only in time of war, while the Navy offense is punishable by death at any time.

The Army offense of leaving one's post without being relieved is similar to the Navy offense of deserting his station in time of battle, except that the Army offense applies in time of war, while the Navy offense applies only in time of battle.

The same act at other times would be punishable as A.W.O.L. by the Navy.

IV. Recommendations

The McGuire Articles and the White Study, No. 2, would make "sleeping on watch in time of War" a capital offense.

Uniform Code of Military Justice

Subject: Interest in Sale of Provisions, A.W. 87.

I. Army Provisions

1. Articles of War,

"ART. 87. Personal Interest in Sale of Provisions.-- Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct."

2. Manual for Courts-Martial.

MCM does not discuss A. W. 87.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

"Article 11. Dealing in supplies.--

"No person in the naval service shall procure stores or other articles or supplies for, and dispose thereof to, the officers or enlisted men on vessels of the Navy, or at navy yards or naval stations, for his own account or benefit."

2. Naval Courts and Boards.

No discussion of Art. 11.

3. Proposed Navy Bill.

Article 11 is renumbered as Article 12.

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Sixtieth. Or fails to comply with or violates any provision of articles 1, 3, 12 and 13 of these Articles;..
.....'"

III. Differences

A. W. 87 applies to commanding officers, while A.G.N. 12 applies to any person in the Navy.

A. W. 87 applies to victuals or other necessities of life, while A.G.N. 12 applies to all articles.

A. W. 87 applies to laying any duty upon or being interested in the sale of such articles, while A.G.N. forbids the procuring and disposing of such articles for one's own account or benefit.

IV. Recommendations

The McGuire and White proposed A.G.N. do not mention this offense.

The Vanderbilt Report recommends repeal of A. W. 87 as obsolete.

Uniform Code of Military Justice

Subject: Unlawfully Influencing Actions of Court.
A. W. 88.

I. Army Provisions

1. Articles of War

Present A.W. 88, relating to intimidation of persons bringing provisions, has been repealed.

2. Manual for Courts-Martial

"Par. 87. COURTS-MARTIAL--ACTION--Reviewing Authority.--

"b. Powers and duties--general--.....Neither an acquittal or a finding of 'not guilty' requires approval or confirmation; and neither should be disapproved.....The reviewing authority may, however, properly advise the members of the court by letter of his nonconcurrence in an acquittal or in a finding of not guilty, and the reasons for such non-concurrence....."

3. Public Law 759--80th Congress, Chapter 625, 2d Session

"Sec. 233. Article 88 is amended to read as follows:

"ART. 88. UNLAWFULLY INFLUENCING ACTION OF COURT.-- No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts."

II. Navy Provisions

1. Articles for the Government of the Navy

There is no article in the present A.G.N. making it a specific offense to coerce or influence the member of a court-martial. The offense is probably punishable under Art. 22(a), the general article covering offenses not specified.

2. Naval Courts and Boards

"Sec. 472 $\frac{1}{2}$. Action of reviewing authority on acquittal.--

"No action shall be taken by a reviewing authority which purports to approve or disapprove an acquittal or finding of not guilty or not proved.....If a reviewing authority does not concur in the finding of the court, he may so state in his action upon the record, giving such reasons as he may deem appropriate for the information of the members of the court and other reviewing authority....."

"Sec. 473. Power of reviewing authority: Returning record.--
....."

"It is not in the power of the convening authority to compel a court to reverse its decision upon a motion or plea, when the court's ruling has terminated the trial, or to change its findings or sentence, when, upon being reconvened by him, it has declined to modify them, nor either directly or indirectly to enlarge the measure of punishment imposed by a court martial, nor to coerce a court to adopt his view upon any question arising in the course of its proceedings. When the proceedings, findings, or sentence of a court are illegal, the convening authority should set them aside.

"The convening authority in his remarks returning a record for revision should not, in effect, threaten disciplinary action against the members of the court."

3. Proposed Navy Bill

"Sec. 39. Article 53 is renumbered as Article 39 and amended to read as follows:

"ART. 39."

"(j) The Secretary of the Navy is authorized and directed to issue such regulations as may be necessary to assure that the members of every court martial shall be free to perform their sworn duties without any coercion or influence, directly or indirectly, on the part of any person in the naval service."

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Forty-fifth. Or corruptly; or by threat or force, or by any threatening communication, endeavors to influence, intimidate, or impede any witness in any disciplinary proceeding in the naval service, or injures any witness in his person or property on account of the witness attending or having attended such disciplinary proceeding, or on account of the witness testifying or having testified to any matter therein;

"Sixty-third. Or is guilty of any violation which is an offense against the Articles for the Government of the Navy under Article 5 (d)."

"Sec. 47....."

"ART. 5(d) The following shall be offenses against the Articles for the Government of the Navy:

"Fourth. Violations of the laws, orders, regulations, or customs of the naval service....."

III. Differences

1. Army provisions write into the Articles of War a specific prohibition against the censuring of a court martial by the convening authority, or its coercion by any person. A violation of these prohibitions will be punishable under A. W. 96. The Navy will prohibit the same kind of conduct by means of regulations promulgated by SecNav, the violation of which will be punishable under new Art. 9, Sixty-third.
2. The proposed Navy bill makes a specific offense of influencing, intimidating, or impeding a witness in any disciplinary proceeding (Sec. 11, new Art. 9, 45th). Articles of War do not have a similar specific offense.

IV. Recommendations

1. Vanderbilt Report (Page 6 ff). RECOMMENDATIONS:

a) "The Manual for Courts-Martial, United States Army, should provide that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial, general, special, or summary, in reaching its verdict or pronouncing sentence, except persons connected with the work of the court, such as members of the court, attorneys, and witnesses; and this prohibition should be made expressly applicable to the appointing or reviewing

authority. It should be stated that any violation will be considered conduct of a nature to prejudice military discipline and to bring discredit upon the military service in violation of Article of War 96.

b) "The Manual should also contain an express prohibition against the reprimand of the court or its members in any form. The reprimand sometimes given a jury by a judge in a civil court for an erroneous verdict furnishes no parallel or excuse for the present Army practice. The jury upon its discharge returns to the body of the people, but the members of a court-martial remain in the service subject to the will of superior officers as to promotions, assignments to duty, and transfers. The statement on page 74 of the Manual that the reviewing authority may properly advise members of a court by letter of his non-concurrence in an acquittal should be expunged. It is a relic of the power formerly possessed by the reviewing authority to return a record of trial to the court for reconsideration of findings of not guilty. This power was taken away in the amendment of the Articles of War and regulations after the First World War and the spirit of the repeal should be respected..
.....

c) "The Manual should contain a statement that it is the duty of courts-martial to exercise their own judgment in imposing sentences and that they should not pronounce sentences which they know to be excessive, relying on the reviewing authority to reduce them"

2. Ballantine Report '43 (Page 23): Comment on the desirability of providing greater independence to the judicial function:

"There is a substantial risk that members of courts, judge advocates and defense counsel may not be altogether free from pressure and restraint by superior authority exercised not in violation but as a part of the system. Convening authorities, for example, not only convene the courts from among those under their command but also order men to trial, and, since it is not their practice to order a man to trial unless reasonably convinced of his guilt, acquittal may be considered tantamount to an expression of disagreement with a superior officer. The opinions of convening authorities respecting adequacy of sentences, not infrequently known to the courts convened by them, may result in the imposition of unduly severe sentences....."

3. Keefe Report (Page 194 ff):

"(iv) The convening authority's power of review carries with it a large measure of indirect control over the court and its actions. If the convening authority does not agree with

the findings of the court, or believes that the sentence is inadequate, even though he may be powerless to change the result in the particular case, he can express his opinion in his action or in a letter to the court. This cannot but have its effect on subsequent cases. The mere knowledge that it can take place is apt to influence a court, without any expression of disapproval or non-concurrence ever being made by the convening authority."

"Nor will palliatives solve the problem. The proposal has sometimes been made that the reviewing authority be prohibited from criticizing a court for its action in a particular case. Obviously this deals with only a surface manifestation, and fails to get at the heart of the difficulty."

The Keeffe Board recommends that the convening authority should not have any power to review the findings and sentence of the court at all; his control of the case should cease upon references of the charges to trial. The Board feels that any minor reforms short of this will not really solve the problem of command domination of the court.

4. McGuire Report, Page 5:

"This has been found to be the most serious criticism against the administration of naval justice, because the thought has been expressed with considerable acerbity, that the verdict or finding in a large number of cases strangely comports to what is felt is the desire of the convening authority. There is more than a modicum of truth here. A fair system of justice can only be had where the judges and other officers of the court are outside the reach and influence of either party.

"It has been sought to obviate this vicious defect, in the new Articles, by making the function of the Judge Advocate conform to what the term itself connotes. He would act in fact as a Judge - thus making certain the protection of those fundamental concepts of justice referred to and with the added certitude that as a consequence they will be given something more than a nod.

"But more than that - and most important, he would under the proposal referred to supra be, from the standpoint of function, under the sole and exclusive jurisdiction of the Judge Advocate General - thus making him as independent as is conceivably possible, and outside the control and the influence of the convening authority....."

Uniform Code of Military Justice

Subject: Good Order to be Maintained and Wrongs
Redressed.

See C.S., A. W. 83 -- Injuries to or Wrongful Disposal of
Property.

Uniform Code of Military Justice

Subject: Provoking Speeches or Gestures, A. W. 90.

I. Army Provisions

1. Articles of War.

"ART. 90. Provoking Speeches or Gestures.-- No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct."

2. Public Law 759--80th Congress, Chapter 625--2D Session.

A. W. 90 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 8..... Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Third (Quarreling).-- Or quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy;

"Fourth (Fomenting quarrels).-- Or endeavors to foment quarrels between other persons in the Navy;....."

2. Naval Courts and Boards.

"SEC. 61. Quarreling.--....."

"A quarrel not resulting in an assault would very rarely be a court-martial offense."

"SEC. 62. Reproachful words.--....."

"Elements: The words of the charge must be taken in their usual acceptation. To constitute the offense it is essential that the person toward whom the words, gestures, or menaces were directed was actually present at the time. ..."

3. Proposed Navy Bill.

"SEC. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

"Fourteenth. Or endeavors to foment quarrels between other persons in the naval service;....."

III. Differences

1. None. The Navy article contains offenses other than that specified in A. W. 90, but these are covered in other Articles of War. See C.S., A. W. 93, Various Crimes, and C.S., A. W. 96, General Article. See also C.S., A. W. 68, Quarrels; Frays; Disorders.

IV. Recommendations

None

Uniform Code of Military Justice

Subject: Dueling, A. W. 91.

I. Army Provisions

1. Articles of War.

"ART. 91. Dueling.-- Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct."

2. Public Law 759--80th Congress, Chapter 625--2D Session.

A. W. 91 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 8..... Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Fifth (Duels).-- Or sends or accepts a challenge to fight a duel or acts as a second in a duel;

"Seventeenth (Refusing to apprehend offenders).-- Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;....."

2. Proposed Navy Bill.

"SEC. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

'Fifteenth. Or sends or accepts a challenge to fight a duel or acts as a second in a duel;

'Twenty-seventh. Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

'Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a

nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

'Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles;.....'"

III. Differences

1. A. W. 91 is broader than the article in the proposed Navy bill dealing specifically with dueling (Art. 9, Fifteenth). Offenses listed in A. W. 91 which are not covered by Art. 9, Fifteenth, proposed Navy bill, could be charged under Art. 9, Twenty-seventh, Sixty-first, or Sixty-second.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Murder--Rape, A. W. 92.

I. Army Provisions

1. Articles of War.

"ART. 92. Murder--Rape.-- Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

2. Manual for Courts-Martial.

"PAR. 148. NINETY-SECOND ARTICLE OF WAR.

"a. Murder.

"Discussion.-- 'In time of peace' contemplates a complete peace, officially proclaimed. (Kahn v Anderson, 255 U. S. 1.)

"Murder is the unlawful killing of a human being with malice aforethought..... The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere.

"Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault, and an attempt to commit murder."

(For further discussion of the elements of the crime, see Par. 148a.)

"b. Rape.

"Discussion.-- Rape is the unlawful carnal knowledge of a woman by force and without her consent.....

"So-called statutory rape--that is, carnal knowledge with her consent of a female under the age of consent--is not an offense under this article, but may be an offense under A. W. 96.

"Among the lesser offenses which may be included in that of rape, are assault with intent to commit

rape, assault and battery, assault, and an attempt to commit rape."

3. Public Law 759--80th Congress, Chapter 625--2D Session.

"SEC. 235. Article 92 is amended to read as follows:

'ART. 92. Murder--Rape.-- Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct; Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.'"

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 6. Murder.-- If any person subject to the Articles for the Government of the Navy commits the crime of murder without the territorial jurisdiction of any particular State, or the District of Columbia, he may be tried by court martial and punished with death. (R. S., sec. 1624, Art. 6; Dec. 4, 1945, c. 554, 55 Stat. 595.)"

"ART. 22. (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct (R. S., sec. 1624, Art. 22)."

2. Naval Courts and Boards.

"SEC. 53. Murder.--.....

"Footnote (2) Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.....

"It will be noted that in civil courts of the United States death is mandatory for murder in the first degree unless the jury otherwise provides, in which event life imprisonment is mandatory, and that imprisonment for not less than 10 years is mandatory for murder in the second

degree, but that death is not an authorized punishment for that crime. These provisions of the Code are not controlling in cases tried by naval courts-martial there being no degree of murder recognized in cases of which such courts-martial have jurisdiction (Art. 6, A.G.N.). However, Art. 51, A.G.N., makes it the duty of naval courts-martial to adjudge a punishment 'adequate to the nature of the offense', while Art. 7, A.G.N., empowers a court-martial to adjudge imprisonment at hard labor in any case where it is authorized to adjudge the punishment of death, and in applying the provisions of these articles it is deemed proper that consideration be given to the above-quoted sections of the Criminal Code. Accordingly, murder committed under such circumstances as to fall within the statutory definition of murder in the second degree should not be punished by death."

(Note: Under the revision of Title 18, U. S. Code, the punishment for murder in the second degree is changed to imprisonment for any term of years or for life. Cf. Title 18, U.S.C., 1111).

"SEC. 336. Conditions necessary to show jurisdiction: Limitation of jurisdiction over crime of murder.-- The 6th A.G.N. provides that 'if any person subject to the Articles for the Government of the Navy commits the crime of murder without the territorial jurisdiction of any particular State, or the District of Columbia, he may be tried by court martial and punished with death.' This precludes a court martial taking jurisdiction of murder committed within the boundaries or territorial waters of any of the States of the United States or of the District of Columbia. If the crime is committed on the high seas, or within a territory or possession of the United States, or within a foreign country, a court martial which has assumed jurisdiction thereof may proceed to a final judgment."

"SEC. 121. Rape and carnal knowledge.-- These are provided for under the 22d A.G.N. and by 18 U.S. Code 457 and 458.....

'Elements: Sec. 457 of the Code reads: 'Whoever shall commit the crime of rape shall suffer death.' A court-martial can not adjudge death for this offense.....'"

(Note: Under the revision of Title 18, U.S. Code, the punishment for rape is changed to include death, or imprisonment for any term of years, or for life. Cf. Title 18, U.S.C. 2031. Cf. also proposed Navy bill provisions cited below.)

3. Proposed Navy Bill.

"SEC. 3. Article 4 is renumbered as Article 8 and amended as follows:

'ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....

'Seventeenth. Or violates any law or treaty or convention incorporated under Article 5 (d) (First), (Second), or (Fifth) of these Articles, the violation of which is, by such law or treaty or convention, punishable by death.'

"SEC. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Sixty-third. Or is guilty of any violation which is an offense against the Articles for the Government of the Navy under Article 5 (d).'

"SEC. 47. Art. 5(d). The following shall be offenses against the Articles for the Government of the Navy:

'First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.

'Third. Violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date of the passage of this Act and at the time they occurred.'

"SEC. 15. Articles 22 and 23 are repealed."

4. Statutory Provisions.

"Title 18, U. S. C., Sec. 1111. Murder.

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempted to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

"Any other murder is murder in the second degree.

"(b) Within the special maritime and territorial jurisdiction of the United States,

"Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life;

"Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

"Title 18, U.S.C., Sec. 2031. Special maritime and territorial jurisdiction.

"Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life."

III. Differences

1. Two degrees of murder, in effect, are recognized under both the amended Articles of War and the proposed Navy bill. (For first degree murder, under the proposed Navy bill, read from new Art. 8, Seventeenth, to new Art. 5(d) First, to Title 18, U. S. C., Sec. 1111; for second degree murder, read from new Art. 9, Sixty-third, to new Art. 5(d) First, to Title 18, U. S. C., Sec. 1111.) The line of distinction for the two degrees, however, will differ under the two systems. A. W. 92 distinguishes the degrees according to whether the murder was premeditated or unpremeditated. Under the Navy bill, the distinction drawn will presumably be according to the delineation made in the U. S. Criminal Code (Title 18, U. S. C., Sec. 1111). Under the Code delineation, murders committed in connection with the perpetration of certain felonies, whether they are premeditated or not, are made first degree murders. Under A. W. 92, an unpremeditated killing, whether or not committed in connection with a felony is, in effect, made second degree murder.
2. The definition of the crime of murder (without regard to degree), as it is now given in the Army Manual for Courts-Martial (Par. 148a), is identical to that given in the U. S. Criminal Code; thus, to the extent that a Naval prisoner is tried for the crime of murder as a violation of the criminal laws of the U.S., the definition of his offense is the same as under the Army definition. However, Navy provisions also make a violation of State criminal laws an offense against the A.G.N., Art. 5(d), Third, proposed Navy bill; under the present A.G.N. violations of state laws are tried under Arts. 8(1) or 22(a). It would therefore be possible to try a Naval prisoner for murder, as that crime is defined by a State statute, and such definition could be much broader than the

definition under A. W. 92. (For example, a State statute could make an accidental, unpremeditated killing, where there was wanton negligence shown, murder in a lesser degree.). There appears to be no question of the jurisdiction of a Navy court-martial to try such a case, although as a matter of practice the man might be surrendered to the State for trial.

3. Under A. W. 92, a punishment of death or life imprisonment is mandatory for the crime of premeditated murder. Under the proposed Navy bill, the punishment for first degree murder may be death or such other punishment as the court may adjudge.
4. Army Manual for Courts-Martial (Par. 148a) states that where the charge is murder, the death must have occurred within a year and a day after the act or omission which caused it. There is no similar requirement under Navy provisions.
5. A. W. 92 provides that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union or the District of Columbia in time of peace. Under the proposed Navy bill either crime may be tried without regard to any limitation as to territorial jurisdiction (Art. 5(d) First). This changes the rule for jurisdiction of naval courts martial for these offenses under the present A. G. N. (NC&B Sec. 336.)
6. Under the present A.G.N., rape is not an offense punishable by death. Under the proposed Navy bill, it is made an offense punishable by death or such other punishment as a court martial may direct. (Read from new Art. 8, Seventeenth, to new Art. 5(d) First, to Title 18, U.S.C., Sec. 2031). This conforms with the Army punishment.

IV. Recommendations

1. Vanderbilt Report, page 13: Amend A. W. 92 to provide that a person convicted of rape shall suffer death or such other punishment as a court martial may direct.
2. Keefe Report, page 301: Recommendation that civil offenses most likely to occur in the naval service, such as murder, rape, etc. should be specifically listed. The Board criticizes the method used in the proposed McGuire draft of not listing any offenses specifically but referring instead to offenses against the criminal statutes of the U.S. or criminal laws of the various states, territories and possessions. The offenses listed should be defined in Naval Courts and Boards, not in the Articles themselves.

Page 260 ff: Discussion of the territorial limitation in the present A.G.N. on the jurisdiction of a naval court martial in the case of murder. Recommendation that the

limitation be eliminated; in lieu thereof Naval Courts and Boards should contain a provision that certain types of offenses, therein specified, committed within the territorial jurisdiction of the U.S., shall be referred to trial by a civil court when authorized by SecNav. Such provision, however, is not to be considered as a limitation on the jurisdiction of naval courts martial.

FEL-3

Uniform Code of Military Justice

Subject: Various Crimes, A. W. 93.

I. Army Provisions

1. Articles of War.

"ART. 93. Various Crimes.-- Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

"ART. 94..... And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls,"

"ART. 96. General Article.-- Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

2. Manual for Courts-Martial.

For definition and discussion of each crime specified in A. W. 93, see Par. 149. Other crimes of a similar nature are discussed in Par. 152, as offenses against A. W. 96.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

"SEC. 236. Article 93 is amended to read as follows:

'ART. 93. VARIOUS CRIMES.-- Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm shall be punished as a court-martial may direct: Provided, That any person subject

to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article."

"SEC. 237. Article 94 is amended to read as follows:

'ART. 94.' (12th clause, in part)

'..... If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom.'

A. W. 96 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy,

"ART. 8..... Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--

"First (Scandalous conduct).-- Who is guilty of....., fraud, theft, or any other scandalous conduct tending to the destruction of good morals;

"Third (Quarreling).-- Or.....assaults,....., any person in the Navy;"

"ART. 22. (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct (R. S., Sec. 1624, Art. 22)."

2. Naval Courts and Boards.

The crimes listed in A. W. 93 are defined and discussed in NC&B as follows:

Manslaughter	Sec. 119	Larceny	Sec. 58
Mayhem	" 122	Perjury	" 115
Arson	" 124	Forgery	" 102, 113
Burglary	" 96	Sodomy	" 108

Housebreaking	Sec. 96	Assault	Sec. 61,120
Robbery	" 123	Embezzlement	" 89,100

Other crimes, not listed under A. W. 93, but which would be offenses under A. W. 96, are defined and discussed in NC&B as follows:

Fraud (not against the U. S.)	Sec. 57
Blackmail and extortion	" 93
Breaking arrest	" 94
Resisting arrest	" 106
Seduction	" 107
Uttering	" 110
Conspiracy	" 112
Bribery	" 114
Aiding escape of person under arrest	" 116
Offenses against the Postal Service	" 117
Offenses against foreign and interstate commerce	" 118
Carnal knowledge	" 121
Receiving stolen goods	" 125
Circulating obscene literature, etc.	" 126
Polygamy, unlawful cohabitation, etc.	" 127
Offenses against the narcotic law	" 128
Offenses against the revenue acts	" 129

3. Proposed Navy Bill.

"SEC. 11. Article 14 is renumbered as Art. 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the articles for the Government of the Navy-----

'Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

'Thirty-ninth. Or is guilty of forgery, uttering a forgery, burglary, housebreaking, seduction, or sodomy or any other unnatural sexual act;

'Forty-first. Or embezzles, or willfully or maliciously injures or destroys, private property not his own;

'Forty-second. Or is guilty of extortion or blackmail;

'Forty-third. Or obtains any property not his own by any false pretense, expressed or implied, reasonably calculated to deceive the person to whom the pretense is made as to any existing or past fact, knowingly made with intent to defraud, and with intent permanently to deprive the owner thereof of said property;

'Forty-fourth. Or maliciously publishes any writing, picture, sign, or other representation which tends to defame any person in the armed services of the United States, or slanders or threatens any person in the armed services of the United States;

'Forty-sixth. Or willfully and corruptly takes any false oath to any material matter, or procures another to do so;

'Sixty-third. Or is guilty of any violation which is an offense against the Articles for the Government of the Navy under Art. 5 (d).'"

"SEC. 47.....

'ART. 5 (d) The following shall be offenses against the Articles for the Government of the Navy:

'First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.

'Third. Violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date of the passage of this Act and at the time they occurred.'"

III. Differences

1. Some of the crimes listed in A. W. 93 are made specific offenses in the proposed Navy bill, new Art. 9. Others will

be offenses against the proposed A.G.N. by virtue of being violations of the criminal laws of the U. S., or of the criminal laws of a State, Territory, District or possession of the U. S. Conversely, certain offenses are listed specifically in the proposed A.G.N. (e.g. seduction, extortion, blackmail, criminal libel, obtaining property by false pretenses etc.) which will be offenses against the Articles of War only by virtue of being violations of A. W. 96.

2. A.W. 93 provides that one who commits embezzlement shall be guilty of larceny within the meaning of the Article. Under the proposed A.G.N. embezzlement is made a specific offense (new Art. 9, Forty-first); larceny is not a specific offense, but being a violation of a criminal law of the U.S., will also be an offense against the Articles.
3. The crimes listed in A.W. 93 are defined and discussed in Army Manual for Courts-Martial (Par. 149). The same crimes, as violations of present A.G.N. 8 or 22(a), are defined and discussed in Naval Courts and Boards. The only apparent difference of definition in the two manuals is in the case of housebreaking. Par. 149(e) defines it as "unlawfully entering another's building with intent to commit a criminal offense therein." The term "criminal offense" includes any act or omission violation of the Articles of War, which is cognizable by courts-martial, except acts or omissions constituting purely military offenses. In Sec. 96, NC&B, housebreaking is defined as the breaking and entering of any building, with intent to commit a felony therein.

The crime of assault with intent to do bodily harm is not defined separately in NC&B.

4. A. W. 94 (12th clause) provides in part that any person who steals or fails properly to account for any money or other property held in trust for enlisted persons or as its official custodian while in the military service shall continue to be liable to be arrested and held for trial and sentence by a court martial although he has received a discharge or dismissal or has been separated from the service otherwise. Navy articles have no similar provision. (This clause in A. W. 94 is more closely related to A. W. 93 since the offenses described in the clause would be chargeable under A. W. 93. See MCM, Par. 149h and Par. 150i).

IV. Recommendations

1. Keeffe Report.

Page 281 ff:

"2. Proposals for Reform

"(a) McGuire Committee Draft:

This draft extends the Articles to all offenses against (i) the criminal laws, treaties, or conventions of the United States; (ii) the criminal laws of a State, Territory or U. S. Possession; (iii) lawful orders or regulations of the Secretary of the Navy; (iv) the customs of the naval service, or of the laws of war; (v) or are recognized military offenses, as the latter may be defined by the Secretary of the Navy. The definition of offenses, and the quantum and mode of proof, shall be such as prevail in the courts of the United States.

"It is to be noted that this proposal would practically eliminate from the Articles for the Government of the Navy all mention of specific offenses." (Offenses punishable by death are specifically listed). "It would authorize a penal code for the Navy which is specific only by reference to a multitude of Federal and State statutes, as well as to much unwritten law....."

"(b) Judge Advocate General Draft:

"This draft extends the Articles to offenses against (i) the criminal laws, treaties, or conventions of the United States, (ii) the laws, regulations, customs or usages of the naval service, or (iii) the laws of war. This classification includes but is not limited to 32 offenses which are specifically set forth. The latter include most of the common law crimes as well as the commonly recognized military offenses.

"This proposal has the merit of specifying most of the offenses which are likely to occur in the naval service. This feature is a distinct improvement over the present Articles, which fail to specify the various civil offenses and many of the military offenses for which persons subject to the Articles are answerable. The draft fails to mention violations of State laws, presumably for the reason that if they do not fit a common law definition, they may be tried as scandalous conduct or conduct to the prejudice of good order and discipline....."

"The Articles proposed by the Judge Advocate General do not mention definition of offenses. Presumably, it is intended that civil crimes such as murder, rape, or manslaughter will carry their common law definition or will be defined by the applicable federal statute and that military offenses will be defined, as at present, in accordance with the customs of the service or by reference to applicable court decisions or court martial orders. Such treatment of the definitions and elements of offenses seems desirable. However, some of the offenses are not well stated in the proposed article. For example, one offense is specified simply as 'carnal knowledge.'

This is strictly a statutory crime and is only an offense if the female is below a certain age limit, which varies under the laws of the different states and under the federal law. The words 'carnal knowledge', standing alone, import merely sexual intercourse and seem insufficient as a description of this statutory offense.

"(c) White Draft:

"The Article on offenses proposed by Commodore White is almost identical with that proposed by the Judge Advocate General. The White Articles, like the McGuire Articles, also include a provision covering offenses against the criminal laws of a State, Territory, or possession of the United States.....

"(d) Tedrow-Finn Articles:

"..... These articles extend to all offenses which are (i) violations of the criminal statutes, treaties, or conventions of the United States, (ii) violations of the criminal laws of a State, Territory, or possession of the United States, where committed, or (iii) violations of the customs or usages of the naval service or of the laws of war. These offenses are to be 'defined and punished as prescribed in the U. S. Criminal Code and the power delegated to the President.....' by the articles. The Article then sets forth 11 of the most serious civil crimes or offenses.

".....

"The Board agrees that the present articles dealing with offenses are inadequate and are ineptly arranged. The most important deficiencies are:

"(i) There is no specific mention of any civil offenses (other than murder) which are offenses against the Articles.

"(ii)

"(iii) No specific mention is made of offenses against the criminal laws of the United States, its treaties, or conventions or against the laws of war.

"(iv) It is not stated that violations of certain state laws may also violate the Articles as constituting scandalous conduct or conduct to the prejudice of good order and discipline.

"(v),(vi)

"A number of offenses are defined, and their elements set forth, in Chapter II of Naval Courts and Boards. Some of these definitions have been criticized as incomplete, if not partly erroneous, and as being of little help to courts and judge advocates. Much of this criticism is justified.

"The Board is not disposed to recommend the adoption, in toto, of any of the proposals which have been made relating to a new article or articles to take the place of the present Articles covering offenses and punishment. However, certain features of these proposals have great merit and the Board believes that these features should be incorporated in any revision of the Articles. More specifically, the Board makes the following comments:

"(a) It is considered important to list specifically the offenses against the Articles in a manner readily understandable to every person subject to naval law. The language of most of the present punitive articles should be retained, since it is, in general, satisfactory. A few of the Articles are obsolete and should not be retained, but the offenses listed in the other punitive articles are of common occurrence and are clearly set forth.

"(e) Those civil offenses which are most likely to occur in the naval service should be specifically stated. This would correct a serious deficiency of the present Articles, which make no mention of civil offenses, except murder. A person subject to the Articles who is charged with manslaughter will search in vain for any mention of this offense in the present Articles. There is no doubt whatsoever that civil offenses such as manslaughter, rape, larceny, and assault, are also offenses against the Articles, but the failure of the Articles to specifically mention such offenses has been much criticized.

".....

"In all but one of the proposed revised articles, the civil offenses which are most likely to occur in the naval service are enumerated. Article I(d) of the McGuire Articles does not mention specific civil offenses, but refers to offenses against the criminal statutes of the United States or criminal laws of the various states, territories, and possessions. The Tedrow-Finn Articles (Article I(d)), follow the White and Judge Advocate General Articles and list the more common civil offenses. It is believed that the McGuire draft is objectionable, in this respect, for the same reason as the present Articles. Little is done to remove this objection by merely referring to the criminal laws and statutes of various jurisdictions.

"The Board believes that the articles proposed by the Judge Advocate General, in omitting mention of violations of the criminal laws of the several states, is sound. Although no great harm would result from including such a provision, it is believed that the present practice of regarding them, under certain circumstances, as scandalous conduct or as conduct to the prejudice of good order and discipline, has merit and should be continued. The Army holds that such violations may, but need not, constitute offenses under A. W. 96 (the general article) depending upon their seriousness and their effect on discipline. To make all violations of state law automatically offenses under the Articles might result in petty offenses being tried in naval courts without any real necessity therefor. Under the present practice, offenses against the state law (not otherwise offenses against the Articles) are tried by naval courts only if the acts which constitute the offenses are considered to be scandalous conduct or to be prejudicial to good order and discipline.

.....
 "(h).....

"The Army method is to define offenses and to set forth the elements and necessary proof thereof in the Manual for Courts Martial. The British follow the same method in the Manual of Military Law. The current navy practice is along the same lines. Various sections of Naval Courts and Boards define offenses, their elements, and set forth sample charges and specifications. Providing the official manual is carefully prepared, there is much merit in this practice. There is no legal objection to a statutory provision which states that a certain offense is punishable without defining it. Little is gained by setting forth in the statute the sources from which definitions of offenses may be obtained. So long as the definitions of offenses, the description of their elements, and the quantum of proof necessary to sustain a conviction are accurately and clearly described in the service manual on naval law, no more should be necessary.....

"The present edition of Naval Courts and Boards has been criticized in respect to its definition of offenses in the Naval Justice Journal. A comparison of Naval Courts and Boards with the Manual for Courts-Martial and the British Manual of Military Law shows the need for complete revision of the Naval Courts and Boards. Additional emphasis on the elements which must be present to constitute particular offenses and which must be proved in order to sustain a conviction is needed. Some of the sample specifications set forth in the current Naval Courts and Boards are ineptly worded."

trial of strictly military offenses and to civil offenses committed outside the continental U. S. Civil offenses committed within the geographical limits of the U. S. would be tried by a civil court. The Board rejects the proposal and recommends that all statutory limitations as to place be eliminated, even as to murder. In lieu thereof, Naval Courts and Boards should contain a provision that certain types of offenses, therein specified, committed within the territorial jurisdiction of the U. S., shall be referred to trial by a civil court when authorized by SecNav. Such provision, however, is not to be considered as a limitation on the jurisdiction of naval courts martial. The Advisory Council should consider, from time to time, what types of cases should be referred to civilian tribunals during peace time and advise the Secretary accordingly. In working out a policy as to which cases should be referred, an important consideration is that if naval courts martial are to function well during war time they must acquire experience in handling serious cases during peace time.

FEL-3

Uniform Code of Military Justice

Subject: Frauds Against the Government, A. W. 94.

I. Army Provisions

1. Articles of War.

"ART. 94. Frauds Against the Government.-- Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers

to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

"Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls."

2. Manual for Courts-Martial.

"Par. 150. NINETY-FOURTH ARTICLE OF WAR.

"a. MAKING OR CAUSING TO BE MADE A FALSE OR FRAUDULENT CLAIM.

"Discussion.-- Making a claim is a distinct act from presenting it.....

"An instance of making a false claim would be where an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits such claim to his commanding officer for the action of the board.

"b. PRESENTING OR CAUSING TO BE PRESENTED FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM.

"Discussion.--.....

"Presenting to a paymaster a false final statement, knowing it to be false, is an example of the offense under discussion.

"h. MAKING OR DELIVERING RECEIPT WITHOUT HAVING FULL KNOWLEDGE THAT THE SAME IS TRUE.

"Discussion..... If, with intent to defraud the United States, he signs the paper without such knowledge, he is guilty of a violation of this clause of the article; and signing the paper without such knowledge is prima facie evidence of such intent.

"i. STEALING, EMBEZZLEMENT, MISAPPROPRIATION, SALE, ETC., OF MILITARY PROPERTY OR MONEY.

"Discussion.--.....

"Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not be for the benefit of the accused;....."

See MCM, Par. 150, for definitions and discussion of other offenses listed in A. W. 94.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

"SEC. 237. Article 94 is amended to read as follows:

'ART. 94. FRAUDS AGAINST THE GOVERNMENT.-- Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

'Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

'Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

'Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes

or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

'Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

'Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

'Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

'Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

'Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof: Provided, That any person, subject to military law, who commits larceny or embezzlement with respect to property of the United States, furnished or intended for the military service thereof, or with respect to other property within the purview of this article, steals said property within the meaning of this article; or

'Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same; or

'Who enters into any agreement or conspires to commit any of the offenses aforesaid;

'Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial may adjudge, or by any or all of said penalties. If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom.'

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 14. Persons to whom applicable.-- Fine and imprisonment or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States--

"First (Presenting false claims).-- Who presents or causes to be presented to any person in the civil, military, or naval service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Second (Agreement to obtain payment of false claims).-- Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Third (False paper).-- Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

"Fourth (Perjury).-- Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"Fifth (Forgery).-- Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment

Uniform Code of Military Justice

Subject: General Punitive Articles

I. Army Provisions

1. Articles of War

"ART. 95. Conduct Unbecoming an Officer and Gentleman.-- Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Note: "Offenses under A.W. 95 and A.W. 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts held not illegal as placing him twice in jeopardy for the same offense. (McRae v. Henkes, 273 Fed. 108.) (Dig. J.A.G. 1922, p. 118.)"

"ART. 96: General Article.--Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

2. Manual for Courts-Martial

Par. 151. "Nineth-Fifth Article of War. Conduct Unbecoming An Officer and a Gentleman.

"Discussion.--The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms.

"There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can

be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.

"This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article.

"Instances of violation of this article are:

"Knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading another's letters without authority; giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence, or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; cruel treatment of soldiers; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

"Proof.--(a) That the accused did or omitted to do the acts; as alleged; and (b) the circumstances, intent, motive, etc., as specified."

Par. 103a. An officer convicted under A.W. 95 alone must only be sentenced to dismissal and nothing more.

Par. 152 "Ninety-Sixth Article of War.

"a. Disorders and Neglects to the Prejudice of Good Order and Military Discipline.

"Discussion.--The disorders and neglects include all acts or omissions to the prejudice of good order and military discipline not made punishable by any of the preceding articles.

"By the term 'to the prejudice', etc., is to be understood directly prejudicial, not indirectly or remotely, merely. An irregular or improper act on the part of an officer or soldier

can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, confined to cases in which the prejudice is reasonably direct and palpable. (Hinthrop).

"Instances of such disorders and neglects in the case of officers are: Disobedience of standing orders or of the orders of an officer when the offense is not chargeable under a specific article; allowing a soldier to go on duty knowing him to be drunk; rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness.

"Instances of such disorders and neglects in the cases of enlisted men are: Failing to appear on duty with a proper uniform; appearing with dirty clothing; malingering; abusing public animals; careless discharge of firearms; personating an officer; making false statements to an officer in regard to matters of duty.

"Among the disorders herein made punishable is the fraudulent enlistment contemplated by A.W. 28, which differs from fraudulent enlistment under A.W. 54 in that the element of the receipt of pay or allowances is not present. The fact that at the time of the alleged fraudulent enlistment the accused was serving in a prior enlistment from which he had not been discharged may be proved, prima facie, by introducing authenticated records of a former unexpired enlistment. If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, prima facie, by the certificate of The Adjutant General or one of his assistants that the files and records of the office of The Adjutant General contain no record of the discharge of the accused from such enlistment.

"For proof of fraudulent enlistment under A.W. 54, see 129 (Proof).

"Proof.—(a) That the accused did or failed to do the acts specified; and (b) the circumstances, etc., as specified.

"b. Conduct of a Nature to Bring Discredit Upon the Military Service.

"Discussion.—'Discredit' as here used means 'to injure the reputation of.' Instances of such conduct on the part of persons subject to military law may include acts in violation

of local law committed under such circumstances as to bring discredit upon the military service. So also is punishable under this clause any discreditable conduct not elsewhere made punishable by any specific Article of War or by one of the other clauses of A.W. 96.

"If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct. He should not be brought to trial unless, in the opinion of the military authorities, the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by the officer or soldier. The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims, that is, where there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either A.W. 95 or A.W. 96, as the circumstances may warrant.

"One object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as failure to pay debts.

"Proof.--(a) That the accused did or failed to do the acts alleged; and (b) the circumstances, etc., as specified.

"c. Crimes or Offenses not Capital.

"Discussion.--The crimes referred to in this article embrace those crimes, not capital and not made punishable by another Article of War, which are committed in violation of public law as enforced by the civil power. The 'public law' here in contemplation includes that enacted by Congress or under the authority of Congress. For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States. A person subject to military law cannot, however, be prosecuted under this clause of the article for an act done in a State, Territory, or possession which is not a crime in that jurisdiction, merely because the same act would have exposed him to a criminal prosecution in a civil court of the District of Columbia had he done the act within the jurisdiction of such court. But such act, of course, might in a proper

case be made the basis of a prosecution under one of the other clauses of this article as being a disorder, a neglect, or conduct of a nature to bring discredit upon the military service.

"Among the crimes referred to in this article may be those offenses created by statute and given names therein which names are also found in other Articles of War given to offenses which have essentially different elements. For example, in sec. 117 of the Servicemen's Dependents Allowance Act of June 23, 1942 (56 Stat. 385), a false statement is declared to be perjury under certain circumstances although not made under oath. This perjury, however, is not the perjury denounced by A.W. 93. Therefore, the perjury defined by the act is chargeable under A.W. 96.

"So also section 90 of the Federal Penal Code of 1910 provides that a failure by an officer to render accounts for public money received by him unless authorized to retain it as salary, pay, or emolument is an embezzlement of such funds. Such an embezzlement, not being within the general definition of embezzlement as the term is used in A.W. 93 and A.W. 94, would be chargeable under the general article.

"The elements of some of the more common crimes that are chargeable as crimes under this article if committed in violation of public law as enforced by the civil power will now be discussed."

"ATTEMPTS

"Discussion.--An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.)

"An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt. For example, a purchase of matches with intent to burn a haystack is not an attempt. But it is an attempt where the haystack is actually set on fire, even though it may be immediately put out by rain, blown out by the wind, or otherwise extinguished, with only immaterial damage to the hay. It is not an attempt where if every act intended by accused were completed there would legally be no crime, even though the accused may at the time believe he is committing such crime. Thus, to shoot at a log believing it to be a man would not be an attempt to murder.

"Soliciting another to commit a crime is not an attempt! nor is mere preparation to do a criminal act.

"If an attempt is included in the offense charged it may be found as a lesser included offense in violation of A.W. 96. However, if such attempt is denounced by some specific article it should be found under that article.

"Proof.—(a) That the accused committed an overt act which if not interrupted by circumstances independent of the deed's will would have resulted in the commission of the offense, as alleged; (b) that the accused intended to commit that particular offense (this may usually be shown by the facts and circumstances surrounding the act); and (c) the apparent possibility of committing the offense in the manner indicated."

Par. 104c. Maximum punishments. Offenses not provided for are punishable as authorized by statute or by the custom of the service or by analagous offenses.

3. Other Interpretation

(a) Violations of Federal Laws

The "crimes or offenses not capital" referred to in Article of War 96 of which courts-martial may take cognizance are limited to those committed in violation of a Federal law in force where the act is committed. The mentioned statutes (Federal statutes on statutory rape, adultery, and fornication) do not apply to offenses committed within the territorial jurisdiction of a state. 4 Bull. JAG 13, Jan. 1945.

The Article expressly excludes from the jurisdiction of courts-martial all capital crimes of military personnel. The exclusion being absolute, the capital crime, however, nearly it may have affected the discipline of the service, cannot be any more legally adjudicated indirectly than directly. Winthrop, Military Law and Precedents, (1920 Reprint) p. 723.

"Accused was found guilty of conspiracy to engage in certain acts, involving the failure to obey a standing order of the theater, in violation of A.W. 96. The defense moved to dismiss the Specification, contending that conspiracy is a common law offense and that since the United States has no common law jurisdiction, it must be shown that the particular conspiracy alleged is denounced by a Federal statute. Held: Under the provisions of sec. 37, Federal Criminal Code (18 U. S. C. 88), a conspiracy against the United States is

established where the object of an unlawful agreement was the commission of some offense against the United States or the doing of some act made an offense by the laws of the United States. Since the failure to obey a lawful standing order constitutes an offense against the United States within the scope of A.W. 96, it follows that a conspiracy to violate such an order falls within the scope of the Federal Criminal Code provisions denouncing conspiracies to commit an offense against the United States." 5 Bull. JAG 340, Nov-Dec. 1946.

Note: The above seems to show the only basis for the trial of conspiracies by courts-martials; however, compare the following which is probably overruled by the above:

"The specification charges a conspiracy to commit theft and robbery. It alleges no overt act, however, and this omission, if the specification were laid under section 37, Federal Penal Code (35 Stat. 1096), would be fatal. But the specification need not have been, and apparently was not, so laid. Conspiracy is also a common-law crime, and differs from the crime defined by section 37, *supra*, in the very material fact that an overt act is not required to be either alleged or proved; that crime exists in the District of Columbia and is punishable by the code thereof. The specification contains everything necessary to charge that crime and must be upheld accordingly. C.M. 112560, 120543 (1918)." Dig. Op. JAG (1912-40) P. 351.

(C.M. 120543 was held at Camp Travis, Texas)

"Accused, a soldier, was charged with having cocaine in his possession, in violation of section 8, Chapter I, of the act of December 17, 1914, commonly known as the Harrison Anti-narcotic Act, the evidence showing that he had a small quantity of the drug in his possession for his personal use. The section of the act referred to applies only to persons required by the act to register, and the possession of a small amount of a drug by a person not required to register, such as accused in this case, does not constitute a violation of the act (U.S. v. Jim Huey Hoy, 225 Fed. 1003, 241 U.S. 394). Such possession is, however, punishable as a violation of A. W. 96 (par. 4, G. O. 25, U. D., 1918); and punishment is limited to dishonorable discharge, total forfeitures, and confinement at hard labor for one year (the maximum punishment under the Executive order of December 10, 1920, for the offense of introducing a habit-forming drug into command, quarters, etc.) in a place other than a penitentiary. C.M. 156134 (1923)." Dig. Op. JAG (1912-40) p. 361.

Note: The above opinion is cited to show that although an offense may be tried as a violation of a federal statute, the accused may be convicted of conduct to the prejudice of good order and conduct.

(b) Violations of State Laws

The test to be applied in determining whether the act is an offense is whether it is a violation of A.W. 96 and not whether it violated a state statute. Nor does the state statute control the maximum punishment that may be imposed. 4 Bull. JAG 342, August 1945.

The violation of a State law is not necessarily a violation of an Article of War unless the acts which constitute the offense under State law would also constitute an offense under the Articles of War regardless of the State statute. 3 Bull. JAG 346, August 1944.

4. U.S. Criminal Code

"Conspiring to commit offense against the United States.-- If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the two parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both." 18 U.S.C. 83.

"Principals.-- Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U.S.C. 550.

(These two statutes are also applicable to the Navy).

The above provisions have been amended by the new Criminal Code:

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment

for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. 371 (1948).

"§ 2. Principals

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." 18 U.S.C. 2 (1948).

5. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 22 (a) Offenses not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct."

"ART. 8. Persons to whom applicable.--Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--

"First (Scandalous conduct).--Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals."

2. Naval Courts and Boards

Sec. 22 "General and specific charges.--

"Scandalous conduct tending to the destruction of good morals, conduct to the prejudice of good order and discipline, and conduct unbecoming an officer and a gentleman constitute the general charges. All other charges are specific charges. Since most attempted (but not consummated) offenses have to be laid under a general charge (sec. 42), it follows that one of the general charges is a lesser included offense in most of the specific charges."

Sec. 26 "Statement of offense--The Charge.--

"If an offense is one specifically provided for, it should be preferred under a specific rather than a general charge. In order to determine this point the following sources should be consulted:

- "(a) Sample charges and specifications.
- "(b) Limitations of punishments.
- "(c) Articles for the government of the Navy.

"When an offense is not specially provided for in the above sources, it shall be preferred under one of the general charges, to wit, 'scandalous conduct tending to the destruction of good morals', or 'conduct to the prejudice of good order and discipline', or 'conduct unbecoming an officer and a gentleman.' In determining which of the general charges should be used, the following general rule should be observed: Acts are of a scandalous nature and, consequently, are properly so charged, that give offense to the conscience or moral feelings; call out condemnation; involve scandal or disgrace to reputation; bring shame or infamy, or because of their evil nature are malum in se."

Sec. 27. "The Specification.--.....

"It is not essential to state in a specification that an offense was committed in breach of any Federal statute, article of the articles for the government of the Navy, law of the State in which the court is sitting, or general regulation, as the court takes judicial notice of such statute, article, State law, or regulation, under which the charge is laid, but whenever the offense comes directly under any other enactment (foreign law, municipal ordinance, or local ship or station order), the same should be set forth verbatim in the specification and proved like any other fact."

Sec. 457. "Schedule of offenses and limitations.....

"Offenses	"Limit of Punishment
<p>"Any offense in the act of Congress approved May 4, 1909 (35 Stat. 1088) entitled 'An act to codify, revise, and amend the penal laws of the United States,' or in any other general statute of the United States, which is not specified in the Articles for the Government of the Navy (1).</p>	<p>"Officer: Dismissal and confinement for the period named in the statute as the maximum period of imprisonment.</p>

"Offenses

"NOTE.--Where the statute does not prescribe any period of imprisonment, dismissal or discharge shall not be adjudged, but loss of numbers not to exceed 10, or confinement not to exceed 3 months, may be adjudged.

"Where the statute prescribes the punishment of death, and a naval court-martial is not authorized by the Articles for the Government of the Navy to adjudge the punishment of death for the offense, the limit of punishment shall be dismissal or dishonorable discharge and confinement for life."

Sec. 42. "How to charge attempts.--

"If an attempt is not provided for as a specific charge it should be alleged under the appropriate general charge."

Sec. 43. "What constitutes an attempt.--

"An attempt to commit a crime consists of three elements: (1) The intention to commit the crime, (2) performance of some act toward the commission of the crime, and (3) the failure to consummate the crime. It follows that one proven actually to have committed an offense cannot be found guilty of an attempt to do so and that a specification alleging such commission does not support a charge of attempt."

Sec. 59. "Scandalous conduct.--.....

"Elements: Most of the offenses specified in the articles for the government of the Navy are of a military character or are against the United States. The bulk of the common law and statutory offenses come under this charge and under the 22d A.G.N.

"Offenses of a scandalous nature for which no specific charges are provided should be laid under this charge. These offenses are so diverse that it is impracticable to set forth the elements of each. Where the offense is similar to that under a specific charge appearing elsewhere in this chapter, the elements set forth thereunder should be examined.

"Limit of Punishment

"Enlisted man: Confinement for the period named in the statute as the maximum period of imprisonment and dishonorable discharge."

"As a number of attempted or uncompleted offenses are not specified, most such, involving scandalous acts, must be laid under this charge, and it follows that this charge is a lesser included charge in the specific charges of a scandalous nature."

Sec. 98. "Conduct to the prejudice of good order and discipline.--
....."

"Elements: This charge is to be used for offenses not specified and not of a scandalous character. The remarks in section 59 apply, in general, to this charge also.

"By the term 'to the prejudice', etc.; is to be understood directly prejudicial, not indirectly or remotely merely. An irregular or improper act on the part of an officer or man can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline; but such distant effects are not contemplated under this charge; and it is, therefore, deemed properly to be confined to cases in which the prejudice is reasonably direct and palpable.

"Instances of such disorders and neglects in the case of officers are: Disobedience of standing orders, or of the orders of an officer when the offense is not chargeable under a specific article; allowing a man to go on duty knowing him to be drunk; rendering himself unfit for duty by excessive use of intoxicants or drugs.

"Instances of such disorders and neglects in the cases of enlisted men are: Failing to appear on duty with a proper uniform; appearing with dirty clothing; refusing to submit to treatment necessary to render him fit for duty; refusing to submit to a necessary and proper operation not endangering life; missing ship, dishonorable neglect to pay debts, and the instances cited under the succeeding section.

"Another class of offenses coming under this charge are violations, not of a scandalous nature, of local laws in a country, State, Territory, or District."

Sec. 99. "Conduct unbecoming an officer and a gentleman.--....."

"Elements: The conduct contemplated is action or behavior in an official capacity, which, in dishonoring or disgracing the individual as an officer, seriously compromises his character

and standing as a gentleman; or action or behavior in an un-official or private capacity which, in dishonoring or disgracing the individual personally as a gentleman; seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms.

"There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing; of indecency or indecorum; of lawlessness, injustice, or cruelty.

"Instances of violation of this charge are: Knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading another's letters; giving a check on a bank where there were no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence, or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; failing without a good cause to support his family."

3. Other Interpretation

This Article applies only to offenses "not specified in the foregoing articles", and which are recognized as military offenses by the usages of the naval service. *Smith v. Whitney* (1886) 116 U.S. 167.

This Article is not intended to confer upon a court-martial general criminal jurisdiction, but only jurisdiction over those offenses, not specified in the preceding articles of said section, which are injurious to the order and discipline of the Navy; the jurisdiction being given for the purpose of preserving that order and discipline. (1880) 16 Op. Atty. Gen. 579.

Under the Navy regulations and the A.G.N. all persons in the naval service are subject to discipline and trial by court-martial for any offense committed by them which is a violation of any Federal or State law. CMO 30-1918 p. 28.

The charge of "unauthorized use of an automobile" does not allege an offense in violation of the A.G.N. or any other enactment of Congress. However, the use of such a charge presupposes a statute making such act a criminal offense in the State, Territory, or district where such act takes place, and the

specification should be alleged in the words of the statute concerned. Such a statute should be alleged and proved in order that the accused, the court, and the reviewing authorities may know that the acts of the accused set out in the specification are contrary to the law of the place where committed. CMO 3-1924.

Article 1645 (1) Navy Regulations 1913 prescribes in effect that members of the naval service scrupulously respect and observe the territorial authority of foreign civilized states in amity with the United States. Naval courts may not take judicial notice of foreign law, the existence of said foreign law being a question of fact which must be proved. This, of course, does not prevent a naval court from exercising jurisdiction over an offense against any of the laws or regulations governing a foreign port or the territorial water thereof committed by a member of the naval forces while on liberty ashore under the charge of "scandalous conduct tending to the destruction of good morals" or "conduct to the prejudice of good order and discipline." CMO 109-1918. See also CMO 1-1933, p. 9; CMO 8-1924, p. 3.

4. Proposed Navy Bill

"ART. 5 (d) The following shall be offenses against the Articles for the Government of the Navy:

- "First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.
- "Second. Violations of the treaties or conventions of the United States, whenever adopted, during the time such treaties or conventions are in force.
- "Third. Violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date of the passage of this Act and at the time they occurred.
- "Fourth. Violations of the laws, orders, regulations, or customs of the naval service.
- "Fifth. Violations of the law of war."

ART. 33(a) Above offenses not to be punished by greater imprisonment than specified in such laws.

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--

"Seventeenth. Or violates any law or treaty or convention incorporated under article 5(d) (First), (Second), or (Fifth) of these Articles, the violation of which is, by such law or treaty or convention, punishable by death."

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

"Fifty-ninth. Or, in any way other than specifically provided against herein, being an officer; so seriously offends against law, justice, morality; or decorum as to expose the offender; socially as a man or woman, to disgrace, and at the same time to bring, through the nature of the act or the circumstances under which it was committed, dishonor or disrepute upon the naval profession;

"Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

"Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles....."

III. Differences

1. Violations of Federal Laws.

A. W. 96 gives Army courts-martial direct authority to try offenses against Federal Statutes. Under present naval practice, naval courts-martial have jurisdiction over offenses against Federal Statutes as conduct prejudicial to good order and discipline, such violations having been declared as such. However, under the proposed A.G.N. naval courts-martial would have broader power to punish violations of Federal Statutes, since the proposed Art. 5(d) would make such violations offenses against

the A.G.N. without regard to the territorial jurisdiction of the United States. Under the Articles of War, the acts constituting the offense must occur within the territorial jurisdiction of the United States. Thus, under the proposed A.G.N., a naval court-martial could punish as an offense acts occurring in New York State as an offense against the United States, while such an act occurring in New York is not an offense against either Federal or New York law.

Both the Army and Navy seem to punish offenses against Federal laws, because they are offenses against such law. Both services also seem to follow the Criminal Code as to what elements are necessary to constitute the offense. Query: whether all defenses under federal law are recognized in courts-martial?

Under A.W. 96 Army courts-martial have no jurisdiction over capital offenses not specified in the Articles of War, while there is no such limitation in the proposed A.G.N.

As to double jeopardy, see C.S., A.W. 40.

2. Violations of State Laws

Violations of state laws are not necessarily offenses against the Articles of War. The act itself must be conduct of a nature to bring discredit upon the military service or prejudicial to good order and discipline.

Under present Navy practice, any violation of the criminal laws of a state is an offense against the A.G.N. regardless of whether the act in of itself is of a scandalous character or prejudicial to good order and discipline. The mere violation of such law being prejudicial to good order or discipline.

Since the proposed A.G.N. specifically grants jurisdiction over violation of state law, it is to be presumed that present practice is to be followed. Army courts-martial on the other hand do not have jurisdiction to try violations of state laws.

Query: whether under the proposed A.G.N. defenses under state law and state statutes of limitations are binding on naval courts-martial trying offenses against state law?

The proposed A.G.N. would restrict violations of state laws to violations of those laws in force at the date of enactment of the proposed A.G.N.

As to double jeopardy, see C.S., A.W. 40.

3. Violations of Treaties, Law of War, and Foreign Law

Under present Army practice, there are no provisions specifically authorizing courts-martial to try persons subject to military law for offenses against the law of war or in violation of treaties or conventions. Querie: whether these offenses are tried as offenses against Federal laws or as conduct of a nature to bring discredit upon the military service? The proposed A.G.N. would make such offenses, offenses against the A.G.N.

As to jurisdiction of general courts-martial to try persons not subject to military law, see C.S., A.W. 12.

Under the present Navy practice, offenses against foreign laws are treated in the same manner as offenses against state law. Querie: whether this practice would be continued under the proposed A.G.N.?

The Army does not try offenses against foreign laws as such.

4. Violations of the Laws, Orders, Regulations, or Customs of the Service

These offenses are punishable by Army courts-martial under A.W. 96 as conduct to the prejudice of good order and discipline, while the proposed A.G.N. would punish these offenses under Art. 9, paragraphs Twentieth and Sixty-third.

5. Attempts, Conspiracy, and Solicitations

The proposed A.G.N. provides that any attempt, conspiracy, or solicitation to commit an offense against the A.G.N. is in itself an offense against the A.G.N. The Army punishes attempts under A.W. 96 and also tries conspiracies and solicitations to commit offenses against the Articles of War, as conspiracies and solicitations to commit offenses in violation of federal statutes under the "crimes and offenses" clause of A.W. 96.

Appended is a list of offenses specified in the proposed A.G.N., but not specified in the Articles of War and charged under A.W. 96.

6. Conduct Unbecoming an Officer and Gentleman.

The only difference between the A.G.N. and A.W. is that the Army provision applies to cadets as well as officers and carries a mandatory sentence of dismissal.

7. Disorders and Neglects to Prejudice of Good Order and Discipline or Conduct to Bring Discredit Upon the Service.

There is no substantial difference between the Army and Navy provisions as to these offenses.

IV. Recommendations

1. As to Offenses

"A. OFFENSES

"1. In General

"Some offenses against naval law are specifically provided for in the present Articles for the Government of the Navy. Some are classified according to punishments under Articles 4, 8, and 14. Others are made punishable by Articles 1, 3, 5, 6, 9, 10, 16, 17, 19, 20, 21, 22(b), 31, 42, and 44. The remaining offenses are covered by one broad provision, Article 22(a), which provides for the punishment of 'all offenses not specified in the foregoing Articles.'

"Common civil offenses such as manslaughter, rape, assault and robbery are not specifically mentioned in the Articles. However, by interpretation, Article 22(a) comprehends common law crimes. Article 22(a) has also been interpreted to include all offenses against the criminal statutes of the United States, offenses against state laws, and various military offenses. The Attorney General has held that this Article is not intended to confer general criminal jurisdiction upon naval courts martial, but is limited to those offenses, not specified in the preceding articles, which are injurious to the order and discipline of the Navy. But where an offense made punishable by the common law or by the statutes of the United States is directly prejudicial to good order and discipline, naval courts martial have jurisdiction to try it. The more common military offenses not specifically mentioned in the Articles but which are, by reason of Article 22(a), offenses by custom of the service are broadly classified as: Neglect of duty, conduct to the prejudice of good order and discipline, and conduct unbecoming an officer and a gentleman.

"It is also possible to try common law and statutory offenses and various military offenses under Article 8(1), which makes punishable 'any other scandalous conduct tending to the destruction of good morals.'

"Definitions of the various offenses are at present based upon common law definitions as found in court opinions, statutory definitions, and the customs of the service. Chapter II of Naval Courts and Boards sets forth the offenses most likely to arise in the service, defines them and lists the essential elements thereof.

"It is evident from the above discussion that the majority of offenses are based upon unwritten law, by virtue of interpretation of Articles 8(1) and 22(a), and that only a few are specifically provided for in the Articles. However, most of the cases actually tried by general court martial are based upon offenses which are specifically mentioned in the Articles, that is to say, desertion and other unauthorized absence. Of the 643 cases reviewed by the Board down to 1 July 1946, at least 505 involved desertion, absence without leave, or absence over leave.

"2. Proposals for Reform.

"In the draft articles submitted by the McGuire Committee, as also in those recommended by Commodore White and by the Judge Advocate General, a single article under the general heading of jurisdiction covers the entire subject of offenses.

"(a) McGuire Committee Draft:

"This draft extends the Articles to all offenses against (i) the criminal laws, treaties, or conventions of the United States; (ii) the criminal laws of a State, Territory, or U. S. Possession; (iii) lawful orders or regulations of the Secretary of the Navy; (iv) the customs of the naval service, or of the laws of war; (v) or are recognized military offenses, as the latter may be defined by the Secretary of the Navy. The definition of offenses, and the quantum and mode of proof, shall be such as prevail in the courts of the United States.

"It is to be noted that this proposal would practically eliminate from the Articles for the Government of the Navy all mention of specific offenses. It would authorize a penal code for the Navy which is specific only by reference to a multitude of Federal and State statutes, as well as too much unwritten law. It would not specify military offenses, but would leave the listing and definition thereof to the Secretary of the Navy. This appears to be a delegation of legislative power, the constitutionality of which is open to doubt. The fact that the article uses the words 'recognized military offenses' does not completely remove the question of constitutionality, because wide discretion would still be left with the Secretary.

"(b) Judge Advocate General Draft:

"This draft extends the Articles to offenses against (i) the criminal laws, treaties, or conventions of the United States, (ii) the laws, regulations, customs or usages of the naval service, or (iii) the laws of war. This classification includes but is not limited to 32 offenses which are specifically set forth. The latter include most of the common law crimes as well as the commonly recognized military offenses.

"This proposal has the merit of specifying most of the offenses which are likely to occur in the naval service. This feature is a distinct improvement over the present Articles, which fail to specify the various civil offenses and many of the military offenses for which persons subject to the Articles are answerable. The draft fails to mention violations of State laws, presumably for the reason that if they do not fit a common law definition, they may be tried as scandalous conduct or conduct to the prejudice of good order and discipline. The proposal does not, in listing offenses, distinguish between military offenses and civil offenses, as such. Relatively minor offenses, such as gambling, receive as much notice as more serious offenses, such as murder or mutiny. Moreover, proposed Article 10(c) (4), which lists offenses punishable by death, includes some offenses which are not mentioned at all in proposed Article 6(d), dealing with offenses generally. On the other hand, desertion in time of war is specified in both Articles.

"The Articles proposed by the Judge Advocate General do not mention definition of offenses. Presumably, it is intended that civil crimes such as murder, rape, or manslaughter will carry their common law definition or will be defined by the applicable federal statute and that military offenses will be defined, as at present, in accordance with the customs of the service or by reference to applicable court decisions or court martial orders. Such treatment of the definitions and elements of offenses seems desirable. However, some of the offenses are not well stated in the proposed article. For example, one offense is specified simply as 'carnal knowledge.' This is strictly a statutory crime and is only an offense if the female is below a certain age limit, which varies under the laws of the different states and under the federal law. The words 'carnal knowledge', standing alone, import merely sexual intercourse and seem insufficient as a description of this statutory offense.

"(c) White Draft:

"The Article on offenses proposed by Commodore White is almost identical with that proposed by the Judge Advocate General. The White Articles, like the McGuire Articles, also include a provision covering offenses against the criminal laws of a State, Territory, or possession of the United States. The offenses specified in the White Articles include all but three of those which are set forth in the Judge Advocate General's draft. The Offenses omitted are: (i) neglect of duty, (ii) culpable inefficiency in the performance of duty, and (iii) suffering, through negligence, a vessel of the Navy to be hazarded, run upon a rock or shoal, or stranded.

"The comments made above with respect to the Judge Advocate General draft apply equally to the White proposal, except for the inclusion in the White draft of violations of state laws.

"(d) Tedrow-Finn Articles:

"As stated above, these articles were submitted by the minority members of the Ballantine Committee. These articles extend to all offenses which are (i) violations of the criminal statutes, treaties, or conventions of the United States, (ii) violations of the criminal laws of a State, Territory, or possession of the United States, where committed, or (iii) violations of the customs or usages of the naval service or of the laws of war. These offenses are to be 'defined and punished as prescribed in the U. S. Criminal Code and the power delegated to the President.....' by the articles. The Article then sets forth 11 of the most serious civil crimes or offenses.'

"The Tedrow-Finn proposed Articles fail to specify a single military offense. They omit mention of violations of lawful Navy regulations. Like the McGuire and White Articles, they specifically include violations of the criminal laws of States, Territories, or possessions. The comments made above with reference to the proposed Articles of the Judge Advocate General are also applicable to the Tedrow-Finn Articles.

"The Board agrees that the present articles dealing with offenses are inadequate and are ineptly arranged. The more important deficiencies are:

"(i) There is no specific mention of any civil offenses (other than murder) which are offenses against the Articles.

"(ii) Many common military offenses, for which persons subject to the Articles are answerable, are not specified, even by a general reference to the customs of the service.

"(iii) No specific mention is made of offenses against the criminal laws of the United States, its treaties, or conventions or against the laws of war.

"(iv) It is not stated that violations of certain state laws may also violate the Articles as constituting scandalous conduct or conduct to the prejudice of good order and discipline.

"(v) Provisions which specify punishments for various offenses are scattered throughout the Articles in a confusing manner.

"(vi) Some of the punitive Articles are obsolete and might well be eliminated.

"A number of offenses are defined, and their elements set forth, in Chapter II of Naval Courts and Boards. Some of these definitions have been criticized as incomplete, if not partly erroneous, and as being of little help to courts and judge advocates. Much of this criticism is justified.

"The Board is not disposed to recommend the adoption, in toto, of any of the proposals which have been made relating to a new article or articles to take the place of the present Articles covering offenses and punishments. However, certain features of these proposals have great merit and the Board believes that these features should be incorporated in any revision of the Articles. More specifically, the Board makes the following comments:

"(a) It is considered important to list specifically the offenses against the Articles in a manner readily understandable to every person subject to naval law. The language of most of the present punitive articles should be retained, since it is, in general, satisfactory. A few of the Articles are obsolete and should not be retained, but the offenses listed in the other punitive articles are of common occurrence and are clearly set forth.

"(b) There is such to be said in favor of separately stating each of the military offenses not listed. The suggestion that all military offenses be left for statement and definition by the Secretary of the Navy or the President is objectionable, both because of the constitutional question involved and because much of the forcefulness and solemnity of the Articles, as a disciplinary and penal code, would be thereby lost.

"(c) The punitive articles should be grouped together under the general heading of 'Offenses and Punishments.' Much of the clarity and force gained by enumerating and specifying offenses would be lost by including this subject under the heading of 'Jurisdiction of Courts Martial,' as proposed by the McGuire Committee, the Judge Advocate General, and Commodore White. The average person subject to the Articles is not interested in the legal niceties of jurisdiction, but is directly concerned with offenses and the punishment therefor.

"(d) Offenses should be classified according to the punishment therefor, rather than listed under jurisdiction, with punishments set forth elsewhere. The most logical arrangement would be to list offenses in two articles, or in two parts of one article, the first enumerating all capital offenses, the second all offenses not punishable by death. These articles should contain both military and civil offenses, as well as a general clause. This linking of crimes and punishments will accomplish the following results, which are not accomplished by the other proposals: (i) The relative seriousness of offenses would be immediately apparent to all persons subject to the Articles; (ii) There could never be any question in the minds of members of courts martial as to the character of punishment authorized for a particular offense; and (iii) It would be unnecessary to refer to two distinct parts of the Articles to connect punishments with offenses.

"The practice of classifying offenses according to their punishments is supported by long usage, not only in the United States Navy and Army codes, but also in the military and naval codes of England. The present punitive articles, although scattered throughout the entire code, actually employ this practice. The Articles of War, in general, couple offenses with punishments, although the method here proposed of separating capital offenses from others is not followed. The British Army Act classified offenses according to punishments of death, penal servitude, imprisonment, cashiering and lesser punishments. The British Navy code follows the same general pattern. In civil penal codes offenses are usually classified as felonies or as misdemeanors.

"The classification of offenses according to punishments would tend to clarify the Articles and make their reading to the men more useful and impressive than it now is. Although it has been said by some that the reading of the Articles to an assembly of naval personnel fails to accomplish its purpose, nevertheless, it is felt that something is accomplished by this reading and that it should be improved rather than abolished.

"(e) These civil offenses which are most likely to occur in the naval service should be specifically stated. This would correct a serious deficiency of the present Articles, which make no mention of civil offenses, except murder. A person subject to the Articles who is charged with manslaughter will search in vain for any mention of this offense in the present Articles. There is no doubt whatsoever that civil offenses such as manslaughter, rape, larceny, and assault, are also offenses against the Articles, but the failure of the Articles to specifically mention such offenses has been much criticized.

"In the Army, so far back as the Code of 1874, important civil offenses were specifically stated in the Articles of War and made punishable by court martial. The present Articles follow the same procedure. The British Army Act makes the offenses of treason, murder, manslaughter, and rape punishable, and refers generally to 'any other offense made punishable by the law of England.' The British Naval Discipline Act, in referring to offenses punishable by ordinary law, enumerates murder, manslaughter, sodomy, indecent assault, robbery, theft and any other criminal offense made punishable by the law of England.

"In all but one of the proposed revised articles, the civil offenses which are most likely to occur in the naval service are enumerated. Article I(d) of the McGuire Articles does not mention specific civil offenses, but refers to offenses against the criminal statutes of the United States or criminal laws of the various states, territories, and possessions. The Tedrow-Finn Articles (Article I(d)), follow the White and Judge Advocate General Articles and list the more common civil offenses. It is believed that the McGuire draft is objectionable, in this respect, for the same reason as the present Articles. Little is done to remove this objection by merely referring to the criminal laws and statutes of various jurisdictions.

"(f) The more common military offenses, now covered by interpretation of Article 22(a), should be specifically set forth. This should be done for the same reasons as have been advanced in connection with civil offenses. By interpretation

of the broad provisions of Article 22(a), certain acts and omissions are presently punishable as violations of the Articles, having become recognized naval offenses by custom of the service. The customs of the Navy, applied by naval courts martial to situations arising in the administration of naval discipline which are not governed by the written law of the Navy, are comparable in origin and development to the rules of the common law. But just as certain common law crimes have for practical reasons been codified by statute in most jurisdictions, the most common naval offenses should be codified in the Articles.

"It is realized that all of the military offenses which might and do occur could not be specifically enumerated. But some of the more common offenses, such as breaking arrest, being drunk on duty, failing to obey orders, et cetera could and should be listed. There would still have to be general provisions, such as provisions prohibiting conduct to the prejudice of good order and discipline and conduct unbecoming an officer and gentleman. Even though there are general clauses, they are more specific than the present vague phraseology of Article 22(a).

"Neither the McGuire Articles nor the Tedrow-Finn Articles enumerate any military offenses. The Judge Advocate General's proposed articles (Article I(d)) list some military offenses which are presently covered by interpretation of Article 22(a). The White draft (Article I(d)) does the same.

"(g) It is suggested that Article 22 be deleted and that in its stead, in a subdivision of one of the two punitive articles, it be specifically stated that offenses against the Articles include (i) violations of the criminal laws, treaties and conventions of the United States; (ii) violations of the regulations and customs of the naval service, and (iii) violations of the laws of war. Such a provision would cover all those offenses which are presently punishable by interpretation of the general language of Article 22(a). Although the language of (ii) is still very general, it is still more specific than that presently contained in Article 22(a). It is not believed possible to dispense with such general language altogether. The Articles proposed by the Judge Advocate General, Commodore White, the McGuire Committee, and the Tedrow-Finn Articles, include the three provisions recommended above.

"The Board believes that the articles proposed by the Judge Advocate General, in omitting mention of violations of the criminal laws of the several states, is sound. Although no great

harm would result from including such a provision, it is believed that the present practice of regarding them, under certain circumstances, as scandalous conduct or as conduct to the prejudice of good order and discipline, has merit and should be continued. The Army holds that such violations may, but need not, constitute offenses under A.W. 96 (the general article) depending upon their seriousness and their effect on discipline. To make all violations of state law automatically offenses under the Articles might result in petty offenses being tried in naval courts without any real necessity therefor. Under the present practice, offenses against the state laws (not otherwise offenses against the Articles) are tried by naval courts only if the acts which constitute the offenses are considered to be scandalous conduct or to be prejudicial to good order and discipline.

"It should be noted that violations of lawful naval regulations are included in this proposal. Such violations are covered in the present Articles, but for reason of better arrangement, it is recommended that they be included in the general clause here suggested.

"Although it is suggested that offenses against the customs of the service be specifically mentioned, the term 'usages' is not included in accordance with the proposal of the McGuire Articles. It is not believed that mere violation of naval usage should be considered an offense against the Articles, for the reason that there may be naval usages which have never become customs. For a naval usage to become a custom and be recognized as applicable to the determination of cases arising in the administration of naval discipline, it must have been long continued, certain, uniform, and compelling; it must have been applied universally and consistently, and duly recognized as such; and it must not be opposed to the terms or provisions of a statute enacted by Congress or a lawful regulation or order made by proper authority pursuant thereto. Custom has the force of law, usage is merely a fact.

"(h) It is not believed that any attempt should be made to have the Articles define the offenses specified therein, either directly or by reference. A thorough revision of Naval Courts and Boards in this report will accomplish better results. The McGuire Articles delegate to the Secretary of the Navy power to define military offenses. Other offenses are to be as defined by the courts of the United States. The Tedrow-Finn Articles provide that offenses will be defined as prescribed in the U. S. Criminal Code and by the President under the power delegated to him by the Articles. Neither the White Draft nor the Judge Advocate General draft mentions definition of offenses. In this they follow the present Articles. The Articles of War do not attempt to define offenses, (except in A.W. 28 defining 'short desertion'), nor does the British Army Act or Naval Discipline Act.

"The Army method is to define offenses and to set forth the elements and necessary proof thereof in the Manual for Courts Martial. The British follow the same method in the Manual of Military Law. The current navy practice is along the same lines. Various sections of Naval Courts and Boards define offenses, their elements, and set forth sample charges and specifications. Providing the official manual is carefully prepared, there is much merit in this practice. There is no legal objection to a statutory provision which states that a certain offense is punishable without defining it. Little is gained by setting forth in the statute the sources from which definitions of offenses may be obtained. So long as the definitions of offenses, the description of their elements, and the quantum of proof necessary to sustain a conviction are accurately and clearly described in the service manual on naval law, no more should be necessary. The authors of the manual will presumably make use of the definitions of military offenses which have been developed by custom of the service, court martial orders, and court decisions. For civil offenses, they may refer to statutory definitions, interpretations by courts of the United States, common law definitions, and authoritative texts."

The McGuire, White, and Navy JAC recommendations are covered by the Keeffe Report.

The Ballantine and Vanderbilt Reports make no recommendations as to changes in offenses in general.

The Vanderbilt Report recommended further study of the elimination of all mandatory minimum sentences.

House Committee on Military Affairs:

"Recommendation 13.

"That article of war 96 be amended by the omission of the clause 'conduct of a nature to bring discredit on the military service.'" (H.R. 2722 79th Cong., 2d Sess.)

2. Officer Offenses

The Vanderbilt Report states:

"A great deal of testimony which we have heard tended to show that officers were not prosecuted as consistently or punished as severely as enlisted men. The critics did not always understand the difficulties of the situation or appreciate the severity of the punishment inflicted upon an officer by

the imposition of a fine or the loss of promotion or reduction in rank, and the devastating effect of this punishment upon his career. Nevertheless, we are convinced that in some instances and in some areas there was foundation for the complaint and it was a general source of criticism among the troops and seriously impaired their morale....."

The Vanderbilt Report also made the following recommendations covered elsewhere:

- Punishment of officers under A.W. 104. (See C. S., A.W. 104).
- Trial of officers by special courts-martial. (See C.S., A.W. 16).
- Reduction of officers to ranks. (See C.S., A.W. 44).

The Keefe Report states:

"3. General Discussion:

"It is probably true, as alleged, that in some instances officers committed offenses and escaped any form of punishment, yet the same would likewise be true with regard to offenses by enlisted personnel. The question remains: Were officers, as alleged, treated more favorably in this regard than enlisted men? There are no available statistics which can answer this question, and guesswork, or the citing of isolated cases, is an interesting but unproductive process. If there has been such disparity of treatment, without sound reason, that situation demands considered attention leading to corrective action. The Board is not prepared to say that because a proportionally greater number of enlisted personnel were tried by naval courts than officer personnel, there was, ipso facto, disparity of treatment. Likewise, where an officer was dismissed from the service for a particular offense but an enlisted man was sentenced to a period of confinement and a dishonorable discharge, the Board is not prepared to say that this is an example of a 'double standard' of justice. All of the factors set forth above must of necessity enter into the matter. It may well be that from a disciplinary standpoint, the same form of punishment for officers and enlisted personnel for similar offenses is neither practicable nor advisable in every case. However, for serious civil offenses there is little justification for disparity of treatment, if it exists. For example, other factors being equal, the punishment for manslaughter should be the same for all persons convicted by naval courts, whether officer or enlisted. In regard to military offenses, other considerations may be present which require punishments to assume different forms, depending upon the status of the accused. This is so even as between

petty officers and non-rated personnel. The Board cannot agree with those who contend that there must be no disparity in the form of quantum of punishment, irrespective of offense or offender.

"The Board is aware of the criticism currently being directed at the Army and Navy to the effect that there is a 'caste system' in the service, and that the administration of justice is not 'even handed.' Moreover, the Board believes that even if this criticism turns out to be unwarranted, its widespread acceptance requires thorough investigation of the problem. This Board has not had the personnel nor has it been authorized to undertake such a study. It believes, however, it is urgent that the Advisory Council, advocated in the introduction of this report, conduct a study of this problem. If the research reveals that the criticisms are unwarranted, the facts on which such conclusion may be based should be given wide publicity. On the other hand, if there is substance to the criticisms, recommendations to effectuate the following policy should be made:

- "(1) No persons, regardless of rank, should escape punishment for an offense against the Articles for the Government of the Navy.
- "(2) Whenever possible, consistent with discipline and the requirements of the service, there should be no disparity in the form of punishment for the same type of offense, whether the offender be a commissioned officer, a warrant officer, or an enlisted man."

The McGuire, White, and Ballantine Reports make a general recommendation as to officer cases.

There are no recommendations as to the offense of conduct unbecoming an officer except as noted above as to mandatory punishments.

3. Recommended Provision - Discreditable Disorders and Neglects, etc.

Art.----- . Any disorder or neglect to the prejudice of good order and discipline, or any conduct of a nature to bring discredit upon the armed services other than any neglect or disorder or conduct mentioned in these articles shall be punished as a court-martial may direct.

Uniform Code of Military Justice

Subject: Appendix to C.S., A.W. 95, 96.

Offenses provided for in proposed A.G.N., but not specified in Articles of War.

"ART. 8. The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....

'Sixth. Or intentionally or willfully suffers any vessel or aircraft of the Navy to be stranded, or run upon rocks or shoals, or improperly hazarded; or maliciously or willfully injures any vessel or aircraft of the Navy, or any part of its tackle, armament, or equipment, whereby the safety of the vessel or aircraft is hazarded or the lives of the crew or passengers exposed to danger;

'Eleventh. Or, being in command of a fleet, group of vessels or aircraft, or vessel or aircraft acting singly, neglects, when an engagement is probable, or when an armed vessel or aircraft of any enemy or rebel is in sight, to prepare his ship or ships or aircraft for action;

'Twelfth. Or does not use his utmost exertions to join in battle, when so ordered;

'Thirteenth. Or fails to encourage, in his own person, his inferior officers and men to fight courageously;

'Fourteenth. Or does not do his utmost to overtake and capture or destroy any vessel or aircraft which it is his duty to encounter;

'Fifteenth. Or does not afford all practicable relief and assistance to vessels or aircraft belonging to the United States or its allies, when engaged in battle;

'Seventeenth. Or violates any law or treaty or convention incorporated under Article 5 (e) (First), (Second), or (Fifth) of these Articles, the violation of which, by such law or treaty or conventions, punishable by death."

"ART. 9. Such punishment other than death as a court-martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Eleventh. Or is guilty of profane swearing, falsehood, or gambling;

'Twelfth. Or is guilty of cruelty toward, or oppression or maltreatment of any person subject to his orders;

P. B

'Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person; (See C.S., A.W. 93)

'Fourteenth. Or endeavors to foment quarrels between other persons in the naval service; (See C.S., A.W. 68).

'Eighteenth. Or utters any seditious or mutinous words; (See C.S., A.W. 66).

'Nineteenth. Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty;

'Twenty-first. Or, through inattention or negligence suffers any vessel or aircraft of the naval service to be stranded, or run upon a rock or shoal, or hazarded;

'Twenty-second. Or, when attached to any vessel appointed as escort to any merchant or other vessel, fails diligently to perform his duty, or demands or exacts any compensation for his service; or maltreats the officers or crews of such merchant or other vessel;

'Twenty-third. Or takes, receives, or permits to be received, on board the vessel or aircraft to which he is attached or assigned, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, for freight or safekeeping; or demands or receives any compensation for the receipt for transportation of any other article than gold, silver, or jewels without authority from the President or Secretary of the Navy;

'Twenty-sixth. Or, when on shore, plunders, abuses, or maltreats any inhabitant;

'Twenty-seventh. Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

'Thirtieth. Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;

'Thirty-fifth. Or is guilty of any irreverent or unbecoming behavior during divine service;

'Thirty-sixth. Or strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize;

P. C.

'Fortieth. Or knowingly commits any lascivious or indecent act, or procures another to do so;

'Forty-first. Or embezzles, or willfully or maliciously injures or destroys, private property not his own;

'Forty-second. Or is guilty of extortion or blackmail;

'Forty-third. Or obtains any property not his own by any false pretense, expressed or implied, reasonably calculated to deceive the person to whom the pretense is made as to any existing or past fact, knowingly made with intent to defraud, and with intent permanently to deprive the owner thereof of said property;

'Forty-fourth. Or maliciously publishes any writing, picture, sign, or other representation which tends to defame any person in the armed services of the United States, or slanders or threatens any person in the armed services of the United States;

'Forty-eighth. Or divulges information of a secret or confidential nature to any person not entitled to receive the same;

'Forty-ninth. Or negligently endangers the life of another;

'Fifty-first. Or unlawfully detains another person;

'Fifty-second. Or uses a vehicle not his own without authority.

'Fifty-third. Or, while under the influence of alcoholic liquors or narcotic drugs, operates any vehicle;

'Fifty-fourth. Or operates any vehicle in a reckless or wanton manner;

'Fifty-fifth. Or is incapacitated for the proper performance of duty by the use of, or previous indulgence in, alcoholic liquors or narcotic drugs, or by self-injury inflicted with intent to incapacitate, or by refusing to submit to medical or surgical treatment with intent to remain unfit for duty;

'Fifty-sixth. Or feigns sickness or any physical disablement or mental lapse or derangement, for the purpose of escaping work or duty;

'Fifty-seventh. Or, without authority, deliberately and willfully misses his ship or mobile unit;

P. D.

'Fifty-eighth. Or exhibits a deliberate indifference to his just financial obligations;

'Sixtieth. Or fails to comply with or violates any provision of articles 1, 3, 12, and 13 of these Articles;''.

"ART. 1. The commanders of all fleets, squadrons, naval stations, vessels, and aircraft belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them."

"ART. 3. Officers and all others in authority in the naval service shall take all necessary and proper measures, under the laws, regulations, and customs of the naval service to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge."

"ART. 12. No person in the naval service shall procure stores or other articles or supplies for, and dispose thereof to, the officers and enlisted men on vessels of the Navy, or at navy yards or stations, for his own account or benefit."

"ART. 13. Distilled spirits shall be admitted on board naval vessels or aircraft only upon the order and under the control of the commanding officers of such vessels or aircraft, and to be used only for nonbeverage purposes."

FEL-1

Uniform Code of Military Justice

Subject: General Article

See C.S. A.W. 95.

Uniform Code of Military Justice

Subject: Courts of Inquiry -- A.W. 97-103.

I. Army Provisions

1. Articles of War.

"ART. 97. When and by Whom Ordered.-- A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into."

"ART. 98. Composition.-- A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder."

"ART. 99. Challenges.-- Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevance and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be presented before the court by counsel of his own selection, if such counsel be reasonably available."

"ART. 100. Oath of Members and Recorders.-- The recorder of a court of inquiry shall administer to the members the following oath: 'You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God.' After which the president of the court shall administer to the recorder the following oath: 'You, A.B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted."

"ART. 101. Powers; Procedure.-- A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a

court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question."

"ART. 102. Opinion on Merits of Case.-- A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so."

"ART. 103. Record of Proceedings.--How Authenticated.-- Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and one other member of the court."

2. Manual for Courts-Martial.

No comment on Courts of Inquiry as such.

3. Army Regulations (Synopsis).

AR 600-300 pertain to Courts of Inquiry.

While any commanding officer has statutory power to order a court of inquiry, it is customary to forward the request to the officer having power to convene a court-martial competent to try the offense, if there be a substantial possibility that charges may follow. 2 b.

The convening authority has absolute discretion except in classification proceedings (See A.R. 605-300 as to mandatory courts of inquiry in classification proceedings) to refuse to convene a court. However, the applicant may appeal to higher authority. 2c.

All members should be superior in rank to the applicant. 3c.

The recorder is not a prosecutor or adviser, but is to assist the court, if it so desires, in all matters leading to correct conclusions of law or fact. 3d.

Only persons actually in the service may request a court of inquiry. 5a.

Statute of Limitations does not apply to courts of inquiry. 5b.

The purposes of a court of inquiry are:

- (1) To discover whether there be a trial by court-martial.
- (2) To inform or advise superior authority in cases which appear not to call for trial by court-martial, but rather administrative action. 5d.

Court of inquiry should follow the principles of military law, applying analogies to court-martial procedure where applicable. 10a.

There may be a dissenting report. 15.

Return for revision is not limited. 17.

Efficiency reports should not reflect acts of which an officer has been cleared by an investigation.

4. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 55. By whom convened.--

"Courts of inquiry may be convened by the President, the Secretary of the Navy, the commander of a fleet or squadron, and by any officer of the naval service authorized by law to convene general courts martial."

"ART. 56. Constitution.--

"A court of inquiry shall consist of not more than three commissioned officers as members, and of a judge advocate, or person officiating as such."

"ART. 57. Powers.--

"Courts of inquiry shall have power to summon witnesses, administer oaths, and punish contempts, in the same manner as courts martial; but they shall only state facts, and shall not give their opinion, unless expressly required so to do in the order for convening."

"ART. 58. Oath of members and judge advocate.--

"The judge advocate, or person officiating as such shall administer to the members the following oath or affirmation: 'You do swear (or affirm) well and truly to examine and inquire, according to the evidence, into the matter now before you,

without partiality.' After which the president shall administer to the judge advocate or person officiating as such, the following oath or affirmation: 'You so swear (or affirm) truly to record the proceedings of this court and the evidence to be given in the case in hearing.'"

"ART. 59. Rights of party or attorney.--

"The party whose conduct shall be the subject of inquiry, or his attorney, shall have the right to cross-examine all the witnesses."

"ART. 60. Proceedings; authentication; use in evidence.--

"The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court martial, provided oral testimony cannot be obtained."

2. Naval Courts and Boards.

"CHAPTER X

"COURTS OF INQUIRY AND INVESTIGATIONS

"INSTRUCTIONS AND PROCEDURE

"SEC. 720. Purpose.--

"Courts of inquiry and investigations, as the names signify, are primarily fact-finding bodies, and, unless specifically directed by the convening authority in the precept to express opinions or to make recommendations, will confine themselves to findings of fact. The proceedings of these bodies are in no sense a trial of an issue or of an accused person; they perform no real judicial function; they are convened solely for the purpose of informing the convening authority in a preliminary way as to the facts involved in the inquiry, and when directed, to aid him with opinions and recommendations; their conclusions are merely advisory. Convening authorities should remember that any action taken in a matter subsequent to its investigation is taken upon the initiative of the convening authority in his administrative capacity. The function of these bodies is merely to aid such officer in the performance of his administrative duties and not to relieve him of responsibility for his administrative acts.

"A court of inquiry has power to compel the attendance of civilian witnesses, and should be convened or requested where testimony of civilians will likely be desired; the

proceedings of a court of inquiry may under certain conditions be evidence before a court martial; otherwise there is no vital distinction in the power or effectiveness of a court of inquiry and an investigation, and the question which to convene is entirely within the discretion of the convening authority. Whether or not an investigation shall be by a board of officers or by one officer is entirely within his discretion; but in important cases where the facts are various and complicated, where there appears to be reason for suspecting criminality, or where crime has been committed, with uncertainty as to the perpetrator, or where serious blame has been incurred without certainty on whom it ought chiefly to fall, a court of inquiry or a board of investigation affords the best means of collecting, sifting, and methodizing information for the purpose of enabling the convening authority to decide upon the necessity and expediency of further judicial proceedings."

"Sec. 721. By whom convened.--

"A court of inquiry may be convened in accordance with the articles for the government of the Navy. An investigation may be ordered by any officer empowered to convene a court of inquiry, by the commander of a division or large force afloat, and by the senior officer present afloat or ashore."

"Sec. 722. When to be convened.--

"If there is no doubt as to the facts of any particular incident or occurrence, and no reason why sworn testimony to facts fresh in the minds of witnesses should be preserved, a complete administrative report by the commander concerned will be fully as satisfactory as the record of a court of inquiry or of an investigation could be. But ordinarily, owing to legal sequels, the following should be covered by a court of inquiry or board of investigation."

The following sections deal with when a court of inquiry is to be convened:

"Sec. 723. Loss of life from accident or under peculiar or doubtful circumstances."

"Sec. 724. Serious casualties or deficiencies in ships."

"Sec. 724 $\frac{1}{2}$. Accidental explosions in which.....explosives are destroyed."

"Sec. 725. Loss or stranding of a ship of the Navy."

"Sec. 726. Collision with a merchant ship."

"Sec. 727. Precept.--

"The precept of a court of inquiry or investigation shall, in addition to naming the membership thereof and setting the time and place of meeting, state clearly and consisely the matter that is to be investigated and shall give explicit instructions what the report of the court or investigation shall include and any other matters of procedure deemed necessary. Neither the record of an investigation previously held in reference to the same subject matter nor official opinions of any kind shall be attached to or made a part of the precept. Such records or papers may, however, as a separate matter, be sent to the judge advocate or recorder for the purpose of assisting him to bring out all the facts in regard to the matter under investigation. The precept shall also specifically name as defendants and interested parties all persons who appear to be such from the outset. The convening authority should cause to be notified the complainant and persons who appear to be defendants and interested parties from the outset of their right to be present during the investigation. A confirmation copy, signed by the convening authority, is required when the court or investigation is convened by dispatch.

"In addition to the above, the precept, or letters to an investigating officer, shall refer to the statutory authority therefor.

"Unless the power is expressly given by the convening authority in the precept, investigations will take no testimony under oath. When such power is given by the convening authority, all testimony shall be taken under oath."

"Sec. 728. Membership.--

"(a) A court of inquiry shall consist of not more than three commissioned officers as members and of a judge advocate.

"(b) A board of investigation shall ordinarily consist of three officers as members.

"(c) The composition of a court of inquiry or board of investigation, both in regard to rank of members and the corps to which they belong, shall be regulated by the circumstances to be investigated. The number of officers to constitute such bodies is within the discretion and judgment of the convening authority, who must consider the importance of the matter to be investigated and the availability of officers for the purpose. When important material under the cognizance of one of the material bureaus of the Navy Department, is involved, an officer especially trained or experienced in such material shall, whenever practicable, be appointed a member.

In case the conduct or character of an officer may be implicated in the investigation, no member of the court of investigation shall, if practicable, be his junior in rank; and should such officer not be of the line, it is proper, if the exigencies of the service permit, that one or more officers of the corps to which he belongs be detailed for duty on the court of investigation. If it can possibly be avoided, no officer shall be named as a member who has personal knowledge of the subject matter of the investigation. An officer who is ordered to duty as a member and who knows or has due reason to believe that he will be designated as a defendant, should immediately so advise the convening authority, and upon receipt of such information such officer should be relieved from duty on said body.

"Whenever, in the judgment of the convening authority, it may be necessary or desirable, counsel to the judge advocate may be appointed.

"A separate recorder need not be named on a board of investigation if there is no likelihood of there being any defendants. In such case the junior member acts as recorder.

"(d) An investigation is composed of one officer."

"Sec. 729. Clerical assistance, interpreter, and orderly.--

"The provisions for courts martial with respect to clerical assistance and services of interpreters govern a court of inquiry or investigation. At the request of the judge advocate or recorder, the commanding officer of the immediate command within which the body is to sit shall direct an orderly to attend upon its meetings and execute its orders."

"Sec. 730. Rule of assembling.--

"Courts of inquiry and investigations shall assemble at the place and, as nearly as practicable, at the time named in the order convening them, but may adjourn, when desirable, to such place as may be convenient to the inquiry. The members thereof shall take their seats in the same order of rank or seniority as on courts martial; that is, the senior member at the head or center of the table and the other members in order of rank at his right and left alternately."

"Sec. 731. Duties of president or senior member.--

"Such officer shall administer the oath to the judge advocate or recorder, and the witnesses, preserve order, decide upon matters relating to the routine of business, such as recess, and may adjourn the court or investigation

from day to day, at and to such hours as in their judgment will be most convenient and proper for the transaction of the business before them; but should an objection be made by any other member, a vote shall be taken with regard to it, and the decision of the majority shall govern."

"Sec. 732. Duties of the judge advocate or recorder.--

"(a) To summon all the witnesses required for the investigation and to lay before the court or investigation a list of them.

"(b) To administer the oath or affirmation to the members.

"(c) To record the proceedings and to make up the record.

"(d) To conduct the examination of witnesses.

"(e) To assist in systematizing the information received, to minute in the proceedings the opinion and recommendation, if called for, and to render such assistance as will enable the court or investigation to lay all the circumstances of the case before the convening authority in a clear and explicit manner.

"(f) In conjunction with the president or senior member, to authenticate the proceedings by his signature.

"(g) In general, he is the prosecutor and is responsible for bringing out all the facts.

"In case the junior member of a board of investigation is acting as recorder (a recorder not having been designated in the convening order), he will not act in any sense as prosecutor, but the board will act in an unbiased manner to obtain all pertinent information available."

"Sec. 733. General rules and procedure.--

"(a) Courts of inquiry and investigations are usually cleared until the order constituting them and the instructions contained therein are read and the mode of procedure has been decided upon. The judge advocate or recorder does not withdraw when the court or investigation is cleared. Whether the investigation shall be held with closed or open doors must depend on the nature of the matter to be investigated, and, if not specified by the convening authority, must be decided by the court or investigation. The fact that the investigation is held with closed doors can not work to exclude parties to the inquiry and their counsel. The body may be cleared at any

time for deliberation, whereupon the parties and their counsel will withdraw. Clearing the court may be dispensed with under the general principles of section 373.

"Boards of investigation, although they shall collect material information from apparent or known facts, or from written evidence which they may possess, and shall record the declarations of persons examined before them, will not take testimony under oath except in important cases in which the precept expressly states that such board is authorized to administer oaths in accordance with the provisions of 5 U.S. Code 93, in which case all testimony shall be taken under oath.

"When a board of investigation is not required by its precept to take testimony under oath, the record of such board can not be introduced as evidence in subsequent proceedings, except as provided in section 222. Therefore a wider latitude is permissible and the rules of evidence need not be strictly observed; the function of such board being solely to obtain information for the convening and higher authority. The same rule applies to an investigation not under oath made by an investigating officer or clerk.

"(b) After the mode of procedure has been decided upon, the complainant and defendants, if any, must be called before the court and the precept read to them by the judge advocate or recorder.

"(c) Need not meet daily.-- Courts of inquiry and investigations need not meet from day to day, but have power to adjourn for such period as may be necessary without requesting permission of the convening authority. When the suspension of business is from one part of a day to another part of the same day it should be recorded as a recess; when from one day to another, as an adjournment.

"(d) Challenges.-- Parties to an inquiry have the right to challenge any member, as set forth in sections 561 and 562.

"(e) Members must determine according to the evidence.-- The oath taken by the members of a court of inquiry requires them to examine and inquire 'according to the evidence' the matter before them.

"(f) Witnesses shall be examined apart from each other.-- It is improper for witnesses, unless they are otherwise connected with the inquiry, to hear the testimony of other witnesses. The court shall inform each witness, other than a member of the court, the judge advocate, or a party to the inquiry, immediately after the witness has been sworn,

of the subject matter of the inquiry. All witnesses, except the judge advocate, a member, or a party to the inquiry, shall be warned, after testifying, in accordance with the provisions of section 297. While it is not legally necessary that defendants should be warned that what they say may be used against them (when a witness under oath), it is desirable that in practice this be done and that they be further informed of their rights, particularly when they are without counsel.

"(g) Summoning and examination of witnesses.-- The summoning and examination of witnesses is conducted in the same manner as before a court martial, except that a board of investigation and an investigation can not compel the attendance of civilian witnesses. The attendance of such witnesses, therefore, is optional, and the subpoena for same should not include mention of a penalty for failure. Such witnesses can be subpoenaed by the recorder at Government expense only with the approval of the convening authority, and the approval of the Secretary of the Navy is necessary to subpoena such witnesses from a distance which would require such authority if the attendance of the witnesses were desired before a general court martial.

"The judge advocate or recorder first calls witnesses; the complainant, if there be one, is then entitled, when the judge advocate or recorder rests his case, to introduce evidence; defendants may then introduce evidence, and after they rest their cases, interested parties may call witnesses. If, at the end of the testimony of the above witnesses, the court or investigation desires further information, it may call witnesses. All witnesses shall be examined in accordance with court martial procedure; that is, the order of their examination shall be direct, cross, redirect, and recross.

"(h) No business other than an adjournment shall be transacted unless a majority of the members be present, except when the convening authority so orders.

"(i) No member shall fail in his attendance at the appointed times unless prevented by illness or some insuperable difficulty, ordered away by competent authority, or excused by the convening authority, except that a short temporary absence may be allowed by the president or senior member of the court or investigation; nor shall a member leave the vicinity of the assembly place unless authorized to do so by the convening authority or his superior.

"In case of the absence of a member, the senior officer shall inform the convening authority of the fact, and also of the reasons for the absence, if known to him, in order that the vacancy may be filled, if deemed necessary.

"A member absent during the investigation of any matter or case shall not vote upon a decision with regard to it unless, if necessary to arrive at a conclusion, a reinvestigation takes place in the presence of that member and of the parties."

"Sec. 734. Parties.--

"(a) Complainant.-- When an inquiry is ordered into facts in connection with accusation or complaint made by any person to the convening authority, such person is known as the complainant and may be allowed to remain in court during the inquiry and make suggestions.

"(b) Defendant.-- A person whose conduct is the subject of investigation is a defendant. Should it appear at any time that any person in the naval service or employ not named as a defendant in the precept becomes involved in such a way that an accusation against him may be implied, it is the duty of the court to inform such person through official channels that he is a defendant.

"In informing a person that he is a defendant, he shall be notified of the gist of the evidence that tends to implicate him and instructed that he will be accorded the rights of an accused before a court martial, namely, the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request, and to make a statement and argument. He has the right of any witness to refuse to answer incriminating or degrading questions. Conversely, should it become apparent at any time that a person who has been designated a defendant is involved in an insignificant degree, the court should inform him that he is not longer a defendant.

"No person outside of the naval service or employ may be named a defendant.

"(c) Interested party.-- Any person, not a complainant or defendant, who has an interest in the subject matter of the inquiry may, within the discretion of the convening authority, be designated, in the precept as an interested party. (See sec. 726.) Should it at any time during the course of the inquiry appear that any person not named in the precept has such interest, he may, within the discretion of the court, be designated an interested party. In either case the person shall be notified that he will be allowed to be present during the inquiry, examine witnesses, and introduce new matter pertinent to the inquiry in the same manner as a defendant. The granting of these privileges to such a person may, but need not be, at his own request. A person granted

the privileges of an interested party may be called as a witness, but, of course, can not be required to incriminate himself. The foregoing provisions do not apply to collision cases, which are governed by section 726.

"It should be borne in mind that the status of a party to the inquiry is at all times subject to change, depending on the evidence adduced. Thus, a person not named in the precept might be designated an interested party by the court during the course of the inquiry, at some later stage of the proceedings become implicated in the matter under investigation in such a way as to make him a defendant thereto, and subsequently cease to be a defendant because involved in an insignificant degree.

"If the rights of a defendant be not accorded when they should be, the court of inquiry or investigation, so far as concerns the person denied his rights, will be held of no evidential effect. This is one of the most important rules to be observed.

"(d) Right to counsel.-- The complainant, defendants, and interested parties before a court of inquiry or investigation have the right to the aid of counsel. Should a defendant waive his right to counsel, the president or senior member shall warn him that sworn testimony is admissible as evidence before courts-martial, as provided in the 60th A. G. N. or the general rules of evidence, and again advise him to provide himself with counsel, informing him that counsel will be assigned him should he so desire. A statement that this section has been complied with shall be entered upon the record of proceedings in any case where an enlisted man so involved waives this right."

"Sec. 735. Deliberation.--

"(a) After all the evidence is in and statements and arguments, if any, have been received, the court of inquiry or investigation should be cleared, the proceedings read over, and the instructions contained in the convening order carefully examined and scrupulously followed.

"After mature deliberation on the testimony recorded during the inquiry, the body shall proceed to report the facts, and, if so directed, an opinion or conclusion drawn from the facts and a recommendation as to what further action, if any, should be had. (A fact is an action; a thing done, a circumstance.) Unless an opinion is called for, care should be taken to state only facts. The body must weigh the evidence and include in its finding of facts those things which it believes the evidence established to have been done, and nothing further. If the body recommends

that further proceedings be had in the matter, it should state in its recommendation the name of the person or persons against whom, and the specific matter upon which, the proceedings should be conducted, together with the nature of the proceedings.

"(b) The report of the court or investigation shall include a full statement of injuries received by personnel and damages to material and an opinion regarding line of duty and misconduct in accordance with section 723.

"(c) If a member does not concur with the findings, opinion, or recommendations of the court or investigation, he shall append his reasons for dissent and subscribe his name thereto. The report shall be based on the opinion of the majority.

"(d) It is held to be a breach of discipline on the part of any member to disclose or publish the opinion, findings, or recommendation of the court or investigation, or of the individual members thereof, without the sanction of the convening authority.

"(e) Ordinarily an opinion should not be requested of an investigation in view of the fact that but one officer constitutes such investigation.

"(f) The proceedings of a court of inquiry or investigation must be authenticated by the signature of the president and the judge advocate, but all the members should sign the record. In the case of a minority report, the respective reports must be signed by the concurring members of the court and the record must be authenticated by the signatures of the president and judge advocate. The record of proceedings is then to be submitted to the convening authority for his consideration, after which the court may adjourn temporarily to await his further instructions."

"Sec. 736. Reviewing authority.--

"(a) Court of inquiry and investigation records are reviewed by the convening authority and by those officers, if any, through whom the record is forwarded (the record is forwarded through regular channels), who shall take such further action upon the matters disclosed by the inquiry as they may deem appropriate, and shall submit the proceedings to the Judge Advocate General. If any disciplinary is taken, or will be taken by the convening or reviewing authority, a statement thereof shall be made in his action.

"(b) The reviewing authority may record his disapproval of the proceedings in whole or in part or may return the record to the convening authority with recommendation to the latter to change his action or to have the court revise the record. Such recommendation, however, is purely advisory. The general principles of section 473 apply.

"(c) In case of failure to accord the rights of a defendant to a person who should properly have been made such, the convening authority should return the record to the court or investigation for revision, and direct that in such revision these rights be accorded. If for any reason this cannot be accomplished the record of proceedings shall be referred to such person for a statement before any action on the proceedings is taken by the convening authority or other reviewing authority which reflects adversely upon such person's official record. Such statement shall be attached to and made a part of the record of proceedings.

"(d) The proceedings of a court of inquiry or investigation may be revised as often as the convening authority may deem necessary. New evidence may be received and recorded on every such revision, and any of the previous witnesses may be recalled and reexamined with a view to eliciting further information, provided that all parties to the inquiry are afforded an opportunity to be present."

3. Other

"Whenever a reviewing authority, including Chief of Naval Personnel or Commandant of the Marine Corps, recommends in an endorsement on a court of inquiry, board of investigation or investigation record, that said record be held to contain matter of interest which within the purview of the reference, relates to the record of any particular officer, the normal procedure upon approval thereof by the Secretary of the Navy, is for the Judge Advocate General to inform all concerned by an endorsement in form following the enclosure. A copy is filed in the record of the officer concerned." (Letter Col. J.E. Curry U.S.M.C. of Office of Navy JAG, dated 16 Aug. 1948).

4. Proposed Navy Bill

"ART. 42.

"(a) Courts of inquiry may be convened by an person authorized to convene general courts martial. A court of inquiry shall consist of three or more commissioned officers.

"(b) Boards of investigation composed of two or more officers and investigations conducted by one officer may be convened by any person authorized to convene courts of inquiry, and by such other officers as the Secretary of the Navy may designate.

"(c) For every court of inquiry and board of investigation, the convening authority shall appoint a counsel to assist the court or board in its duties.

"(d) Any person subject to these articles, or in the employ of the naval service, whose conduct shall be the subject of inquiry, or his counsel, shall have the right to cross-examine all the witnesses.

"(e) Any person subject to these articles, or in the employ of the naval service, who has an interest in the subject of inquiry, shall have the right to be present and to be represented by counsel of his own choice."

"ART. 43.

"Courts of inquiry, and, when empowered by the convening authority, boards of investigation and investigations conducted by one officer shall have power to administer oaths. They shall make findings of fact, and when required so to do, express opinions and make recommendations."

"ART. 44.

"The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the counsel for the court; but in case the proceedings cannot be authenticated by the signatures of the president and of the counsel, by reason of death, disability, or absence of either or both of them, they shall be signed by a member in lieu of the president and by another member in lieu of the counsel. The sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, shall be evidence before a court martial of a defendant before said court of inquiry: Provided, That where such testimony is used in evidence against the accused person, other than under the general rules of evidence, the punishment imposed shall not extend to death."

Witnesses before courts of inquiry are covered in the same provisions as witnesses before courts-martial.

III. Differences

1. Nature

The Navy court of inquiry is a fact-finding body which performs functions similar to those of an Army pre-trial investigation except that it is much more formal and evidence before the court of inquiry may be used in a subsequent court-martial of a person treated as a defendant before the court of inquiry. A Navy court of inquiry makes investigations such as inquests, courts of collisions, etc. The Army court of inquiry appointed by the President is somewhat similar, except that the record may not be introduced in a subsequent

court-martial without the consent of the accused. Army courts of inquiry, except those appointed by the President, may only be convened at the request of the person whose conduct is being inquired into.

The Army court of inquiry is most commonly used in classification proceedings. See AR 605-200.

Thus, the Navy court of inquiry seems to be a regular and usual procedure for the benefit of the naval service, while the Army court of inquiry is an extraordinary and special proceeding for the benefit of an individual.

In both services, courts of inquiry are merely fact-finding bodies and do not render opinions or recommendations unless specially ordered to do so.

The Navy also has boards of investigation which differ from courts of inquiry in that they are less formal, the record thereof, except under special circumstances, is not admissible in a subsequent court-martial, and they may consist of less than three officers. The Army does not have such boards of investigation in its military justice procedure.

An act of an Army officer, of which he has been cleared by a court of inquiry, may not be considered in classification proceedings, while the report of a Navy board of inquiry may be considered by a board of examination.

2. Convening Authority

Only persons authorized to convene Navy general courts-martial may convene Navy courts of inquiry, while under the Articles of War, the President or any commanding officer may convene courts of inquiry. However, an Army commanding officer may only convene a court of inquiry at the request of the person whose conduct is to be inquired into, and if the commanding officer refuses, the petitioner may appeal to the next higher authority.

3. Composition

No difference as to number of members.

The Navy court of inquiry has a counsel, while the Army court of inquiry has a recorder, who performs functions similar, but not as extensive, as the Navy counsel.

4. Parties

In an Army court of inquiry, the only "party" is a person in actual service whose conduct is being inquired

into, while in a Navy court of inquiry, any person subject to the AGN, or in the employ of the naval service, whose conduct is being inquired into or who has an interest in the subject of inquiry, is a "party."

When a Navy court-martial is ordered as a result of a complaint, the complainant may be allowed to be present and make suggestions.

5. Procedure

As to oaths, see C.S., A. W. 19.

The power to summon and examine witnesses is the same as for courts-martials. See C.S., A. W. 22, 23.

Procedure as to challenges is the same, as both allow only challenges for cause.

The provisions to the authentication of records are the same, except that the A. W. make no provision for authentication when the president is disabled.

IV. Recommendations

McGuire Articles:

"Article 7. Courts of inquiry.

"(a) Convening authority. Courts of inquiry may be convened by any person authorized to convene a general court-martial.

"(b) Constitution. (1) A court of inquiry shall consist of three (3) or more commissioned officers of the naval service or of organizations serving as a part of the Navy.

"(2) For every court of inquiry, the convening authority shall appoint a recorder.

"(c) Powers. Courts of inquiry shall have power to summon witnesses, administer oaths, and punish contempts, in the same manner as general courts-martial. They shall make findings of facts, and, when required so to do, express opinions and make recommendations."

"Article 8. Investigations. Boards of investigation and one-officer investigations may be convened and appointed by such officers, and under such rules and regulations, as the Secretary of the Navy may determine."

White Articles:

"Article 15. Courts of Inquiry, Boards of Investigation, Investigations.

"(a) Convening authority and composition. Courts of inquiry may be convened by any person authorized to convene general courts-martial. A court of inquiry shall consist of three or more commissioned officers of the naval service or of organizations serving with the Navy. For every court of inquiry, the convening authority shall appoint a judge advocate who shall have powers similar to the judge advocate of general courts-martial.

"(b) Boards of investigation and investigations conducted by one officer may be convened by such officers, and under such rules and regulations, as the Secretary of the Navy may prescribe.

"(c) Powers. Courts of inquiry, boards of investigation and investigations conducted by one officer shall have power to summon witnesses and administer oaths. They shall make findings of facts, and when required so to do, express opinions and make recommendations."

The Keefe, Ballantine, and Vanderbilt Reports make no recommendations as to courts of inquiry.

Uniform Code of Military Justice

Subject: Composition

See C.S., A. W. 97 -- Courts of Inquiry

Uniform Code of Military Justice

Subject: Challenges.

See C.S., A. W. 97 -- Courts of Inquiry.

Uniform Code of Military Justice

Subject: Oath of Members and Recorders.

See C.S., A. W. 97 -- Courts of Inquiry.

Uniform Code of Military Justice

Subject: Powers; Procedure.

See C.S., A. W. 97 -- Courts of Inquiry.

Uniform Code of Military Justice

Subject: Opinion on Merits of Case.

See C.S., A.W. 97 -- Courts of Inquiry.

Uniform Code of Military Justice

Subject: Record of Proceedings--How Authenticated.

See C.S., A. W. 97 -- Courts of Inquiry.

Uniform Code of Military Justice

Subject: Disciplinary Powers of Commanding Officers. A. W. 104.

I. Army Provisions

1. Articles of War

"ART. 104. Disciplinary Powers of Commanding Officers.--Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week; and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

2. Manual for Courts-Martial

"Par. 105. DISCIPLINARY POWER OF COMMANDING OFFICER--Authority; Policy; Effect of Errors.--

"For statutory basis of authority, see A. W. 104. Subject to the provisions of A. W. 104 and of this chapter, the commanding officer of any detachment, company, or higher command may,

for minor offenses, without the intervention of a court-martial, impose disciplinary punishments upon persons of his command, who are subject to military law, including officers. This authority of a commanding officer can not be delegated, but communications with respect thereto may be signed or transmitted by him personally or as provided for official communications in general.

"Whether or not an offense may be considered as 'minor' depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense.

"A. W. 104 and the provisions of this chapter do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer is authorized and expected to use in order to further the efficiency of his command, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, etc., written or oral, not intended or imposed as a punishment for a military offense. The fact that admonition and reprimand are termed disciplinary punishments by A. W. 104 does not deprive a commanding officer of the power he had prior to the enactment of that article to make use of admonition and reprimand, not as a penalty but as a purely corrective measure, more analogous to instruction than to punishment, in the strict line of his duty to create and maintain efficiency. A commanding officer should resort to his power under A. W. 104 in every case where punishment is deemed necessary and where that article applies, unless it is clear that punishment under that article would not meet the ends of justice and discipline. Superior commanders should restrain any tendency of a subordinate commander to resort unnecessarily to court-martial jurisdiction for the punishment of offenders.

"Any failure to comply with the regulations in this chapter will not invalidate a punishment imposed under A. W. 104, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly nor impliedly waived."

"Par. 106. Punishments.--

"Except as otherwise prescribed, the immediate commanding officer of the accused is charged with the execution of punishment imposed pursuant to A. W. 104. He has power to suspend the execution of such punishment and to vacate such suspension.

"Hard labor will not be imposed or enforced as a punishment against any person of actual, relative, or assimilated rank above that of a private, first class, in the Army, and no form of punishment is permitted which tends to degrade the rank of the person on whom such punishment is imposed. Punishments will be strictly enforced. Any failure in this respect has, if anything, a worse effect on discipline than an unwarranted condonation of the offense for which the punishment was imposed."

"Par. 107. DISCIPLINARY POWER OF COMMANDING OFFICER--Procedure.--

"The commanding officer, after ascertaining to his satisfaction, by such investigation as he deems necessary, that an offense cognizable by him under A. W. 104 has been committed by a member of his command, will notify such member of the nature of such offense as clearly and consisely as may be, and inform him that he proposes to impose punishment under A. W. 104 as to such offense unless trial by court-martial for the same is demanded. The notification and information will be by written communication through proper channels in the case of an officer and may be by such communication in any case. If the notification, etc., is in writing, the accused will be directed to acknowledge receipt of the communication by indorsement through the proper channels and to include in the indorsement any demand for trial wishes to make. If the notification, etc., is not in writing, the accused will be given a reasonable time to make up his mind.

"With reference to each offense as to which no demand for trial by court-martial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. (See 108.) If the original notification and information were in writing, the notification of the punishment imposed and any reprimand or admonition that may be included in such punishment, will be by indorsement on the communication carrying such original notification, etc., and the accused will be directed to acknowledge receipt by similar indorsement, and to include in his indorsement the date of such receipt, and any appeal (see 108) he may desire to make. If the notification of the punishment imposed is not in writing, the immediate commanding officer of the accused will be informed of the matter and given the necessary data for the record (see 109) of punishment."

"Par. 108. DISCIPLINARY POWER OF COMMANDING OFFICER--Appeals.--

"A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. (A. W. 104.) An appeal not made within a reasonable time may be rejected by the 'next superior authority.' An appeal will be in writing through proper channels (see 107 as to appeal by indorsement), and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record (see 109) in the case. The superior will, in passing upon the appeal, ordinarily hear no witnesses. When justice requires such action, he will modify the punishment or set it aside, but will not increase it, and will in no case award a different kind of punishment. After having considered the appeal, he will return the papers through channels to the appellant, with a statement of the disposition of the case and with direction to return the papers to his (the appellant's) immediate commanding officer for file with the record in the case."

"Par. 109. DISCIPLINARY POWER OF COMMANDING OFFICER--Miscellaneous.--

"The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. Applications for mitigation or remission and any action taken under this authority will be in writing and subject to the regulations as to appeals as far as applicable.

"As to each offense for which punishment is imposed under A. W. 104, the immediate commanding officer of the person on whom such punishment was imposed will cause a record to be made and filed in his office or other proper place, showing the offense, with date and place of commission; the punishment, with the authority that imposed it and the date the accused received the notice of the imposition of the punishment; the decision of higher authority on any appeal; any mitigation or remission of the punishment; and any remarks or additional data desired....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.--

"Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon

persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.

"A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 24. Punishments by order of commander.--

"No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement, and such suspension, arrest, or confinement shall not continue longer than ten days unless a further period is necessary to bring the offense to trial by a court-martial; nor shall he inflict, or cause to be inflicted, upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:

"First. Reduction of any rating established by himself.

"Second. Confinement not exceeding ten days, unless further confinement be necessary, in the case of a prisoner to be tried by court martial.

"Third. Solitary confinement, on bread and water, not exceeding five days.

"Fourth. Solitary confinement not exceeding seven days.

"Fifth. Deprivation of liberty on shore.

"Sixth. Extra duties.

"No other punishment shall be permitted on board of vessels belonging to the Navy, except by sentence of a court martial. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log."

"ART. 25. Punishments by other officers.--

"(a) All officers of the Navy and Marine Corps who are authorized to order either general or summary courts martial shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel.

"(b) No officer who may command by accident, or in the absence of the commanding officer, except when such commanding officer is absent for a time by leave, shall inflict any other punishment than confinement."

2. Naval Courts and Boards

No discussion except as to double jeopardy.

3. Naval Justice

"Sec. 8-1. Nature and function of the mast.

"The mast is essentially a formal investigation or inquiry by the commanding officer for the purpose of enabling him to make certain determinations necessary to properly exercise his authority to maintain discipline.

"The determinations which the commanding officer must make in order to dispose of a report of misconduct are as follows: (1) a determination of the facts, (2) a determination of the offense committed, and (3) a determination of action to be taken. These three determinations and the action predicated upon them constitute the exercise of authority to maintain discipline. Although in a strict sense the action taken is not a part of the investigation, it can best be considered in connection with the mast, and, generally speaking, is referred to as mast action, or in case it takes the form of commanding officer's punishment, as mast punishment. The exercise of this authority is only quasi-judicial in nature, and the investigation or inquiry is in no sense a trial; the determinations

do not result in an acquittal or conviction, and the mast action or mast punishment is not a sentence."

Sec. 8-2 - 8. (Synopsis)

Upon a complaint against a person under his command, the commanding officer will conduct an investigation to enable him to decide whether an offense has been committed and to make a sound disposition of the case. All possible evidence should be examined. The commanding officer is not bound by the technical rules of evidence in the interrogation of witnesses at mast. The accused person should be given every opportunity to explain his side of the case, but cannot be required to admit his guilt or incriminate himself.

Sec. 8-4 - 8-6.

After determining the facts the commanding officer should determine what offense, if any, has been committed. If an offense has been committed he shall take appropriate action: - (1) dismiss or warn accused; (2) give mast punishment; or (3) refer for court-martial.

In considering whether the offense should be punished under AGN Art. 24, the nature of the offense and the customary punishment for it must be taken into consideration.

"Sec. 8-6.Policy.

"Commanding officers should bear in mind that it is the certainty of punishment as well as the degree which deters men from committing offenses, and that punishment which immediately follows an offense has a greater deterrent effect than punishment which follows a considerable time after an offense. The Navy Department's statement of policy in this regard is contained in AlNav 83, 1942, which read as follows:

'In interest of reducing paper work and better administration of naval justice, Department directs that all commands utilize to a greater degree mast punishments rather than summary or deck courts-martial and trial by deck rather than summary courts-martial and by summary rather than general courts-martial in cases of infractions by enlisted men of the Navy, Marine Corps, and Coast Guard when such action will accomplish the ends of discipline.....'

"In construing AlNav 83, action which will accomplish the ends of discipline is considered to be action which will deter other men of the command from committing the offense with which the accused is charged as well as deter the accused from again committing the offense."

"Sec. 8-8. Function and use of mast punishment.

"Many infractions of the law occur from time to time in any command which require some punishment but which are not sufficiently serious to warrant trial by court-martial. To provide a prompt and efficient method of disposing of such offenses, commanding officers are empowered to impose limited forms of disciplinary punishment directly upon persons of their command without the intervention of a court-martial. Such disciplinary punishment is commonly known as mast punishment inasmuch as it usually follows immediately upon the mast investigation without intervention of time. In invoking this punishment a commanding officer must carefully adhere to the provisions of Article 24, AGN, since it is a provision of law restrictive in its character, prescribing the limits within which the disciplinary power inherent in command may be exercised."

"Sec. 8-13. Procedure for imposing mast punishment.

"After the commanding officer has determined that he will punish the accused under Article 24, AGN, and has decided the appropriate punishment, he advises the accused of the offense, which he believes has been committed and of the punishment to be imposed therefor. In the case of enlisted man, notification of the punishment should be furnished the executive officer, officer of the day, the man's division officer, the provost marshal, or other agency, as deemed necessary."

"Sec. 8-14. Records of reports and commanding officer's punishments.

"Navy Regulations require that a log shall be kept of all reports and commanding officer's punishments, and that the commanding officer shall affix his signature in the report book. Article D-8017(1), Bureau of Naval Personnel Manual, 1942, requires that a record of all punishments awarded shall be entered in the service record of an offender....."

"Sec. 8-15. The effect of punishment by the commanding officer.

"The fact that punishment under Article 24, AGN, has been imposed upon an enlisted man or an officer may be taken into account by his commanding officer in connection with other matters affecting him in the future. Ordinarily in the case of an enlisted

man the effect will not extend beyond his current enlistment or current extension thereof.

"Future disciplinary action.

"Record of a previous punishment under Article 24, AGN, will often be an important factor to be considered by the commanding officer in deciding what disciplinary action would be appropriate for a subsequent offense. Likewise, the commanding officer, in his capacity as convening authority of a court-martial, will take into account such prior punishment in determining whether a subsequent sentence by court-martial should be mitigated.

"As a bar to trial.

"No person under naval law may, without his consent, be tried twice for the same offense. It has been held that the action of a commanding officer in imposing punishments under Article 24, AGN, does not take the status of a court-martial, that his investigation of an offense is in no sense a trial, that his finding is not a conviction or acquittal, and that the punishment which he imposes is not a sentence. The commanding officer's power in this respect has been likened to the power of a parent over his child, or of a master over his apprentice, or of a school teacher over his scholar. To constitute former jeopardy, there must have been a trial by a duly constituted court, and, therefore, punishment imposed by the commanding officer, under the provisions of Article 24, AGN, does not bar subsequent proceedings by court-martial for the same offense. However, the same fundamental principle of fairness which precludes double jeopardy should be the basis for any determination of the commanding officer as to whether he will order the convening of a court-martial for the trial of a man for an offense which has been properly punished by him, under Article 24, AGN.

"As a previous conviction.

"As noted in the preceding paragraph, punishment by the commanding officer under Article 24, AGN, does not constitute a conviction for any offense. It logically follows, therefore, that a record of a punishment under Article 24, AGN, cannot be introduced in evidence in a subsequent trial by court-martial nor considered by the court against the accused.

"Conduct marks.

"Conduct marks for an enlisted man in any period must be based solely upon the man's behavior during that period. A record of an offense for which punishment is awarded by a commanding officer under Article 24, AGN, during a period under consideration will affect the conduct mark in accordance with the standard established in Article D-8020, Bureau of Naval Personnel Manual, 1942. Since an advancement to any rating requires 4.0 conduct

for a specified period, a record of punishment under Article 24, AGN, during such period will preclude an advancement in rating.

"Punishment of an officer under the provisions of Article 24, AGN, may be taken into account by the commanding officer in his preparation of the officer's fitness report."

4. Proposed Navy Bill

"ART. 14.

"(a) No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement, and such suspension, arrest or confinement shall not continue longer than ten days unless a further period is necessary to bring the offender to trial by a court martial; nor shall he inflict, or cause to be inflicted, upon any enlisted person, for a single offense, or at any one time, any other than one of the following punishments, namely:

"First. Reduction to the next inferior rank or rating;

"Second. Solitary confinement on bread and water not exceeding five days, to run consecutively;

"Third. Confinement not exceeding ten days, to run consecutively, unless further confinement be necessary, in the case of a prisoner to be tried by court martial;

"Fourth. Deprivation of liberty on shore for a period not exceeding one month;

"Fifth. Extra duties not exceeding one month;

No other punishment shall be permitted on board of vessels belonging to the Navy, except by sentence of a court martial. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log.

"(b) All officers who are empowered to convene summary courts martial shall have the same authority as that of a commander of a vessel to inflict punishments for minor offenses committed by persons regularly or temporarily under their command: Provided, That such officers may delegate to their subordinate officers on separate or detached duty the authority to inflict the punishments set forth in article 14 (a).

"(c) As an alternative to a punishment provided for in this article, loss of pay, not exceeding one-half of one month's pay, may, in time of war or national emergency or, when specifically

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authorized by the Secretary of the Navy, in time of peace, be inflicted as a punishment, for a single offense, or at any one time.

"(1) upon any officer by an officer having authority to convene a general court martial for the trial of the offender,

"(2) upon any enlisted person by an officer having authority to convene a summary court martial for the trial of the offender:

Provided, That a full report be made of the infliction under this article of any punishment involving loss of pay,

"(1) to the Secretary of the Navy by the officer inflicting this punishment upon an officer,

"(2) to the next senior officer in the chain of command by an officer inflicting this punishment upon an enlisted person.

"(d) No officer who may command by accident, or in the absence of the commanding officer, except when such commanding officer is absent for a time by leave, shall inflict any other punishments than confinement or suspension from duty."

III. Differences

1. Punishing Authority

The amended Articles of War authorize the commanding officer of any detachment or company or higher command to impose punishment under A. W. 104, while the proposed Navy bill authorizes the commander of a vessel or an officer empowered to order a summary court-martial to impose mast punishment. An Navy officer having summary court-martial jurisdiction may delegate his power to impose mast punishment, except loss of pay, to subordinate officers on separate or detached duty.

A Navy officer commanding by accident may only impose confinement or suspension from duty.

2. Punishments

	<u>ARMY</u>		<u>NAVY</u>	
	<u>EM</u>	<u>Officer W.O.</u>	<u>EM</u>	<u>O</u>
(1) Admonition or Reprimand	Yes	Yes	No	Yes
(2) Withholding of Privileges	One week	One week	No	No
(3) Restriction	One week	One week	One month	No
(4) Hard Labor w/o confinement	One week	One week? ¹	Included under (5)?	No
(5) Confinement	No	No	Ten days	Ten days
(6) Solitary confinement on bread and water	No	No	Five days	No
(7) Extra duties	One week	?	One month	No
(8) Reduction to next inferior rank or rating (EM)	No	No	Yes	No
(9) Arrest	No	No	No	Ten days
(10) Suspension from duty	No	No	No	Ten days
(11) Forfeiture of Pay	No	One-half pay for 3 months by officer having GCM jurisdiction. ²	One-half pay for one month by officer having SCM jurisdiction. ³	One-half pay for one month by officer having GCM jurisdiction. ³

Combinations: Navy - none

Army - (2), (3), (4), & (7) cannot be combined to exceed one week. Otherwise, O.K.

- Notes:
1. MCM, Par. 103c, forbids sentencing officer or warrant officer to hard labor w/o confinement.
 2. Officer below rank of brigadier general.
 3. In time of war, national emergency or when specifically authorized by SecNav in time of peace - When loss of pay is inflicted, a report must be made to SecNav in an officer case, or to the next superior in chain of command in the case of an enlisted person.

3. Right to Trial by Court-Martial.

The amended Articles of War provide that if the accused demands trial by court-martial, he may not be punished under A. W. 104, while the proposed Navy bill does not contain such a provision.

4. Right of Appeal.

A person punished under A. W. 104 has the right of appeal, through channels, to the next superior authority, while the proposed Navy bill gives no such right other than the general provision as to complaints of wrongs. See C.S., A.W. 121.

5. Remission, Mitigation, Suspension.

A. W. 104 provides for remission, mitigation, or suspension of punishment imposed thereunder by the officer imposing it, his successor, or superior authority, while the proposed Navy bill has no such provision.

6. Subsequent Trial by Court-Martial.

Punishment under A. W. 104 is not a bar to trial for a serious offense growing out of the same act and not properly punishable under that article. In such a case, the accused may show disciplinary punishment which shall be considered in determining punishment.

Under the proposed Navy bill, mast punishment is never a bar to trial, and cannot be shown on a subsequent trial by court-martial.

IV. Recommendations

The McGuire Committee recommended abolition of deck courts and an increase in mast jurisdiction and the antecedent right to demand trial by a summary court-martial.

McGuire Articles:

"II. Commanding Officers

"Article 2. Punishments by commanding officers.

"(a) Officers authorized. Every officer of the naval service, or of an organization serving as a part of the Navy, who is authorized to convene either general or summary courts-martial, may, after an impartial hearing, impose upon personnel regularly or temporarily under his command, for the commission of one or more offenses against these articles, such punishments, and none other as are specified in this article.

"(b) Upon officers. Upon a commissioned or warrant officer, at any one time, one and only one of the following punishments may be imposed:

"(1) Suspension, arrest, or confinement for not exceeding ten days, unless a further period is necessary to bring the offender to trial by court-martial;

"(2) Loss of pay not exceeding ten day's pay;

"(3) Private reprimand.

"(c) Upon enlisted persons. Upon an enlisted person, at any one time, one and only one of the following punishments may be imposed:

"(1) Reduction to the next inferior rank or rating;

"(2) Confinement for not exceeding fifteen days, unless a further period is necessary to bring the offender to trial by court-martial;

"(3) Solitary confinement for not exceeding ten days;

"(4) Loss of pay not exceeding fifteen day's pay;

"(5) Deprivation of liberty for not exceeding thirty days;

"(6) Extra duties for not exceeding thirty days, the performance of which shall not involve deprivation of liberty.

"(d) Procedure. (1) Under such regulations as the Secretary of the Navy may prescribe, the commanding officer shall, before imposing punishment, afford the offender an opportunity to demand trial by court-martial. Should such demand be made, the offender shall, as a matter of right, be given a trial by court-martial.

"(2) Punishment imposed by a commanding officer shall be a bar to trial by court-martial of the offender for the offense or offenses for which the punishment was imposed.

"(3) The commanding officer who imposes a punishment, or his successor in office, shall have the power to mitigate or remit any unexecuted portion of that punishment."

White Articles:

"Commanding Officers

"Article 7 - Punishments by commanding officers.

"(a) Officers authorized. Every officer in command may inflict upon personnel regularly or temporarily under his command such

punishments, and one other, as are specified in this article. But no officer who may command by accident, or in an absence of the commanding officer not due to authorized leave, shall inflict any punishment other than confinement and suspension from duty.

"(b) Upon officers. Upon a commissioned or warrant officer, the following punishments may be inflicted:

"(1) Suspension, arrest, or confinement for a period not exceeding ten days, unless a further period is necessary to bring the offender to trial by court-martial;

"(2) Private reprimand.

"(c) Upon enlisted persons. Upon an enlisted person, at any one time, one and only one of the following punishments may be inflicted:

"(1) Reduction of any one rating established by himself;

"(2) Confinement for a period not exceeding ten days, to run consecutively, unless a further period is necessary to bring the offender to trial by court-martial;

"(3) Solitary confinement on bread and water for a period not exceeding five days, to run consecutively:

"(4) Loss of pay not exceeding ten day's pay;

"(5) Deprivation of liberty on shore for a period not exceeding thirty days, to run consecutively;

"(6) Extra duties for a period not exceeding fifteen days, to run consecutively;"

First Ballantine Report:

"Mast Punishment

"34. Authorized punishments. Loss of pay is not an authorized mast punishment. Loss of pay is, however, frequently a most appropriate punishment. Aboard small ships confinement may be carried out only with considerable difficulty. A commander of such a vessel may in effect be compelled to convene a deck court so that loss of pay may be adjudged. This procedure is not only unnecessarily cumbersome, but has the effect of increasing the punishment of the offender, since, if found guilty by a deck court his record will show a 'conviction.' Ordinarily, the loss of one day's pay is considered a disciplinary equivalent for one day's confinement. It would be desirable to provide greater flexibility, with no actual

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increase in disciplinary powers, by authorizing a commanding officer to inflict a comparable loss of pay as one of the alternative forms of punishment."

"Recommendation: An amendment of Article 24 of the Articles for the Government of the Navy should be sought including in the punishments which may be inflicted loss of pay not exceeding ten days."

The Second Ballantine Report recommends the schedule of mast punishments as under the present AGN.

The Keefe Report recommends that:

"(2) Consideration be given by the Advisory Council to a provision that punishment imposed by a commanding officer be a bar to trial by court martial for the same offense, but not a bar to trial for another offense growing out of the same act or omission."

In regard to discrimination in officer punishment, the Vanderbilt Report recommends:

"1. Article of War 104 should be amended to provide: (a) that warrant officers, flight officers, and field officers shall be punishable thereunder; (b) that the punishment shall be imposed by an officer with the rank not less than that of Brigadier General or by an officer who has general court-martial jurisdiction under Article of War 8; (c) that the maximum fine be increased to one-half month's pay for each of three months.

"The right of the officer to demand a court-martial and to appeal to the next higher commander should of course be preserved."

"It has been tentatively proposed in Articles for the Government of the Navy, as redrafted on 17 May 1948, to amend these provisions further in the following manner:

"a. The infliction of arrest as a punishment should be deleted. (Art. 14 (a)).

"b. The provision as to the authority for confinement greater than ten days in case of a prisoner to be tried by court martial should be deleted. (Art. 14 (a)).

"c. The term 'deprivation of liberty on shore' should be changed to 'close confinement within limits.' (Art. 14 Third).

"d. An officer who exercises command, or is in charge, during the temporary absence of the officer regularly in command or in charge, except when such absence is pursuant to authorized leave or orders, shall be limited in inflicting punishment to confinement and suspension from duty."

Uniform Code of Military Justice

Subject: Redress of Injuries to Property, A.W. 105.

I. Army Provisions

1. Articles of War.

"ART. 105. Injuries to Property--Redress of.-- Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization of detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board."

"ART. 89. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct."

2. Manual for Courts-Martial.

"Par. 147. EIGHTY-NINTH ARTICLE OF WAR.

"d. REFUSING OR OMITTING TO SEE REPARATION MADE

"Discussion.-- Refusing to entertain a proper complaint at all; refusing or omitting to convene a board for the assessment of damage; or to act on such proceedings, or to direct the proper stoppages, are instances of this offense.

"Proof.--(a) That the accused was the commanding officer of a certain command in quarters, garrison, camp, or on the

march, as alleged; (b) that a complaint was duly made to him by a certain person of damage to or loss of certain property occasioned by troops of the accused's command, as alleged; and (c) that the accused either refused to see reparation made, or omitted in the manner alleged to see reparation made, to the party injured in so far as the offender's pay would go toward such reparation."

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

No comparable provisions.

III. Differences

The A.G.N. contains no provision for reparation for injuries to property.

IV. Recommendations

The McGuire, White, Ballantine, Keeffe, Vanderbilt, and Navy JAG recommendations do not comment on reparation for injuries to property.

The Statutory Revision Group of the Office of the Army Comptroller suggests that since A. W. 105 has only a collateral relationship to military justice, it might be omitted from the Articles of War and placed elsewhere in the U.S. Code, Letter CSACM-L, 6 Aug. 48.

Uniform Code of Military Justice

Subject: Arrest of Deserters by Civil Officials.
A. W. 106.

I. Army Provisions

1. Articles of War

"ART. 106. Arrest of Deserters by Civil Officials.--It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States."

2. Manual for Courts-Martial

"Par. 23. COURTS-MARTIAL--PROCEDURE BEFORE TRIAL-- Arrest of Deserter by Civilians--Civilians generally.--A private citizen has no authority as such, without the order or direction of a military officer, to arrest or detain a deserter from the Army of the United States (Kurtz v. Moffitt, 115 U. S. 487); but sending out a description of a deserter with a request for his arrest and the offer of a reward for his apprehension and delivery, coupled with the provisions of law and regulations authorizing the payment of such reward, is sufficient authority for the arrest of a deserter by a private citizen."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 106 was not changed by P. L. 759.

II. Navy Provisions

1. There are no provisions in the present A.G.N., the proposed Navy bill, nor NC&B dealing with the arrest of deserters by civil officials.

2. U. S. Code Annotated, Title 34, Navy.

"Sec. 1011. Arrest of deserter by civil officers.--It shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities. (Feb. 16, 1909, c. 131, § 15, 35 Stat. 622.)"

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III. Differences

1. The Navy provision analogous to A. W. 106 appears only in 34 USCA 1011.

IV. Recommendations

None.

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Uniform Code of Military Justice

Subject: Soldiers to Make Good Time Lost, A. W. 107.

I. Army Provisions

1. Articles of War

"ART. 107. Soldiers to Make Good Time Lost.-- Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

No similar provisions in A.G.N.

Similar provisions are incorporated in 34 U.S.C. 183, 183a.

III. Differences

Navy has no corresponding provisions in A.G.N., but Title 34, U.S. Code contains like provisions.

IV. Recommendations

There is no comment in the McGuire, White, Ballantine,

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Keeffe, or Vanderbilt Reports or Navy JAG recommendations.

The Statutory Revision Group of the Office of the Army Comptroller indicates that this provision is only collateral to military justice and might be placed elsewhere in the U.S. Code. Letter CSACM-L, 6 Aug. 48.

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Uniform Code of Military Justice

Subject: Discharges. A.W. 108.

I. Army Provisions

1. Articles of War

"ART. 108. Soldiers--Separation from the Service.--No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."

2. Manual for Courts-Martial

Par. 87(b)

"Dishonorable discharge, in itself a severe punishment, should be approved only when it is clear that the accused should be separated from the service or that he should be required to undergo a period of reformatory discipline before he can again be permitted to serve in an organization composed of honorable men. When the accused is relatively young and his record, except for the offense of which he stands convicted, is good, the reviewing authority should, in the exercise of his sound discretion, suspend the execution of the dishonorable discharge, to the end that the offender may have an opportunity to redeem himself in the military service; but he should not suspend the execution of the dishonorable discharge in any case of conviction of an offense involving that degree of moral turpitude which disqualifies the accused for further military service.".....

Par. 104(b)

"A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against an accused:

"Confinement at hard labor for a period greater than six months.

Par. 104(c) "Maximum Punishments....."

"Permissible additional punishments.--If an accused be found guilty by the court of an offense or offenses for none of which dishonorable discharge is authorized, proof of five or more pre-

vious convictions will authorize dishonorable discharge, total forfeitures, and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months.

"If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures.".....

3. Public Law 759--80th Congress, Chapter 625--2D Session.

"ART. 108. SOLDIERS--SEPARATION FROM THE SERVICE.--

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

"ART. 12. GENERAL COURTS-MARTIAL.--.....

"Provided, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

"ART. 13. SPECIAL COURTS-MARTIAL.--.....

"Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: Provided further, That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case."

II. Navy Provisions

1. Articles for the Government of the Navy.

No similar article. See 34 U. S. C. 191-206.

2. Naval Courts and Boards.

SEC. 444.....

"Where the court deems an offense found proved serious enough to warrant a sentence of imprisonment it should, except under most unusual circumstances, or where not allowed by the limitation of punishment, include in its sentence dismissal or dishonorable or bad conduct discharge; a man who has committed such an offense is not a proper person to remain in the service. Furthermore, such a sentence puts the accused in prison in a status altogether different from that of the other prisoners. A court must be careful in sentencing to confinement to include accessories in its sentence, as otherwise the man will continue to draw full pay.

"The stigma of a dishonorable discharge is in itself a severe punishment. Its use should, therefore, be reserved for those cases where it is entirely proper that this stigma should attach."

SEC. 456. "Restriction upon sentences involving dishonorable discharge.--

"Special attention is invited to the fact that wherever in the accompanying table a dishonorable discharge is authorized, the court, if desiring to adjudge a discharge, need not adjudge a dishonorable discharge, but may in lieu thereof adjudge a bad conduct discharge. In general, dishonorable discharges should be reserved for crimes involving moral turpitude or the serious military or naval crimes."

SEC. 476.

It is desirable that sentences of discharge be conditionally remitted for first offenses not of a serious nature.

SEC. 623, note 24.

A general court-martial may sentence an enlisted man to dishonorable (bad-conduct) discharge alone, but this sentence is not ordinarily deemed advisable.

3. Proposed Navy Bill.

No similar article.

III. Differences

The Navy has no provision comparable to A. W. 108.

The provisos of A.W. 12 and 13 quoted above merely serve to authorize Army General and special courts-martial to adjudge bad-conduct discharges. This authorization might be placed elsewhere since this is the only punishment mentioned in those articles.

Under Army practice, a general court-martial may impose a sentence of dishonorable discharge.

- (1) When confinement greater than six months is imposed. (mandatory).
- (2) On conviction of six minor offenses within one year. (Permissible).
- (3) On conviction of two offenses for which the total authorized confinement is six months or more. (Permissive).
- (4) Here authorized. (Permissive).

Under Navy practice, as a general rule, a person should be given a dishonorable or bad-conduct discharge if sentenced to imprisonment.

In the Navy Table of Maximum Punishments either dishonorable discharge or bad-conduct discharge is authorized for every offense.

However, it is also Navy policy to conditionally suspend discharges for first offenders, if the offense is not of a serious nature. Army policy is the same.

IV. Recommendations

The First Ballantine Report:

"Bad conduct discharges. A review of the records of a representative number of cases discloses that bad conduct discharges are awarded in approximately 20% of the total number of cases. Although the discharges so awarded are remitted on probation in approximately 85% of the cases, the practice is subject to objection. First, since a summary court may, except for loss of pay and extra police duties, sentence an offender to only one punishment, the remission, on probation or otherwise, of the bad conduct discharge necessarily results in the offender's escaping serious punishment. Second, a bad conduct discharge is infrequently an appropriate punishment in time of war. The loss of manpower involved is to be deplored. The offender who receives this punishment is placed in an anomalous position under the Selective Service Law. The position of the Navy is no less anomalous since in certain circumstances it may subsequently accept

the offender back into the service. If the offender is not accepted by any branch of military service, the ultimate punishment is restoration to civilian life with little difficulty in obtaining a safe and comparatively lucrative position. The possibility that there are some men in the service who would welcome such punishment should not be overlooked. In many instances, the offenders might more appropriately be sent to rehabilitation centers, or, if the particular circumstances warrant, to active combat areas. The Army 'special court martial,' referred to above, has no power to adjudge discharge.

"Recommendation: As a matter of policy, bad conduct discharges should not be adjudged except in cases where the offense involves moral turpitude, or where the accused is neither presently nor prospectively of any value to the service."

The Keefe Report:

"2. Discharges: The types of naval discharges are numerous and the distinctions between them are but little understood by the general public, and, it would seem, by most members of the naval service. This is one of the reasons the Board hesitated to recommend immediate discharge in many cases, or a change in the form of discharge, although in a very few cases its recommendation took this form.

"This much seems to be true under the various statutes and regulations relating to discharges:

"Under the Selective Service Act a man discharged from the Navy with either a dishonorable discharge or a bad conduct discharge is barred from public employment by the United States Government. It does not seem to matter, in the case of a Bad Conduct Discharge, whether it was awarded by a summary or a general court martial.

"Any dishonorable discharge or bad conduct discharge from a general court martial will deprive a man of benefits under the Servicemen's Readjustment Act of 1944. A Bad Conduct Discharge from a summary court if for mutiny, spying, moral turpitude or wilful and persistent misconduct may also rob a man of the benefits under this Act. In certain other cases an undesirable discharge will cause loss of these benefits.

"A collateral statute, often confused by the public with the statute relating to discharges, renders a person ineligible to become a citizen, or, if he is already a citizen, deprives him of his citizenship, and renders him incapable of holding any federal office, if he has been convicted by a court martial of desertion in time of war. A recent amendment provides that restoration to active duty, or reenlistment or induction, in time of war, shall serve to restore the nationality or citizenship, and the civil and political rights, so lost.

"Although this statute relates to the offense, as evidenced by conviction thereof, rather than to the form of discharge, it becomes important to consider it in connection with the subject of discharges, because of the recent amendment. For, by virtue of this amendment, restoration to duty has the effect of restoring the citizenship previously lost. Conversely, a failure to restore a convicted deserter, and execution of his discharge, renders permanent his loss of citizenship.

"Because of the above serious consequences of a dishonorable or bad conduct discharge, and of a discharge based upon a conviction of wartime desertion, the Board has suggested, in Section VII of this Report, that a dishonorable or bad conduct discharge be executed only upon order of the Secretary, or his duly designated representative. Such a procedure has already been proposed by the McGuire, White, Judge Advocate General, and Tedrow-Finn draft articles. It is contemplated that execution of such a discharge would be ordered only after review by the proposed Sentence Review Board.

"There is another reason why this procedure would be advisable. A dishonorable or bad conduct discharge of an enlisted man is comparable to the dismissal of an officer. Both have the same serious consequences. The latter can be carried into execution only after the case has been confirmed by the President or Secretary. To permit execution of a dishonorable or bad conduct discharge of an enlisted man without requiring a substantially equivalent review is to apply a double standard of justice. It is perhaps for this reason that all the draft articles which have been proposed provide for execution of a discharge only upon order of the Secretary, or his duly designated representative. The Board concurs in these proposals.

"It is believed that the Advisory Council should review the whole subject of discharges, in the light of the above discussion. The Advisory Council should also consider whether the discharge system could be simplified, and the number of different kinds of discharges reduced. In this connection, the Council should consider whether the bad conduct discharge should be continued and whether the summary court martial should continue to have the power to impose it.

"From time to time the Board's reviewers recommended that a dishonorable discharge be changed to a bad conduct discharge. The Board's reluctance to approve such recommendations was based principally upon its inability to discover any substantial difference between the two. As stated above, each such discharge from a general court martial deprives the recipient of public employment and benefits under the Serviceman's Readjustment Act of 1944. Under these circumstances the Board felt that there was no substantial reason to recommend a change in the form of discharge.

"On the question whether the summary court martial should

continue to have the power to impose a bad conduct discharge, the following statistics are of interest. They indicate that summary courts martial have used this form of punishment but sparingly.

<u>Month</u>	<u>Trials by Summary Court Martial</u>	<u>1946</u>		<u>Probation Granted (6 mos.)</u>
		<u>Bad Conduct Discharges</u>	<u>Approved</u>	
Jan.	4417	186	109	77
Feb.	3152	167	74	93
Mar.	4516	172	92	80
Apr.	3717	148	77	71
May	3392	140	80	60
June	2319	148	81	67
July	2718	104	64	40
Aug.	3038	138	76	62
Sept.	<u>1962</u>	<u>96</u>	<u>58</u>	<u>38</u>
<u>Totals</u>	29,231	1299	711	588

*Figures supplied by Captain Bunter Wood of the Bureau of Naval Personnel.

"It has been suggested that the power of the summary court martial to impose confinement be substantially increased. If this is done, it might remove the reason for that court having power to give a bad conduct discharge. On the other hand, it might be a reason why such power should be continued. There might, of course, be some increase in the number of trials by general court martial if the power to give a bad conduct discharge were taken away from the summary court martial.

"In any event, no bad conduct discharge, whether imposed by a general or a summary court martial should be carried into execution without review by a Sentence Review Board and the Secretary or his duly appointed representatives.

"The first Ballantine Report recommended that the summary court's power to impose a bad conduct discharge should be reconsidered. The Board believes that the proposed Advisory Council should study this question.

" RECOMMENDATION:

"The Board recommends that the Advisory Council study the whole subject of discharges, both disciplinary and administrative. Such study will be assisted greatly by the current study of Joint Army-Navy Personnel Board which we understand is considering the recommendation of uniform types of discharges for both services."

The Vanderbilt Report (Army) recommends:

"There should be an additional type of discharge; namely, a discharge for unfitness similar to a so-called "blue discharge" in order that a sentence of dishonorable discharge should be reserved for exceptionally grave and heinous offenses."

The Second Ballantine, McGuire, and White recommendations do not add to above.

A Memorandum for the Army JAG from the Statutory Revision Group, Management Division, OAC, dated 6 Aug. '48, indicated that since A. W. 108 has only a collateral relationship to military justice, it might be eliminated from the Articles of War and placed elsewhere in the U. S. Code.

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Uniform Code of Military Justice

Subject: Oath of Enlistment, A. W. 109.

I. Army Provisions

1. Articles of War

"ART. 109. Oath of Enlistment.-- At the time of his enlistment, every soldier shall take the following oath or affirmation: 'I, _____ do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War.' This oath or affirmation may be taken before any officer."

2. Manual for Courts-Martial

No comment.

3. Public Law 759--80th Congress, Chapter 625-2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

No like provision.

34 U.S.C. 593 provides that Navy officers and enlisted men shall take the oath of allegiance provided for officers and men of the Army and Marine Corps.

III. Differences

None except that oath is included in Articles of War and Title 34 U.S. Code.

IV. Recommendations

The Statutory Revision Group of the Army Comptroller's Office indicates that this provision might be omitted from the Articles of War. Letter CSAM-L, 6 Aug. '48.

Uniform Code of Military Justice

Subject: Certain Articles to be Read and Explained.
A. W. 110.

I. Army Provisions

1. Articles of War

"ART. 110. Certain Articles to be Read and Explained.--Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States."

2. Manual for Courts-Martial

"Par. 126. Courts-Martial--RULES OF EVIDENCE--Miscellaneous Matters.

"a. Intent--Ignorance of Law--Ignorance of the law is not an excuse for a criminal act. This rule may be partially relaxed by courts-martial in the trial for purely military offenses of soldiers recently enlisted.

"For example, a recruit might be permitted to show that the Articles of War had never been read to him as required by A. W. 110. While such evidence would not amount to a defense, it could be regarded by the court as an extenuating circumstance."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"Sec. 240. Article 110 is amended to read as follows:

"ART. 110. CERTAIN ARTICLES OF WAR TO BE READ OR EXPLAINED--Articles 1, 2, 24, 28, 29, 54 to 97, inclusive, 104 to 109, inclusive, and 121 shall be read or carefully explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read or explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. And a complete text of the Articles of War and of the Manual for Courts-Martial shall be made available to any soldier, upon his request, for his personal examination."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 20.....Every commanding officer of a vessel in the

Navy shall obey the following rules:

"Tenth (.....).-- He shall cause the Articles for the Government of the Navy to be hung up in some public part of the ship and read once a month to his ship's company."

2. Proposed Navy Bill

"Sec. 13. Article 20 is renumbered as Article 3 and amended to read as follows:

"Art. 3. Officers and all others in authority in the naval service shall take all necessary and proper measures, under the laws, regulations, and customs of the naval service to promote and safeguard the morale, the physical well-being and the general welfare of the officers and enlisted persons under their command or charge."

III. Differences

1. The provisions in the present A.G.N. for posting the Articles and reading them monthly to ship's company have been eliminated in the proposed Navy bill. It is understood that similar provisions will be contained in a new edition of Navy Regulations which is now being prepared.
2. Naval Courts and Boards does not contain any provision that if a man can show that A.G.N. have never been read to him, such evidence can be regarded by the court as an extenuating circumstance.

IV. Recommendations

1. Vanderbilt Report, page 12.

"Special emphasis should be placed upon the education and instruction of enlisted men with respect to Army justice. The Articles of War should not only be read; they should be explained. The instructions should not be confined to Articles relating to punishment of enlisted men, but should include the Articles dealing with the rights and the protection of enlisted men, such as Articles of War 24, 97, and 121.

"Further, the nature and the function of general courts-martial, special courts-martial, summary courts-martial, and company punishment should be explained. The enlisted man should be taught that army discipline and army courts-martial are necessary for his comfort, protection and safety; and that the Army judicial system is not something for use against him, but something which works for him."

2. Keoffe Report, page 289.

"Although it has been said by some that the reading of the Articles to an assembly of naval personnel fails to accomplish its purpose, nevertheless, it is felt that something is accomplished by this reading and that it should be improved rather than abolished."

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Uniform Code of Military Justice

Subject: Copy of Record of Trial, A. W. 111.

I. Army Provisions

1. Articles of War.

"ART. 111. Copy of Record of Trial.-- Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of trial."

2. Manual for Courts-Martial.

Par. 56..... "After the introduction of the accused and his counsel the reporter will be sworn, and the accused, in the case of trial by general court-martial, will be asked if he desires a copy of the record of trial."

Par. 85b..... Attached to record will be certificate of delivery or receipt for copy of record delivered to accused.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

No similar article.

2. Naval Courts and Boards.

"SEC. 521. Copy of record for accused.-- The accused is entitled to a copy of the proceedings of a general court martial, certified as true by the judge advocate. It is the duty of the judge advocate to furnish such copy upon completion of the trial and it shall be noted on the cover page that this has been complied with. The copy should contain a record of all the proceedings except the findings, sentence, recommendation to clemency, and action of the convening authority. These latter may be obtained by the accused, however, upon application to the Navy Department (J. A. G.).

"The accused is also entitled to a certified copy of a record in revision to the same extent as he is to a copy of the original proceedings."

"SEC. 522. Same: Receipt appended.-- The receipt of the accused for his copy of the proceedings shall be the last document appended to the record of a general court martial."

3. Proposed Navy Bill.

No similar provision.

III. Differences

Although both services furnish copies of the record of trial by general court-martial to the accused, the Army provision is statutory and the Navy provision by Regulation. However, the Army accused must ask for the copy, while the Navy accused is automatically furnished with a copy.

IV. Recommendations

The McGuire, White, Ballantine, Keefe, and Vanderbilt Reports make no comment.

Uniform Code of Military Justice

Subject: Disposition of Effects of Deceased, A.W. 112.

I. Army Provisions

1. Articles of War.

"ART. 112. Effects of Deceased Persons.-- Disposition of.-- In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

"The provisions of this article shall be applicable to inmates of the United States Soldier's Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

No corresponding article.

Title 34, U.S.C. 942 provides for disposition of effects of deceased naval personnel.

III. Differences

Since these provisions have no connection with military justice, differences will not be discussed.

IV. Recommendations

The Statutory Revision Group of the Office of the Army Comptroller recommends that this provision be placed elsewhere than in the Articles of War. Letter CSACM-L, 6 Aug. 48.

Uniform Code of Military Justice

Subject: Inquests. A. W. 113

I. Army Provisions

1. Articles of War.

"ART. 113. Inquests.-- When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

No corresponding article.

2. Naval Courts and Boards.

Par. 723. When to be convened (Court of Inquiry): "Loss of life from accident or under peculiar or doubtful circumstances.--

"In such cases it must be determined, if possible, whether the death was caused in any manner by the intent, fault, negligence, or inefficiency of any person or persons in the naval service or connected therewith. Where decedent was in the naval service or connected therewith the court or board will be required to give its opinion whether or not death was in the line of duty and due to misconduct (in this connection see Chapter IX), and will always find and record the facts as to the status of the deceased as to duty, authorized liberty, or otherwise. Unless the body has been lost the court of inquiry or board of investigation will perform the duties of an inquest. The advisability of having a medical officer on the court or board in such a case is apparent. After convening, the court or board will first proceed to the place where the body may be,

carefully identify it, and note the surroundings if pertinent; the court or board will summon such medical witnesses as may be advisable, including always, if possible, the doctor who performed the autopsy if one was made, or a doctor who assisted in or witnessed it, and will ascertain from them the exact condition of the body and the medical opinion of the cause of death. (1)

"If homicide is indicated, the moment suspicion points towards any person, he should be accorded the rights of a defendant.

"Where death resulted from a motor vehicle accident, the following facts, while not exhaustive, are nearly always pertinent; (a) speed of vehicle (s) involved; (b) condition of road; (c) condition of traffic; (d) traffic laws and regulations in force; (e) weather conditions; (f) mechanical condition of the vehicle (s), including brakes, steering gear, lights, tires, etc.; (g) sobriety of driver(s)."

3. Proposed Navy Bill.

No change.

III. Differences

Under Army practice an inquest is held by a summary court, while under Navy practice a court of inquiry is used. See C.S., A. W. 97-103.

IV. Recommendations

The McGuire, White, Ballantine, Keefe, or Vanderbilt Reports do not comment.

Uniform Code of Military Justice

Subject: Authority to Administer Oaths.

See C.S., A.W. 19.

Uniform Code of Military Justice

Subject: Appointment of Reporters and Interpreters,
A. W. 115.

I. Army Provisions

1. Articles of War.

"ART. 115. Appointment of Reporters and Interpreters.-- Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission."

2. Manual for Courts-Martial.

"Par. 46. COURTS-MARTIAL--PERSONNEL--Reporter.--

"a. Authority for appointment or detail.--.....

"Enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards. (Act of August 24, 1912, 37 Stat. 575.)

"Subject to such exceptions as may be made by appointing authorities, and within the limitations of the statutes quoted above, the appointment of reporters or the detail of enlisted men to serve as stenographic reporters is hereby authorized, except for summary courts-martial and except for special courts-martial, when the appointing authority does not direct that the testimony be reduced to writing,

"b. Duties; oath; compensation.--

"He shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. (A. W. 115). If a question is raised as to whether any particular matter is included in the term, 'proceedings, of and testimony taken,' the court will determine the question in accordance with applicable law and regulations.

"He will be required to discharge his duties as promptly as practicable under the circumstances. He will prepare one carbon copy of the typewritten parts of general court-martial record, and such additional carbon copies thereof as may be

required by the trial judge advocate, not exceeding the number authorized by the appointing authority.

"See 95 as to oath, and AR 35-4120 as to compensation."

Par. 47. "COURTS-MARTIAL--PERSONNEL--Interpreter.--

"a. Authority for appointment.--

"Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter. (A. W. 115.) Interpreters may be employed for courts-martial whenever necessary without application to the appointing authority.

"b. Duties; oath; compensation.--

"He shall interpret for the court. (A. W. 115.)

"In questioning a witness through an interpreter the question should be put in the same form as when questioning a witness not through an interpreter. Thus, ask 'What is your name?' instead of telling the interpreter to ask the witness what his name is.

"The interpreter should translate questions and answers as given to him. Thus, if the question is 'What is your name?' that question should be asked in the language of the witness, and the interpreter should not use such a form as 'They want to know what your name is.'"

3. Public Law 759--80th Congress, Chapter 625--2D Session.

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 64. (c) Recorder.-- Any person in the Navy under command of the officer by whose order a deck court is convened may be detailed to act as recorder thereof (Feb. 16. 1909, c. 131, Sec. 3, 35 Stat. 621)."

2. Naval Courts and Boards.

"SEC. 361. Clerical assistance and interpreter.--

"In all trials by court martial, when practicable and necessary, the convening authority shall provide for the furnishing of clerical assistance. In cases where there is no competent stenographer assigned, the court may require that all communications, motions, and questions be reduced to

writing and read to the court.

"Wherever practicable the convening authority, if not present at the place where the court is to meet, shall direct some officer present there to detail clerical assistance from either the enlisted or civilian personnel under his jurisdiction.

"If a reporter or interpreter be employed, he should be sworn. He should be present when the court is open but should not be allowed to be present during closed court."

3. Proposed Navy Bill.

Art. 64(c) is renumbered 16(d)

III. Differences

No reporter is authorized for Army summary courts, while a clerk for Navy deck courts is authorized by statute.

Only difference between the Army and Navy provisions as to interpreters is that the former is statutory, while the latter is by regulations.

IV. Recommendations

There is no comment in the McGuire, Keefe, White, Ballantine, or Vanderbilt Reports.

ARTICLE OF WAR 116

SEE. C.S., A. W. - 17.

Uniform Code of Military Justice

Subject: Removal of Civil Suits. A.W. 117.

I. Army Provisions

1. Articles of War

"ART. 117. Removal of Civil Suits.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled, 'an Act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause."

§ 76. (Judicial Code, section 33, amended.) Removal of Suits and prosecutions against revenue officers.

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit

and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall ~~thereupon~~ be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or any other process except *capias*, the clerk of the district court shall issue a writ of *certiorari* to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by *capias* or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may ~~thereupon~~ proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non *prosequitur* may be rendered against him, with costs for the defendant." 28 U.S.C. 767

2. Manual for Courts Martial

No comment.

3. Other Interpretation

A soldier of the United States who murders a citizen of the state has no right to the removal of a prosecution from a state

court to a federal court under this section, where it is not contended that the act was done under of his office or status.
Funk v. State (1919) 208 S.F. 509, 84 Tex. Cr. 402.

4. Public Law 759—80th Congress, Chapter 625—2D Session

"ART. 117. REMOVAL OF CIVIL SUITS.—

"When any civil or criminal prosecution is commenced in any court of a State of the United States against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause."

II. Navy Provisions

1. Articles for the Government of the Navy

There is no corresponding provision in the AGN, however, the general statute as to removal would apply to naval personnel acting in an official capacity:

"§ 71. (Judicial Code, section 28, amended.) Removal of suits from State Courts.

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction,* in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district.".....28 U.S.C. 71.

III. Differences

Under A. W. 117, military personnel have special powers to remove suits against them from state to federal courts. Naval personnel, however, may only remove suits when the suit falls within one of the general removal statutes. 28 U.S.C. 71-77.

Suits of a civil nature against naval personnel acting in

an official capacity would fall within the category of suits arising under the Constitution and laws of the United States of the general removal statute, 28 U.S.C. 71. The removal of such suits is limited to those of which a district court would have original jurisdiction. A district court would have original jurisdiction of such a suit if a question of federal law is determinative of the outcome of the suits and if the amount in controversy exceeds \$3000.

Under A. W. 117, there is no requirement that the suit be one of which a district court would have original jurisdiction.

Assuming that due to the legislative history of A. W. 117, the procedure of removal will continue to be that prescribed by Sec. 33 of the Judicial Code, naval personnel will have to use different procedure as to removal.

A. W. 117 authorizes removal of criminal prosecutions as well as civil suits, while the general removal statute is limited to suits of a civil nature.

IV. Recommendations

There is no comment in the McGuire, White, Ballantine, Keeffe, or Vanderbilt Reports.

Since A. W. 118 has only a collateral relationship to military justice, it has been suggested that this article be placed elsewhere in the U. S. Code instead of the Articles of War. See letter Statutory revision Group, Office of Army Comptroller, CSACM-L, 6 Aug, 48.

Uniform Code of Military Justice

Subject: Officers, Separation From Service, and
Right of Trial of Officers Dismissed
by President.
A. W. 118.

I. Army Provisions

1. Articles of War

"ART. 118. Officers, Separation From Service.-- No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction."

"ART. 1. Definitions.-- The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

"(a) The word 'officer' shall be construed to refer to a commissioned officer;....."

2. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 118 was not changed by P. L. 759.

A. W. 1 was amended by P. L. 759, but the portion of the article quoted above was not changed.

3. Statutory Provisions

"10 USC 573. Trial of Officers Dismissed by President.--

"When any officer, dismissed by order of the President, makes, in writing, an application for trial; setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. (R.S. § 1230.)"

4. Decisions

In *Wallace v U. S.* (1920) 55 Ct. Cl. 396, affirmed (1922) 257 U. S. 541 it was held that the right of the President to dismiss an Army officer, insofar as it may have been limited by what is now Sec. 573 of Title 10, is now unimpaired, as that section was superseded by Sec. 1590 (i.e. by A. W. 118).

In *Blake v U. S.* (Ct. Cl. 1881) 103 U.S. 227, 236 it was held that it was not the purpose of Sec. 1590 (A. W. 118) to withdraw from the President the power to supersede or remove an officer of the Army by the appointment, by and with the advice and consent of the Senate, of his successor.

5. JAG, Army, Opinions.

Dig. J.A.G., Army, 1912-1940, page 36: "A. W. 118, which provides that 'in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof', does not apply to warrant officers, that article being limited by the definition of the word 'officer' contained in A. W. 1."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 36. Dismissal of Officers.--

"No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court martial or in mitigation thereof: Provided, That the President is authorized to drop from the rolls of the Navy or Marine Corps any officer thereof who is absent from duty without leave for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a State or Federal penitentiary: Provided further, That no officer so dropped shall be eligible for reappointment....."

"ART. 37. Officer dismissed by President may demand trial.--

"When any officer, dismissed by order of the President since March 3, 1865, makes, in writing, an application for trial, setting forth, under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court martial to try such officer on the charges on which he shall have been dismissed. And if such court martial

shall not be convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void: Provided, That the accounting officers are prohibited from making any allowance to any officer of the Navy who has been, or may hereafter be, dismissed from the service and restored to the same under the provisions of this article, to exceed more than pay as on leave for six months from the date of dismissal, unless it shall appear that the officer demanded in writing, addressed to the Secretary of the Navy, and continued to demand as often as once in six months, a trial as provided for in this article....."

"B-73. Meaning of 'officers' and 'superior officers' as used in the Articles for the Government of the Navy.--

"Within the meaning of the Articles for the Government of the Navy, unless there be something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers;....."

2. Naval Courts and Boards

"SEC. 334. Conditions necessary to show jurisdiction: When jurisdiction over persons terminates.--

"The jurisdiction of courts martial over officers, midshipmen, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge.....

"The general rule is subject to the following exceptions:

"(b) An officer dismissed from the service in time of war by the President may be tried by court martial on his own application, in accordance with the provisions of the 37th article, A.G.N."

3. Proposed Navy Bill

"SEC. 26. Article 36 is renumbered as Art. 40 and amended to read as follows:

"ART. 40. No officer shall be dismissed from the naval service except by sentence of a general court martial; or in mitigation or commutation thereof, or, in time of war, by order of the President: Provided, That the President is authorized to drop from the rolls of the Navy or Marine Corps

any officer thereof who is absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a State or Federal penitentiary: Provided further, That no officer so dropped shall be eligible for reappointment."

"SEC. 27. Article 37 is renumbered as Article 41, and amended by deleting the words 'since 3rd, March 1865.'"

III. Differences

1. A. W. 118 does not apply to Army warrant officers. A.G.N. 36 applies to Navy warrant and commissioned warrant officers as well as to commissioned officers.
2. Under Navy provisions, an officer who is dismissed from the service by the President, in time of war, is given the right to demand a trial by court-martial. (Cf. A.G.N. 37; NC&B, Sec. 334). Sec. 573 of 10 U.S. Code contains an identical provision applicable to Army officers, but by decision the provision has been held to have been superseded by the later enactment of A. W. 118, which was construed as giving the President an absolute right to dismiss an officer in time of war. *Wallace v U. S.* 55 Ct. Cl. 396 (1920), affirmed 257 U.S. 541 (1922). Thus, an Army officer dismissed by the President in time of war does not have the right to demand a trial by court-martial.

The construction of A. W. 118 in *Wallace v U.S.* raises the question of whether its counterpart in A.G.N., Art. 36, (Art. 40 in proposed Navy bill) does not make Art. 37 (Art. 41 in proposed Navy bill) of no effect. The case would appear to be good authority for construing that the power to dismiss given to the President in time of war is a summary power, the exercise of which can not be voided later by the failure to appoint a court-martial, or by the action of a court in giving a sentence other than death or dismissal. However, the decision in the *Wallace* case rests largely on the fact that the Articles of War, including what is now A. W. 118, were enacted subsequently to the Act which is now codified as 10 U.S.C. 573, and that the act containing the Articles of War expressly provided that anything inconsistent with them was repealed. The right to trial of an officer dismissed in time of war being held to be inconsistent with the summary power given to the President by A. W. 118 to dismiss an officer in time of war, the act giving the right to trial was held to be inoperative. A.G.N. 36 and 37, on the other hand, were enacted together, so the

reasoning of the Wallace decision, insofar as it depends on the sequence of enactment of the two acts it deals with, is not wholly applicable. It should be noted, however, that A.G.N. 37 (up to the proviso) was derived from an act originally passed March 3, 1865, which is also the original source of the provision in 10 USC 573. Similarly, A.G.N. 36 (up to the first proviso) is derived from an act originally passed July 13, 1866, which is also the original source of the first two clauses of A. W. 118. Thus the construction of A. W. 118, and its effect on the provision contained in 10 USC 573, are relevant to the construction of A.G.N. 36 and its relation to A.G.N. 37. Also, in their original enactment, the provision in A.G.N. 36 was subsequent to the provision in A.G.N. 37. Also, the Wallace case was not decided until 1920, which was subsequent to the simultaneous enactment of A.G.N. 36 and 37, so there was no precedent at the time for their meaning.

On the other hand, the two articles are again to be enacted simultaneously in the proposed Navy bill, but this may have been done without consideration of the effect of the Wallace decisions.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Rank Between Components and Command When Different Commands Join, A. W. 119, 120.

I. Army Provisions

1. Articles of War

"ART. 119. Rank and Precedence Among Regulars, Militia, and Volunteers.-- That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organization thereof, the President may assign the command of the forces of such field; department, or command, or of any organization thereof, without regard to seniority of rank in the same grade."

"ART. 120. Command When Different Corps or Commands Happen to Join.-- When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President."

2. Manual for Courts-Martial

No comment.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

No corresponding articles.

2. Naval Courts and Boards

No comment.

3. Proposed Navy Bill

No corresponding articles.

III. Differences

There are no articles in the A.G.N. corresponding to A.W. 119, 120. Chapter 4 of Title 34 U.S.C. (Sec. 241-261) contains statutes as to the rank and precedence of naval officers.

IV. Recommendations

There is no comment in the McGuire, White, Ballantine, Keefe, or Vanderbilt studies.

Since A.W. 119 and 120 have no direct relation to military justice, it has been suggested that these provisions be deleted from the Articles of War and placed elsewhere in the U. S. Code. See letter Statutory Revision Group, Office of the Army Comptroller, CSACH-L, 6 Aug. 48.

Uniform Code of Military Justice

Subject: Command When Different Corps or Commands Happen to Join.

See C. S., A. W. 119 - Rank Between Components, and
Command When Different Commands Join.

Uniform Code of Military Justice

Subject: Complaints of Wrongs, A.W. 121.

I. Army Provisions

1. Articles of War

"ART. 121. Complaints of Wrongs.-- Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon."

2. Manual for Courts-Martial

No comment.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

"ART. 121. COMPLAINTS OF WRONGS.--

"Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of the Army, a true statement of such complaint, with the proceedings had thereon."

II. Navy Provisions

1. Articles for the Government of the Navy

No corresponding provision.

2. Naval Courts and Boards

"SEC. 75. Violating general orders or regulations.--....."

P. 2

"CHARGE II

"VIOLATION OF A LAWFUL REGULATION ISSUED BY THE SECRETARY
OF THE NAVY

"Specification 8

" * * *, on board said ship, address and cause to be delivered to the Secretary of the Navy and to Rear Admiral Q _____ R: S. _____, U. S. Navy, an application for redress of wrong, bearing thereon a number of signatures of enlisted men of the U. S. Navy, and being in tenor as follows: 'We, the men whose names are on this paper, are dissatisfied with the conditions on the U. S. S. _____. If conditions can not be remedied, we request to be TRANSFERRED,' he the said P _____, having failed to make said application in writing through his immediate commanding officer to the commander in chief of the fleet (or squadron) to which he, the said P _____, was then and there attached (or to the senior officer present, as the case may be) (15)."

3. Navy Regulations

ART. 99. Any application for redress of wrong shall be made in writing through the immediate commanding officer to the commander in chief of the fleet or squadron, or to the senior officer present, and it shall be the duty of the latter to take such action in the matter as, in his judgment, justice and the good of the service demand.

4. Proposed Navy Bill

No provision.

III. Differences

The Army provision for complaints of wrongs is in the Articles of War, while the Navy provision is in Navy Regulations.

Under the Articles of War, the petitioner must first seek redress from his commanding officer. Then, if redress is refused, he may write the officer having general court-martial jurisdiction over the commanding officer.

Under Navy regulations there is no requirement that the petitioner first seek redress from his commanding officer, but he must make his application through his commanding officer to the fleet or squadron commander.

Under the Articles of War, a report must be made to the Department of the Army, (Querie: what officer?), while under Navy Regulations, no report is required.

A. W. 121 applies only to wrongs by the petitioner's commanding officer; Navy regulations apply to any wrong.

IV. Recommendations

There is no comment in the McGuire, White, Ballantine, or Keefe Reports.

The Vanderbilt Report recommends:

"Special emphasis should be placed upon the education and instruction of enlisted men with respect to Army justice. The Articles of War should not only be read; they should be explained. The instructions should not be confined to Articles relating to punishment of enlisted men, but should include the Articles dealing with the rights and the protection of enlisted men, such as Articles of War 24, 97, and 121."

APPENDIX

Uniform Code of Military Justice

Subject: Authority of Officers After Loss of Vessel, AGN 4.

I. Army Provisions

No similar provision.

II. Navy Provisions

1. Articles for the Government of the Navy.

"Article 21. Authority of officers after loss of vessel.—

"When the crew of any vessel of the United States are separated from their vessel by means of her wreck, loss, or destruction, all the command and authority given to the officers of such vessel shall remain in full force until such ship's company shall be regularly discharged from or ordered again into service, or until a court martial or court of inquiry shall be held to inquire into the loss of said vessel. And if any officer or man, after such wreck, loss, or destruction, acts contrary to the discipline of the Navy, he shall be punished as a court martial may direct."

2. Proposed Navy Bill

"ART. 4.

"When the crew of any vessel or aircraft of the United States are separated from their vessel or aircraft by means of its wreck, loss, or destruction, all the command and authority given to the officers of such vessel or aircraft shall remain in full force until such crew shall be regularly discharged from or ordered again into service, or until a court martial or court of inquiry shall be held to inquire into the loss of said vessel or aircraft."

III. Differences

The Articles of War contain no comparable provision.

IV. Recommendations

None.

APPENDIX

Uniform Code of Military Justice

Subject: Divine Service. A.G.N. 2.

I. Army Provisions

Provisions relating to Chaplains and duties of commanding officers in regard to divine services are in AR 60-5.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 2, Divine service.—

"The commanders of vessels and naval stations to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God."

2. Proposed Navy Bill

No change.

III. Differences

No discussion, as not within purview of military justice.

IV. Recommendations

None.

Comment: As this provision is not related to military justice, it might be placed elsewhere in naval statutes.

APPENDIX

Uniform Code of Military Justice

Subject: Authority of Officers of Separate Organization
of Marines, AGN 46.

I. Army Provisions

No comparable provisions.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 67. Authority of officers of separate organization of marines.-- When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organizations of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon (Aug. 29, 1916, c. 417, 39 Stat. 586)."

2. Proposed Navy Bill.

Article 67 is renumbered as Art. 46 and the "navy yard" are changed to "naval station."

III. Differences

The Articles of War contain no comparable provision.

IV. Recommendations

None.