



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.

## P. 11

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.

FEL - 1

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.

P. B

"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

P. C

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."

P. D

"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

P. E

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.)

P. F

## 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.

P. G

"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."

P. H

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

P. I

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.

FEL-2



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.

P. 4

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."

FEL - 1



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, Keefe 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

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. 50<sup>1</sup> 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

P. 7

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 most 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.